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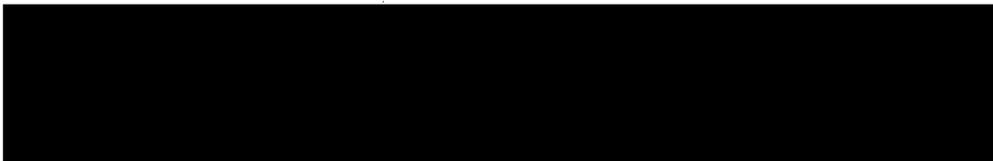
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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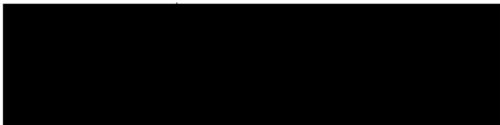


FILE: WAC 04 020 50507 Office: CALIFORNIA SERVICE CENTER Date: MAR 01 2007

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact and is accompanied by new evidence. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d).

The record indicates that Hill Construction filed two Form ETA 750 labor certification applications on November 27, 2000, both of which were for Valoid Sarkissian as beneficiary. Subsequently, Hashem Mahmoudi was substituted as the beneficiary of one of those petitions, though which one is unclear. Later still, the petitioner filed the instant visa petition and submitted copies of both labor certifications. In filing the instant visa petition counsel stated that the petitioner was withdrawing the visa petition for [REDACTED] and substituting the instant beneficiary, though which labor certification the petitioner is relying on in filing the instant petition remains unclear.

Only copies of the various labor certifications were submitted, rather than originals, as is required by 8 C.F.R. § 204.5(g). Which, if either, of the two original approved labor certifications were unavailable for having been previously submitted to support another petition is unknown to this office.¹

Because both of the [REDACTED] Form ETA 750 labor certification applications were accepted by DOL for processing on November 27, 2000, that is the priority date of the instant petition. Depending upon which of those labor certifications is supporting the instant petition, the proffered wage is either \$13.91 per hour, which equals \$28,932.80 per year, or it is \$30.91 per hour, which equals \$64,292.80 per year.

The beneficiary petitioned for on the original Form ETA 750 was not the instant beneficiary. The instant beneficiary was substituted for the original beneficiary when Hilltech Incorporated filed the Form I-140 visa petition in this matter.

The visa petition states that [REDACTED] gross annual income is \$139,419 and that its net annual income is \$55,936.² On the Form ETA 750, Part B, signed by the beneficiary on January 1, 2003, the beneficiary did not claim to have worked for Hilltech Incorporated. The petition and the Form ETA 750 both indicate that Hilltech Incorporated would employ the beneficiary in Glendale, California. The Form I-140 visa petition states that [REDACTED] proposes to pay the beneficiary \$13.91 per hour, or \$28,932.80 per year.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.³

In the instant case the record contains (1) the joint 2000 and 2001 Form 1040 U.S. Individual Income Tax Returns of [REDACTED] and his spouse, (2) the 2002 and 2003 Form 1120, U.S. Corporation Income Tax Returns of [REDACTED] Incorporated, (3) financial analyses by counsel, (4) two California Form DE-6 Quarterly

¹ If the petitioner attempts to overcome today's decision on appeal it should state why the original labor certifications are unavailable. If either or both have been submitted to CIS in support of visa petitions, the petitioner should provide the case numbers associated with those visa petitions and any other information that demonstrates that, although, CIS may be in possession of the original forms, the labor certification remains available to the petitioner to support other visa petitions.

² The number stated as the petitioner's net income was subsequently shown to be the sum of its 2002 taxable income before net operating loss deductions and special deductions and its 2002 end-of-year net current assets.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ Corporate tax returns submitted state that they pertain to "[REDACTED]" California Form DE-6 wage statements spell that same name "[REDACTED]". The same name is spelled "[REDACTED]" on the Form I-140 visa petition. Although it is by no means clear, this office will assume, for the sake of analysis, that all three spellings are meant to denote the same entity. If this is incorrect and prejudices the petitioner's interest in this matter that assumption may be corrected on motion. This office will use the spelling "[REDACTED]" in this decision, notwithstanding the various spellings in the documents submitted. If the petitioner seeks to overturn today's decision on other grounds, it should also explain the name discrepancies.

Wage and Withholding Reports of [REDACTED], and (5) monthly statements pertinent to bank accounts of Hill Construction. The record does not contain any other evidence relevant to the ability of [REDACTED] to pay the proffered wage beginning on the priority date.

Schedules C attached to the 2000 and 2001 Form 1040 U.S. Individual Income Tax Return of Seroj [REDACTED] show that during that year he owned an electrical contracting service that did business under the name [REDACTED] Construction. The 1040 returns show that Mr. [REDACTED] and his wife had one dependent during those years.

During 2000 [REDACTED] Construction returned a net profit of \$38,264. Mr. [REDACTED] and his spouse declared adjusted gross income of \$80,203 during that year, including the construction company's profit.

