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FILE: WAC 06 046 53409 Office: TEXAS SERVICE CENTER Date: **NOV 14 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:
[Redacted]

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, Texas Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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. 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 either 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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 16, 2003. The proffered wage as stated on the Form ETA 750 is \$13.77 per hour, which equals \$28,641.60 per year.

The Form I-140 petition in this matter was submitted on November 28, 2005. On the petition, the petitioner stated that it was established during January 1996 and that it employs 11 workers. The petition states that the petitioner's gross annual income is \$788,259. The space reserved for the petitioner to report its net annual income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on July 7, 2003, the beneficiary claimed to have worked for the petitioner since January 2003. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Rancho Palo Verdes, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. 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.¹ In the instant case the record contains (1) copies, or portions of copies, of the petitioner's 2002 and 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation, (2) copies of the petitioner's 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, (3) copies of the 2004 and 2005 Form 1120, U.S. Corporation Income Tax Return of Conant, Incorporated of Long Beach, California (Conant), (4) copies of 2003 and 2004 Form W-2 Wage and Tax Statements showing wages the petitioner paid to the beneficiary during those years, (5) copies of 2004 and 2005 W-2 forms showing amounts Conant paid the beneficiary during those years, (6) copies of pay statements showing amounts the petitioner paid to the beneficiary during 2005 and 2006, (7) unaudited financial statements pertinent to Conant for the five months ended April 30, 2006, (8) copies of monthly statements pertinent to the bank account of [REDACTED] (9) copies of monthly statements pertinent to the bank account of [REDACTED] (10) copies of monthly statements pertinent to the bank account of [REDACTED] Guest Home III of 1803 [REDACTED] in [REDACTED] California, (11) a copy of a Contingency for Sale or Purchase of Other Property, (12) copies of closing statements, (13) a spreadsheet that purports to be a statement of the net real estate assets of [REDACTED]. [REDACTED] certified the validity of the information on that spreadsheet, (14) copies of monthly statements pertinent to mortgage loans on real estate, and (15) a copy of a California Domestic Stock Corporation Statement of Information. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on October 1, 1996, and that it reports taxes pursuant to cash convention accounting and the calendar year. Those tax returns show that the petitioner's owners during 2002, 2003, and 2004 were [REDACTED]

During 2002 the petitioner declared Schedule K, Line 23, Income/loss reconciliation² of \$88,009. Because the corresponding Schedule L was not provided this office is unable to calculate the petitioner's current assets and current liabilities.³ However, this office notes that, in any event, because the priority date is July 16,

¹ 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).

² The Income/loss reconciliation of a subchapter S corporation or other entity reporting on Form 1120S is considered to be its net income for the purpose of analyzing its ability to pay the proffered wage during a given year. On the version of that form for 2003 and earlier years, that figure is on Schedule K at Line 23. On subsequent versions of the form it is shown at Line 17e.

³ Whether the petitioner filed a Schedule L during that year is unknown to this office.

2003, evidence pertinent to the petitioner's finances during previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

During 2003 the petitioner declared Schedule K, Line 23, Income/loss reconciliation of \$92,061. Because the corresponding Schedule L was not provided⁴ this office is unable to calculate the petitioner's current assets and current liabilities.

During 2004 the petitioner declared a loss of \$62,454 as its Schedule K, Line 17e, Income/loss reconciliation. Although that return does not indicate that it is the corporation's final return, it shows that at the end of that year the corporation then had no assets. The Schedule L submitted with that return was left blank,⁵ other than information identifying the petitioner as the taxpayer. This office is unable, therefore, to conclude that the petitioner had any current assets or current liabilities or, therefore, any net current assets.

Conant's tax returns show that it is a corporation, that it incorporated on December 1, 2004, and that it reports taxes pursuant to cash convention accounting and a fiscal year running from December 1 of the nominal year to November 30 of the following year.

During its 2004 fiscal year, which ran from December 1, 2004 to November 30, 2005, Conant declared a loss of \$5,351 as its taxable income before net operating loss deduction and special deductions.⁶ At the end of that fiscal year the petitioner had \$11,501 in current assets and no current liabilities, which yields net current assets of \$11,501.

