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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
EAC 05 01250030

Office: VERMONT SERVICE CENTER

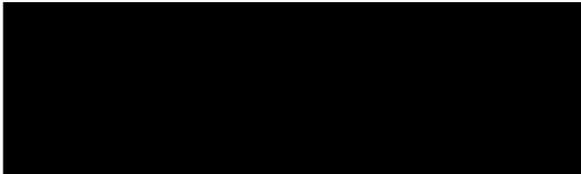
Date: DEC 06 2006

IN RE: Petitioner:  
Beneficiary:



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, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook or specialty foreign food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor 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.

On appeal counsel submitted a brief and additional evidence.

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). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.90 per hour for a 35-hour workweek, which equals \$34,398 per year.

The Form I-140 petition in this matter was submitted on October 12, 2004. On the petition, the petitioner stated that it employs 35 workers and that it was established during 2002. This office notes that the submission of the Form ETA 750 labor certification application predates the year during which the petitioner stated it was established.

The petitioner did not state its gross annual income and net annual income in the spaces provided for those figures on the Form I-140 petition. On the Form ETA 750, Part B, signed by the beneficiary on September 9, 2004, the beneficiary did not claim to have worked for the petitioner.

The original Form ETA 750 submitted in this matter was for a different beneficiary. The instant beneficiary was substituted for that original beneficiary. The proposed employer on the approved Form ETA 750 was [REDACTED] New York 10021 (Manhattan) where the petitioner

stated that it would employ the beneficiary. On the Form ETA 750, Part B substituting the current beneficiary for the original beneficiary, the petitioner states that it would employ the beneficiary at Jimmy's 67 Restaurant Corporation dba Jimmy's Uptown at [REDACTED]. The petitioner listed on the Form I-140 petition is [REDACTED] Restaurant Corporation dba [REDACTED] Uptown. That petition states that the petitioner would employ the beneficiary at Jimmy's Downtown at 400 East 57<sup>th</sup> Street. The petitioner's taxpayer identification number was not provided on that petition.

In support of the petition, counsel submitted the Form 1120, U.S. Corporation Income Tax Return of Sierra Bronx Seafood Corporation and the Form 1120, U.S. Corporation Income Tax Return of [REDACTED]. Both corporations list their address as [REDACTED]. The taxpayer identification number shown for Sierra Bronx Seafood Corporation is [REDACTED]. The taxpayer identification number shown for [REDACTED] is [REDACTED].

Counsel also submitted a letter dated September 9, 2004 in which he stated, "[REDACTED] Downtown opened for business in 2002."

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 16, 2004, requested additional evidence pertinent to that ability. The service center noted the discrepancies between the various names and locations given for the petitioner and asked the petitioner to reconcile these apparent contradictions in the record.<sup>1</sup>

The service center observed that counsel's September 9, 2004 letter indicated that [REDACTED] Downtown had opened for business during 2002, whereas Jimmy's Downtown filed the Form ETA 750 in this matter on April 30, 2001. The service center further noted that if Jimmy's Downtown did not exist on the priority date, then it would be unable to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.<sup>2</sup> The service center noted that the two tax returns submitted did not appear to pertain to the petitioner in this matter. Finally, the service center requested the petitioner's 2001, 2002, and 2003 tax returns.

In response, counsel submitted the petitioner's 2002 Form 1120, U.S. Corporation Income Tax Return, and a letter dated March 2, 2005. Counsel did not provide the petitioner's 2001 or 2003 returns and did not explain that omission.

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<sup>1</sup> Specifically, the service center asked the petitioner to demonstrate that Jimmy's Uptown had acquired [REDACTED]. In the alternative, however, the petitioner could have reconciled the various names and locations listed for the petitioner and thereby demonstrated that the petitioner is entitled to rely on the approved Form ETA 750 in this matter.

<sup>2</sup> In certain instances, it is possible for a company that is not engaging in business to demonstrate that it has the ability to pay the proffered wage. However, if the petitioner did not exist at all in 2001, the director is correct that it would not be able to demonstrate that it had funds available to pay the wage in 2001.

The petitioner's 2002 tax return shows that it is a corporation, that it incorporated on June 2, 2000,<sup>3</sup> that its taxpayer identification number is [REDACTED] and that it reports taxes pursuant to accrual convention and the calendar year. During 2002 the petitioner declared a loss of \$249,471 as its taxable income before net operating loss deductions and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

In his March 2, 2005 letter counsel stated that in its advertisements and in filing the application the petitioner stated that it would not open until September of 2001, and that the petitioner subsequently<sup>4</sup> delayed its opening until 2002.

