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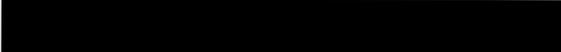
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FILE: WAC 03 180 50902 Office: CALIFORNIA SERVICE CENTER Date: **SEP 12 2007**

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, California 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 care facility. It seeks to employ the beneficiary permanently in the United States as an institutional cook. 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. The director also noted that MIJ Elder Care Incorporated (MIJ) had submitted documentation necessary to demonstrate that it is entitled to rely on the approved Form ETA 750. Finally, the director stated that the evidence submitted shows that the beneficiary would not be employed as a permanent full-time employee. The director 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.

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 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$10.96 per hour, which equals \$22,796.80 per year.

The Form I-140 visa petition and the Form ETA 750 labor certification application were both filed by Northridge Guest House and both indicate that the petitioner would employ the beneficiary in Northridge, California. The Form I-140 petition in this matter was submitted on May 28, 2003. On the petition, the petitioner stated that it was established on November 1, 1996 and that it employs four workers. The petition states that the petitioner's gross annual income is \$204,500 and that its net annual income is \$1,516. On the Form ETA 750, Part B, signed by the beneficiary on March 23, 2001, the beneficiary did not claim to have worked for the petitioner.

The AAO reviews *de novo* issues raised 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.<sup>1</sup>

In the instant case the record contains (1) the 2001, 2002, and 2003 Form 1040 U.S. Individual Income Tax Returns of [REDACTED], (2) articles of incorporation of MIJ, (3) the 2004 Form 1120, U.S. Corporation Income Tax Return of MIJ, (4) California Form DE-6 Wage Reports, (5) photocopies of checks, (6) monthly statements pertinent to the bank account of [REDACTED] and [REDACTED] and (7) monthly statements pertinent to the bank account of MIJ. 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 other issue in this matter, in addition to the petitioner's ability to pay the proffered wage, is whether MIJ is able to rely on the approved labor certification. Northridge Guest House submitted the Form ETA 750 Labor Certification Application and the labor certification was approved for its use. It subsequently filed the Form I-140 visa petition in this matter.

The record contains a September 2, 2005 letter from MIJ's Licensee/Administrator/Co-owner states that MIJ acquired all of the rights, duties, obligations, and assets of Northridge Guest House. It does not state how that transfer was accomplished or the date on which the transaction transpired.

In order for another company to rely on the approved labor certification as a successor-in-interest petitioner, the successor-in-interest must show that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). It must submit proof of the change in ownership and of how the change in ownership occurred. It must also show, rather than merely allege, 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.

The successor-in-interest is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Auto Repair Shop, Inc., Id.*

The record contains evidence pertinent to whether MIJ is the petitioner's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The record contains (1) the first page of a deed of trust dated October 15, 2003, (2) a copy of MIJ's articles of incorporation, (3) a lease of the petitioner's premises, (4) a copy of the Form I-140 petition submitted by MIJ, and (5) a license, effective August 26, 2004, permitting MIJ to operate Northridge Guest House at the petitioner's address.

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<sup>1</sup> 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).

The evidence sufficiently demonstrates that MIJ operates a care home at the same location where the original petitioner previously operated a care home. Evidence relevant only to that proposition will not be further discussed. The record contains no other evidence pertinent to whether MIJ assumed all of the rights, duties, obligations, and assets of the petitioner or the date upon which those rights, duties, obligations, and assets were transferred, or how they were transferred.

individual tax returns show that he had two dependents during each of the salient years. Corresponding Schedules C show that he owned the petitioner as a sole proprietorship during each of those years.

During 2001 the petitioner suffered a loss of \$574. The petitioner's owner declared adjusted gross income of \$49,825 during that year.

During 2002 the petitioner returned a profit of \$1,516. The petitioner's owner declared adjusted gross income of \$54,975 during that year, including the petitioner's profits.

During 2003 the petitioner returned a profit of \$3,071. The petitioner's owner declared adjusted gross income of \$63,210 during that year, including the petitioner's profits.

The tax returns of MIJ show that it is a corporation, that it incorporated on January 27, 2003, that it is owned by [REDACTED] and [REDACTED] and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2004 MIJ declared a loss of \$81,051 as its taxable income before net operating loss deductions and special deductions. At the end of that year MIJ had current assets of \$165,829 and current liabilities of \$100,917, which yields net current assets of \$64,912.

The photocopied checks show that MIJ paid the beneficiary \$2,250 on May 30, 2005, and \$2,500 on June 30, 2005 and July 29, 2005.

The Form DE-6 wage reports show that [REDACTED] did business as Northridge Guest House during some quarters of 2000, 2001, and 2002. The wage reports cover the last quarter of 2000, the first, second, and third quarters of 2001, and the first, second, and fourth quarters of 2002. During those quarters Northridge Guest House employed between one and five workers, to whom it paid between \$3,266.22 and \$11,256.59 during those quarters. The highest amount that the petitioner paid to any of its employees during any of those quarters was \$3,762.88.

The copy of the Form I-140 petition provided by MIJ states that MIJ was established on January 27, 2003. On its tax returns it stated that it had incorporated on January 27, 2003. The articles of incorporation show that one of its owners signed it on January 21, 2003 and that it was filed with the California Secretary of State on January 27, 2003. These documents indicate that MIJ, commenced business no earlier than January 27, 2003, but does not otherwise demonstrate when MIJ commenced business.

The first page of the October 15, 2003 deed of trust dated evinces a loan by a commercial lender to [REDACTED] one of MIJ's owners, and secured by the real property, thus implying that [REDACTED] then owned that real estate. That [REDACTED] acquired that real estate, however, does not demonstrate that MIJ, acquired any interest in the business either then or at any other time.