During 2001 [REDACTED] Construction returned a net profit of \$44,898. Mr. [REDACTED] and his spouse declared adjusted gross income of \$89,861 during that year, including the construction company's profit.

The 2002 and 2003 tax returns of [REDACTED] Incorporated show that company is a corporation, that it incorporated on July 5, 2001, that the 2002 return is its initial corporate return, and that it reports taxes pursuant to the calendar year. Those returns did not specify whether [REDACTED] utilizes cash convention accounting, accrual convention accounting, or some other convention.

During 2002 [REDACTED] declared taxable income before net operating loss deductions and special deductions of \$18,660. At the end of that year Hilltech had current assets of \$37,353 and current liabilities of \$77, which yields net current assets of \$37,276.

During 2003 [REDACTED] declared taxable income before net operating loss deductions and special deductions of \$11,792. At the end of that year [REDACTED] had current assets of \$37,759 and current liabilities of \$19,395, which yields net current assets of \$18,364.

In his financial analysis pertinent to the 2002 return counsel computed [REDACTED] net current assets and added that amount to [REDACTED] net income, thus yielding a figure that counsel asserted shows the ability to pay the proffered wage. This office notes that counsel stated that figure as [REDACTED] net income on the Form I-140 petition.

In his financial analysis pertinent to 2003 counsel again computed [REDACTED] net current assets and added it [REDACTED] net income. Counsel also computed [REDACTED] current ratio.

The California wage reports provided cover the second and third quarters of 2004 and show that [REDACTED] employed six and five employees during those two quarters, respectively, but did not employ the beneficiary.

The director denied the petition on July 12, 2005.

On appeal, counsel asserted that the correct proffered wage is \$13.91 per hour or \$28,932.80 annually, and not \$30.91 per hour or \$64,292 per year, as was stated in the decision of denial. Counsel stated that, based on

the same labor certification upon which Hilltech is relying in the instant case, the California Service Center approved a Form I-140 petition for the previously substituted beneficiary, who no longer wishes to immigrate.

As to 2000, counsel noted that the net profit of [REDACTED] Construction exceeded the proffered wage, and asserted that Hill Construction has therefore demonstrated its ability to pay the proffered wage during that year. Counsel also cited [REDACTED] Construction's wage expense, interest income, and bank balances in support of that ability.

As to 2001, counsel again noted that the net profit of [REDACTED] Construction exceeded the proffered wage, and cited [REDACTED] wage expense and interest income as additional indices of its ability to pay the proffered wage during that year.

As to 2002, counsel cited the gross receipts, gross income, compensation of officers, salary and wage expense, and taxable income of [REDACTED] as evidence of its ability to pay the proffered wage. Counsel again included [REDACTED] net current assets in its net income.

As to 2003, counsel cited the salary and wage expense and compensation of officers of [REDACTED] as indices of its ability to pay the proffered wage.

In a previous letter dated February 1, 2005 counsel cited a May 4, 2004 memorandum from the Associate Director for Operations of CIS for the proposition that a sufficiently favorable ratio of current assets to current liabilities demonstrates that a petitioner is able to pay the proffered wage.

Showing that a petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that a petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁵ or otherwise increased its net income,⁶ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

In citing the petitioner's officer compensation as evidence of its ability to pay the proffered wage counsel implied that the petitioner need not have compensated its officers, but could have been retained that officer compensation to pay the proffered wage. Counsel provides no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the

⁵ A petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁶ A petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁷ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750 the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. (Reg. Comm. 1967).

The instant case is complicated by the fact that the entity that proposed to employ the beneficiary when the labor certification application was filed was a sole proprietorship, whereas the entity that now proposes to employ him is a corporation. Because different statistics appear on the Form 1040 U.S. Individual Income Tax Return from those shown on the Form 1120, U.S. Corporation Income Tax Return, analysis of a petitioner's ability to pay the proffered wage based upon one of those forms necessarily differs from analysis based on the other.

In either event, in determining a petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, neither █████ Construction nor Hilltech, Incorporated appears to have employed and paid the beneficiary.

⁷ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If a petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's tax return or, in the case of a sole proprietorship, the adjusted gross income shown on the petitioner's owner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2). The statistic shown on a Form 1120, U.S. Corporation Income Tax Return which most closely corresponds to net income is taxable income before net operating loss deductions and special deductions.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because a sole proprietor's owner is obliged to satisfy the company's debts and obligations out of his own income and assets, the petitioner's owner's income and assets are properly considered in the determination of the petitioner's ability to pay the proffered wage. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). The petitioner's owner is obliged to demonstrate that he could have paid his existing business expenses and the proffered wage, and still supported himself and his household on his remaining adjusted gross income and assets.

If a petitioner is a corporation the AAO will consider, in addition to wages the petitioner paid to the beneficiary, the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the corporate petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the

petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁸ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

This office is not convinced by counsel's argument that the petitioner's current ratio, the ratio of its current assets to its current liabilities, shows the petitioner's ability to pay the proffered wage.