Counsel stated that because the petitioner was not open during 2001 it provided the tax returns of two other corporations with the same owner, [REDACTED] and [REDACTED] to demonstrate the ability to pay the proffered wage. Those returns contain no indication that they pertain to [REDACTED] and [REDACTED] and do not indicate who owns the corporations.

Counsel stated that the losses [REDACTED] Downtown restaurant suffered during 2002 are normal for new restaurants in the area. Counsel cited the petitioner's total assets, depreciation expense, and pre-opening costs during that year as indices of its ability to pay the proffered wage.

Counsel further stated that the petitioner's name is [REDACTED] and that references in various submissions to [REDACTED] were typographical errors.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and, on April 6, 2005, denied the petition.

On appeal, counsel submitted a letter dated October 15, 2000 and a brief. The October 15, 2000 letter pertains to a different employment-based petition.

In his brief counsel stated that the original beneficiary of the approved labor certification, [REDACTED] longer works for the petitioner, and that the wages paid to him, therefore, can be considered a fund available to pay the wages of the proffered position to the beneficiary.

Counsel, however, provided no evidence that the petitioner ever employed [REDACTED] nor evidence of the wages it paid to him, if any.<sup>5</sup> The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17

<sup>3</sup> Subject to various exceptions, a corporation incorporated on that date would be expected to have filed both 2000 and 2003 tax returns.

<sup>4</sup> Counsel's letter implies that the delayed opening was occasioned by the tragic events of September 11, 2001 in Manhattan and elsewhere, but provides no evidence in support of that implicit assertion.

<sup>5</sup> This office does not mean to imply that the absence of evidence pertinent to the wages paid to Victorino Calva is the only reason those wages cannot be considered available to pay wages to the beneficiary; only that it is a sufficient reason.

I&N Dec. 503, 506 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Counsel's assertion or implication that the petitioner paid some unstated amount of wages during unidentified years to an employee who performed the proffered position is insufficient to establish the petitioner's ability to pay the proffered wage.

In his brief counsel also asserted that the same individual owns [REDACTED] Downtown, and [REDACTED]. Counsel argued that they are, therefore, affiliated entities within the meaning of 8 C.F.R. § 204.5(j)(2). Counsel cited the October 15, 2000 letter as evidence that the petitioner's owner's income and assets can be considered in determining the petitioner's ability to pay the proffered wage. Counsel asserts, or at least implies, that the petition in that other case was approved, apparently in a non-precedent decision, on the strength of the petitioner's owner's assets, and that the instant case should therefore also be approved.

Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel made no such argument and counsel's citation of a non-precedent decision is of no effect.

The regulation at 8 C.F.R. § 204.5(j)(2) defines the term "affiliate" for the purpose of petitions for multinational executives and managers pursuant to section 203(b)(1)(C) of the Act.<sup>6</sup> That two companies qualify as affiliates under that regulation is not relevant to any material issue in this case or in any other case involving a petition filed pursuant to the instant visa category. Counsel did not make any argument pertinent to the relevance of his assertion that the various entities for which tax returns were provided qualify as affiliates and this office is aware of none.

Further the record contains no evidence pertinent to the ownership of the petitioner and, as was also noted above, counsel's unsupported assertions are not evidence. *Phinpathya* 464 U.S. at 188 189; *Ramirez-Sanchez*, 17 I&N at 506.

Even if the non-precedent case counsel cited were binding, and the petitioner's ownership and that of the other corporations were established, the instant case appears to be distinguishable from the case cited. The petitioner in that case is [REDACTED] dba [REDACTED]. That name appears to indicate that the petitioner in that case was a sole proprietorship.

Because the owner of a sole proprietorship is obliged to satisfy the company's debts and obligations out of his or her own income and assets, the petitioner's income and assets are properly combined with a portion of those of the petitioner's owner in the determination of the petitioner's ability to pay the proffered wage. The sole proprietor is obliged to demonstrate that he or she could have paid the petitioner's existing business expenses and still paid proffered wage. In addition, he or she must show that he or she could still have

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<sup>6</sup> Because that regulation pertains to the ability of U.S. corporations to petition for a manager employed by a foreign affiliate, whether a foreign corporation is an affiliate of the U.S. corporation is essential to the approvability of a petition pursuant to that visa category.

sustained himself or herself and his or her dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

The petitioner in the instant case, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). A corporation's owners and shareholders are not obliged to pay the debts of the corporation, and the assets of its shareholders or of other enterprises or corporations cannot, therefore, be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Nothing in the governing regulation, 8 C.F.R. § 204.5, permits CIS to consider the financial resources of individuals or entities with no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). The income and assets of the petitioner's owner, whether individual(s), a corporation(s), or some other entity or entities, cannot correctly be included as a fund available to the petitioner to pay the proffered wage.