The 2003 and 2004 W-2 forms issued by the petitioner show that it paid the beneficiary \$20,836.29 and \$22,431.44 during those years, respectively. The 2004 W-2 form issued by Conant shows that it paid the beneficiary an additional \$1,604 during that year. The 2005 W-2 form shows that Conant paid the beneficiary \$21,084.58 during that year.

The pay statements submitted do not identify the recipient by name, but list the same social security number provided for the beneficiary on the Form I-140 visa petition. Those pay statements also do not identify the entity paying the amounts shown, but as the petitioner claims to have sold the petitioning business to Conant by prior to the dates shown on those pay statements, this office believes that they were submitted to support the proposition that Conant paid wages to the beneficiary during the periods covered by those statements.

Only one of the pay statements submitted pertains to 2005. That pay stub covers the last two-week pay period of 2005 and shows that Conant paid the beneficiary gross pay of \$802 during that period. The statement also shows a year-to-date total of \$802 during 2005, which indicates that the beneficiary did not work for the petitioner prior to that last pay period of 2005.

⁴ Again, whether the petitioner filed a Schedule L during that year is unknown to this office.

⁵ Whether the petitioner was required to complete Schedule L is unclear.

⁶ The taxable income before net operating loss deduction and special deductions of a subchapter C corporation is considered to be its net income for the purpose of computing its ability to pay the proffered wage during a given year.

The other eleven pay statements submitted are for pay periods during 2006. Those statements also show that [REDACTED] paid the beneficiary gross pay of \$802 during each of those pay periods. The most recent of those pay statements is for the pay period ending June 9, 2006 and shows a year-to-date gross income of \$9,624. This office notes that \$802 every two weeks equates to an annual salary of \$20,852, an amount less than the annual amount of the proffered wage.

The Contingency for Sale or Purchase of Other Property is dated March 25, 2004 and is an agreement between [REDACTED] as buyer and [REDACTED] that the sale of real property at [REDACTED] in Rancho Palos Verdes, California⁷ is to be temporarily contingent upon the sellers' locating a suitable replacement property.

The closing statements are dated December 21, 2004 and January 5, 2005 and show the settlement of sales of real property at, respectively, 2121 and [REDACTED] Rancho Palos Verdes, California by Justiniani Corporation to [REDACTED]. This office notes that the petitioner's address as stated on the Form I-140 petition is [REDACTED].

The corporate Statement of Information shows that [REDACTED] are the officers of [REDACTED] which has its principal business office at their home address and operates a guest home, [REDACTED].

The spreadsheet labeled "[REDACTED] Statement of Net Real Estate Assets" purports to show the market value, indebtedness, equity, and annual income of five properties. Whether the properties are owned by [REDACTED] or some combination is not stated. How Mr. Conant arrived at the market values of those properties is also unstated.

One of the loan statements provided pertains to one of the properties on the spreadsheet described above and is addressed to [REDACTED]. The other pertains to the home address of [REDACTED] and is addressed to them both. Although those statements so state explicitly, they suggest that the record owners of those properties are [REDACTED], rather than the petitioner.

The director denied the petition on August 14, 2006.

On appeal, counsel stated that as to the petitioner's performance during 2004, "it must be taken into account that the negative net income indicated on the tax return merely reflects the activities of a business that is preparing for the closure/transfer of its main business." Counsel did not indicate whether winding up a business necessarily results in a loss, or how this office should assess the ability of the petitioner to pay the proffered wage during that year.

In a previous letter dated July 24, 2006 counsel noted the amount of the petitioner's depreciation deduction, and the sum yielded by adding it to the petitioner's net income, apparently citing the petitioner's depreciation deduction as a fund available to pay additional wages. Counsel also noted the amount of the petitioner's and Conant's gross receipts during the various years.

⁷ This is the same address that bank statements show is occupied by [REDACTED] Guest Home III. The relationship of that company to the petitioner and to Conant is unknown to this office.

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 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.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. 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 asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.⁸ Counsel appears to assert 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.