In a November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable ratio of current assets to current liabilities would lead the Service Center to the assumption that the petitioner is able to pay a proffered wage. Notwithstanding the opinion of the Director, Vermont Service Center,⁹ however, the current ratio is a measure of a petitioner's ability to cover its existing debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike the petitioner's current ratio, its net current assets, that is, the difference between the petitioner's current assets and its current liabilities is an index of the ability to absorb additional expenses, such as additional wages.

This office considers net current assets greater than the annual amount of the proffered wage to be a valid indicator of a petitioner's ability to pay the proffered wage during a given year, as is explained in detail below. This office will not, however, consider the petitioner's current ratio.

The priority date of the instant petition is November 27, 2000.

The proffered wage is either \$28,932.80 per year or \$64,292.80 per year, depending upon which of the approved labor certifications¹⁰ is available to support the instant petition. Because this is unclear to this office, it will consider the petitioner's ability to pay the higher annual wages. If this analysis prejudices the petitioner's interest in this case the matter may be addressed on motion. In that event the petitioner should demonstrate, rather than merely allege, that the labor certification listing the lower wage is available to support the instant petition.

During 2000 Mr. ██████ declared adjusted gross income of \$80,203, including ██████ Construction's profit. That amount exceeds the proffered wage in this matter. If obliged to pay the entire amount of the proffered wage out of his adjusted gross income during that year, however, Mr. ██████ would have retained only \$15,910.20¹¹ with which he would have been obliged to support his family during that year. No evidence pertinent to Mr. ██████ family's recurring expenses has been provided in this matter and none was submitted. This office does not find reasonable, however, the assumption that Mr. ██████ could have

⁸ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁹ This office is not bound by the opinion of the Director, Vermont Service Center.

¹⁰ This office does not rule out that neither of the petitions is available to support the instant petition. If

¹¹ This analysis depends on the assumption that the proffered wage in this matter is \$64,292.80 per year, rather than \$28,932.80. If that assumption is incorrect and prejudices the petitioner's case it may be redressed on motion.

supported his family of three on that annual amount. The petitioner has not demonstrated its ability to pay the proffered wage during 2000.

During 2001 Mr. ██████ declared adjusted gross income of \$89,861, including ██████ Construction's profit. That amount exceeds the proffered wage in this matter. If obliged to pay the entire amount of the proffered wage out of his adjusted gross income during that year, however, Mr. ██████ would have retained only \$25,568¹² with which he would have been obliged to support his family during that year. Again, this office does not find reasonable the assumption that Mr. ██████ could have supported his family on that annual amount. Mr. ██████ has not demonstrated its ability to pay the proffered wage during 2001.

Hilltech Incorporated, a corporation, operated the business during 2002 and 2003.

During 2002 ██████ declared taxable income before net operating loss deductions and special deductions of \$18,660. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$37,276. That amount is also insufficient to pay the proffered wage.¹³ The petitioner has submitted insufficient reliable evidence to demonstrate that other funds, with which it could have paid the proffered wage, were available to it during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

During 2003 ██████ declared taxable income before net operating loss deductions and special deductions of \$11,792. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$18,364.¹⁴ That amount is also insufficient to pay the proffered wage. The petitioner has submitted insufficient reliable evidence to demonstrate that other funds, with which it could have paid the proffered wage, were available to it during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

The evidence failed to demonstrate that ██████ Construction had the ability to pay the proffered wage during 2000 and 2001. The evidence failed to demonstrate that ██████ Incorporated had the ability to pay the proffered wage during 2002 and 2003. Therefore, the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The visa petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The record appears to show that ██████ Construction, a sole proprietorship, was the entity that proposed to employ the beneficiary during 2000 and 2001. That sole proprietorship appears to have been acquired in

¹² Again, this analysis depends on the assumption that the proffered wage in this matter is \$64,292.80 per year, rather than \$28,932.80. If counsel is able to demonstrate that the labor certification with the lower proffered wage was available to support the instant petition, this matter may be addressed on motion.

¹³ The analysis pursuant to which the net current assets of ██████ at the end of 2002 were less than the proffered wage depends upon the assumption that the wage proffered in this matter is \$64,292.80 per year, rather than \$28,932.80.

¹⁴ The finding that ██████ net profit and its net current assets were both insufficient to pay the proffered wage during 2003 does not depend on whether the wage proffered in this case is \$28,932.80 per year or \$64,292.80 per year.

some manner by ██████████ Incorporated, which operated the business during subsequent years. Clearly, a new company, a corporation, was formed, notwithstanding that the previous owner of the sole proprietorship may own the new corporation, either in whole or in part.

When an existing, approved Form ETA 750 is to be used by a company other than the company to which it was issued, the substituted petitioner must demonstrate that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case the evidence does not demonstrate that the corporation assumed all of the rights, duties, obligations, and assets of the sole proprietorship.

This issue was not raised in the decision of denial and the petitioner has not been accorded the opportunity to address it. Today's decision, therefore, will not rely on that additional basis for denial, even in part. If the petitioner attempts to overcome today's decision with a motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.