For all of the reasons listed above, the funds of the petitioner's owner, including profits from other entities he may own, will not be considered in assessing the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost or other basis of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

While the depreciation expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserts that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>7</sup> Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

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<sup>7</sup> Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

In his brief counsel stated that the petitioner had "pre-opening costs of \$367,799." Although he failed to make it explicit, counsel appeared to imply that those were non-recurring expenses and should be discounted in the determination of the petitioner's ability to pay the proffered wage.

Counsel did not provide any evidence or state his basis for the statement that the petitioner had that amount of pre-opening expense. Again, as per *Phinpathya* 464 U.S. at 188 189; *Ramirez-Sanchez*, 17 I&N at 506. counsel's unsupported assertions are not evidence.

If the petitioner could demonstrate that the amount asserted by counsel as pre-opening costs represents a non-recurring expense and that the petitioner is likely to become profitable in the immediate future, then that reasonable anticipation of improved performance could be considered as per the opinion in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

*Sonegawa* however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonegawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner has ever posted a large profit. Although counsel's implication that the petitioner had some non-recurring expenses is credible, the record contains no evidence that in the future, absent those one-time expenses, the petitioner will be profitable. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

In determining the 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, the petitioner did not establish that it employed and paid the beneficiary. The petitioner is obliged, therefore, to show the ability to pay the total amount of the proffered wage during each of the salient years.

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 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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. 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.

The petitioner's net income is not the only statistic that may be used to show the 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 and, contrary to counsel's implication, are not an index of the petitioner's ability to pay the 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 minus 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 typically<sup>8</sup> 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.

The proffered wage is \$34,398 per year. The priority date is April 30, 2001.

Pursuant to 8 C.F.R. § 204.5(g)(2) the petitioner is obliged to show its ability to pay the proffered wage during 2001 with copies of annual reports, federal tax returns, or audited financial statements. The petitioner, however, submitted no evidence pertinent to that year.<sup>9</sup> The petitioner has not demonstrated its ability to pay the proffered wage during 2001.

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

<sup>9</sup> Even if the petitioner did not file a tax return during 2001 because it was not yet engaging in business, it is

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profits during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no other reliable evidence of its ability to pay the proffered wage during 2002. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

Although the service center, in the December 16, 2004 request for evidence, specifically requested the petitioner's 2003 tax return that return was not provided nor was a reason for its absence. The petitioner submitted no other reliable evidence of additional funds available to it during that year with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001, 2002, and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which basis has not been overcome on appeal.

The record suggests additional issues that were not addressed in the decision of denial.

In the December 16, 2004 request for evidence the service center requested the petitioner's 2001 and 2003 tax returns. Those returns were not provided and the petitioner gave no reason for that omission. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.<sup>10</sup>

Further, although the Form I-140 petition in this matter was filed by [REDACTED] dba [REDACTED], in the Bronx, it proposes to employ the beneficiary at [REDACTED] Downtown in Manhattan. Because this issue was not raised in the decision of denial and the petitioner has not been accorded an opportunity to address it, this office declines to base today's decision, in whole or in part, on that ground. If the petitioner attempts to overcome today's decision on motion, however, it should address the issue of whether a petitioner may submit a petition for an employee to be employed by a different entity. It should

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still obliged to demonstrate, in accordance with the requirements of 8 C.F.R. § 204.5(g)(2), its continuing ability to pay the proffered wage beginning on the priority date.

<sup>10</sup> This office notes, however, that simply providing those returns on the motion would be insufficient to overcome this basis of denial pursuant to 8 C.F.R. § 103.2(b)(14). Where, as here, a petitioner has been previously put on notice of a deficiency in the evidence and afforded an opportunity to respond to that deficiency, this office will not accept evidence relevant to that deficiency that is offered for the first time on appeal or on motion, without sufficient explanation for any previous omissions. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

explain clearly which entity is the petitioner in this case, for whom the beneficiary would work, where the beneficiary would work, and why these facts were misstated in at least some of the documents submitted.

Finally, the petitioner submitted the labor certification on April 30, 2001, although it was not then in business. If the petitioner attempts to overcome today's decision on motion it should also address why a company not then in business should be considered a U.S. employer within the meaning of 8 C.F.R. 204.5(c) and how it could have experienced difficulty filling positions with U.S. workers so long before it opened its doors.

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.