Counsel's reliance on the amount of the petitioner's gross receipts and its total annual wage expense is misplaced. Showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the 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 expenses⁹ or otherwise increased its net income,¹⁰ 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. 1080, 1084 (S.D.N.Y. 1985), 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

⁸ 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.

⁹ The 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.

¹⁰ The 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.

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 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). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "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."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

The real estate owned by the petitioner's owners is not directly relevant to the inquiry into the petitioner's own continuing ability to pay the proffered wage beginning on the priority date as is explained above. Further, even if the petitioner owned that real estate, it would be an unlikely index of ability to pay additional wages.

First, a reliable, disinterested real estate appraisal would typically be performed by a licensed or certified real estate appraiser. In the instant case the owner of the property appears to have estimated the values of the properties in question. It is neither alleged nor assumed that the owner is disinterested or competent to perform real estate valuations.

The amount by which the property is encumbered is insufficiently demonstrated. Submission of evidence of a single mortgage loan is not evidence that the property is otherwise unencumbered. A list of a property's encumbrances would typically be generated by a real estate title search. This office finds that the petitioner did not demonstrate that the property is encumbered only in the amount represented. Even the current ownership of real estate is more reliably demonstrated by a title search than by evidence of a single past transfer.

Even if the ownership, the value of the properties and the amounts by which they are encumbered were sufficiently demonstrated, that would be insufficient to show that the difference, the amount of the petitioner's owner's equity, was available to pay wages. The petitioner's owner will not necessarily realize the value of properties in cash in the near future and their value has not, therefore, been shown to be available to pay wages.

The petitioner's owner could secure a home equity loan with whatever equity he might have in the properties. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of equity in real property owned will not be considered in evaluating the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Similarly, the bank statements indicate that they show funds in the accounts of individual part owners of the petitioning company, or of an apparently unrelated company, rather than of the petitioner itself. Because of the insulation of a corporation's owners from the debts and obligations of the corporation, as explained above, those funds are not available to the petitioner as a matter of right and cannot show the petitioner's ability to pay the proffered wage.

Even if the statements pertained to the petitioner's bank account, and the balances shown were its own funds, bank statements would not typically be able to demonstrate a petitioner's ability to pay the proffered wage.

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.¹¹ 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

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

¹¹ 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 the 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.

instant case, the petitioner established that it paid the beneficiary \$20,836.29 and \$22,431.44 during 2003 and 2004, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years.

The petitioner demonstrated, further, that [REDACTED] paid the beneficiary \$1,604 and \$21,084.58 during 2004 and 2005. Whether [REDACTED] may be substituted for [REDACTED] Corporation dba Brittanex Guest Homes as petitioner in this case is an issue that will be addressed below. For the purpose of analysis of the issue of ability to pay the proffered wage, however, this office will assume, without deciding, that wages paid by [REDACTED] are wages paid by the petitioner.

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).

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. 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 typically¹² 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 \$28,641.60 per year. The priority date is July 16, 2003.

The petitioner has demonstrated that it paid the beneficiary \$20,836.29 during 2003 and must show the ability to pay the remaining \$7,805.31 balance of the proffered wage during that year. During 2002 the petitioner

¹² The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

declared net income of \$88,009. That amount is sufficient to pay the balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

The petitioner owned the subject care facility through November 2004. Ordinarily, therefore, the petitioner would be obliged to show the ability to pay only 11/12th of the proffered wage. In the instant case, however, the petitioner's 2004 tax return shows that its existence continued after it stated that it sold its care facility. Further, that the tax return does not indicate that it is the petitioner's final return implies that it intended to submit another Form 1120S in 2005, which in turn implies that it intended to continue in business.

We will not consider 12 months of income toward an ability to pay a proffered wage during some shorter period any more than we would consider 24 months of income toward paying the annual amount of the proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence. The petitioner is required to show the ability to pay the entire proffered wage during 2004.

During 2004 the petitioner paid the beneficiary \$22,431.44. The petitioner is obliged to show the ability to pay the remaining \$6,210.16 balance of the proffered wage. During 2004 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 profit during that year. The Schedule L submitted with that return shows neither current assets nor current liabilities. 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 submitted no reliable evidence of any other funds available to it during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

Consideration of the ability of Conant to pay the proffered wage would ordinarily be complicated by the fact that it reports taxes pursuant to a fiscal year, whereas wages are reported on W-2 forms pursuant to the calendar year. In the instant case, however, the pay statements in the record show that [REDACTED] pays the beneficiary \$802 per two-week pay period. Rather than apportioning the amounts on the 2004 W-2 form to the petitioner's 2004 and 2005 fiscal years, this office notes that the amount the petitioner paid to the beneficiary during the 2005 calendar year is the same amount it paid him during its 2004 fiscal year.

During its the 2004 fiscal year, which ran from December 1, 2004 to November 30, 2005, Conant paid the beneficiary \$21,084.58. The petitioner is obliged to show that Conant had the ability to pay the remaining \$7,557.02 balance of the proffered wage during that fiscal year.

During its 2004 fiscal year [REDACTED] declared a loss. The petitioner has not demonstrated, therefore, that Conant could have paid any portion of the proffered wage with its profit during December 2004 or the ensuing 11 months. At the end of that fiscal year, however, [REDACTED] had net current assets of \$11,501. That amount is sufficient to pay the remaining balance of the annual amount of the proffered wage. The petitioner has demonstrated that [REDACTED] was able to pay the proffered wage during its 2004 fiscal year.

The petition in this matter was submitted on November 28, 2005. On that date [REDACTED] 2005 tax return was unavailable. On May 2, 2006 the service center issued a request for evidence in this matter, requesting

additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, specifically, the petitioner's 2003, 2004, and 2005 tax returns.¹³ CIS received counsel's response to that request on July 27, 2006, and the record is deemed to have closed on that date. On that date, absent extension [REDACTED] 2005 tax return was still unavailable.¹⁴ For the purpose of today's decision, the petitioner is excused from showing [REDACTED] ability to pay the proffered wage during its 2005 fiscal year and subsequent fiscal years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2004. 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 has not been overcome on appeal.

As has been alluded to above, the record suggests an additional issue that was not addressed in the decision of denial.

The June 30, 2006 letter from [REDACTED] the petitioner's administrator states, "Brittanex Guest Homes was assumed by [REDACTED] a California corporation, in December 2004." She added, "Despite the change in ownership, Brittanex Guest Homes functions as the same business entity, retaining and assuming all assets, liabilities, personal and even location of the original management of Brittanex Guest Homes. It will continue to sponsor [the beneficiary] in an employment-based petition with the [CIS]." In a letter dated July 24, 2006 counsel stated that, in acquiring Justiniani Corporation, Conant had retained and assumed all of Justiniani's assets and liabilities.

The Form ETA 750 labor certification in this matter was issued to Justiniani Corporation dba Brittanex Guest Homes. [REDACTED] now seeks to rely upon it to employ the beneficiary. The substituted petitioner must demonstrate that it is the original petitioner's true successor. 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. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1986).

Showing that owners of [REDACTED] acquired real estate from Justiniani Corporation, of from the owners of Justiniani Corporation, and began to run the care facility in question is insufficient. What is meant by [REDACTED] having "assumed" the original petitioner is unclear. The record is silent on the matter of how the business itself was transferred. Other than the assertion of counsel in his July 24, 2006 letter¹⁵ and that of Tina Conant

¹³ Although the request for evidence specifically requested the tax returns of the petitioner, [REDACTED] [REDACTED], given that the petitioner was asserting that Conant has been substituted as petitioner, it was obliged to provide that other company's tax returns for appropriate years.

¹⁴ The instructions to the Form 1120, U.S. Corporation Income Tax Return state that the return is due on the 15th day of the third month after the last day of the taxpayer's reporting cycle. The petitioner's 2005 fiscal year ended on November 30, 2006.

¹⁵ 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 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

in her June 30, 2006 letter nothing in the record demonstrates, or even suggests, that [REDACTED] acquired all of the assets of Justiniani Corporation or assumed all of its duties and obligations.

The petitioner has not demonstrated that [REDACTED] is the true successor of Justiniani Corporation within the meaning of *Matter of Dial Auto Repair Shop, Inc, Id.* The petition will be denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.