The lease of the petitioner's premises shows that MIJ executed a lease agreeing to rent the premises of the care home from [REDACTED] beginning December 1, 2003 and ending November 3, 2007. That does not demonstrate when MIJ commenced business, except that it was likely on or after December 1, 2003.

The director denied the petition on December 8, 2005. On appeal, counsel asserted that the petitioner's continuing ability to pay the proffered wage beginning on the priority date is demonstrated by (1) the original owner's adjusted gross income during 2001, 2002, and 2003, (2) the total income and total assets of the successor-in-interest, MIJ, during subsequent years, and (3) the checks issued to the beneficiary.

Counsel noted that MIJ's failure to demonstrate that it is the true successor of the original petitioner within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) was not discussed in the notice of intent to deny. Counsel argued that basing the decision of denial on that ground, in part, therefore violated 8 C.F.R. § 103.2(b)(16)(ii).

Counsel further stated that the service center "failed to state the reasons for its conclusion that the petitioner is unable to pay the proffered wage," and that this failure violated the process guaranteed by 8 C.F.R. § 103.3(a)(1).

In a previous letter dated May 20, 2003 counsel asserted that the petitioner's depreciation deductions during the various year also represents funds available to pay additional wages.

Initially, this office notes that counsel has inverted the burden of proof in this matter. The service center was not obliged to demonstrate that the petitioner is unable to pay the proffered wage. The petitioner and counsel have the burden of affirmatively demonstrating that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. The director did not find that the petitioner is unable to pay the proffered wage, but merely that the petitioner had not sustained its burden of proof. The director's discussion of that finding was sufficient to satisfy the requirements of 8 C.F.R. § 103.3(a)(1).

The regulation at 8 C.F.R. § 103.2(b)(16)(ii) states, in pertinent part,

*Determination of statutory eligibility.* A determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner . . . .

In the instant case, the determination of statutory ineligibility pursuant to MIJ's failure to demonstrate that it is the petitioner's true successor, was based on statutes, regulations, precedent decisions, and the evidence provided by the petitioner, specifically, evidence that the subject care home has changed hands. Notice to the petitioner of the contents of the evidence it provided is unnecessary, as is further notice of the previously published statutes, regulations, and precedent decisions applicable to the instant visa category. The director

was not required to discuss this basis of the decision of denial in a previously issued request for evidence or notice of intent to deny.

With regard to the petitioner's ability to pay the proffered wage, showing that the petitioner's gross income 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 expenses<sup>2</sup> or otherwise increased its net income,<sup>3</sup> 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 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.

A taxpayer's Form 1120, Line 11 Total Income is derived from its gross receipts minus returns, allowances and the cost of goods sold, with some other types of income added, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional 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.<sup>4</sup> 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.

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

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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.

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 implied that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.<sup>5</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.

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. 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 instant case, MIJ established that it paid the beneficiary \$7,250 during 2005, but did not establish that it paid wages to the beneficiary during any of the other salient years. The petitioner did not show that it paid wages or other compensation to the beneficiary during any 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

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<sup>5</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.

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 corporate 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 corporate 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 corporate petitioner's total assets, however, are not available to pay the proffered wage. The corporate 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>6</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.

During the period when \_\_\_\_\_ owned the subject care home, he held it as a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Because a sole proprietor petitioner's owner is obliged to satisfy the petitioner'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 report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. 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 (7<sup>th</sup> 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.

The proffered wage is \$22,796.80 per year. The priority date is April 25, 2001.

During 2001 the petitioner's owner declared adjusted gross income of \$49,825. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year, he would have

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<sup>6</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

been left with \$27,028.20 with which to support his family of three. No evidence pertinent to the petitioner's previous owner's recurring monthly expenses (budget) was requested or provided. This office finds, however, that the sole proprietor might reasonably be expected to support his household for a year on \$27,028.20. The petitioner has demonstrated that it was able to pay the proffered wage during 2001.

During 2002 the petitioner's owner declared adjusted gross income of \$54,975. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year, he would have been left with \$32,178.20 with which to support his family of three. No evidence pertinent to the petitioner's previous owner's recurring monthly expenses (budget) was requested or provided. This office finds, however, that the sole proprietor might reasonably be expected to support his household for a year on \$32,178.20. The petitioner has demonstrated that it was able to pay the proffered wage during 2002.

During 2003 the petitioner's owner declared adjusted gross income of \$63,210. If the petitioner's owner had been obliged to pay the proffered wage out of his own adjusted gross income during that year, he would have been left with \$40,413.20 with which to support his family of three. No evidence pertinent to the petitioner's owner's recurring monthly expenses (budget) was requested or provided. This office finds, however, that the sole proprietor might reasonably be expected to support his household for a year on \$40,413.20. The petitioner has demonstrated that it was able to pay the proffered wage during 2003, or whatever portion of that year it owned the business.

During 2004 MIJ declared a loss. MIJ is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year, however, MIJ had current assets of \$64,912. That amount is sufficient to pay the proffered wage. MIJ has demonstrated that it was able to pay the proffered wage during 2004, or whatever portion of that year it owned the petitioning care home.

The date that [REDACTED] transferred the petitioning business to MIJ is not in evidence.<sup>7</sup> Whether MIJ began operating the care home at some time during 2003 or at some time during 2004, for instance, is unknown to this office. This office notes, however, that unless the business transferred at the end of the calendar year, then either MIJ was obliged to show the ability to pay the proffered wage during some portion of 2003 or else [REDACTED] was obliged to show the ability to pay some portion during 2004.<sup>8</sup> For this reason, MIJ has failed to show that the petitioner was able to pay the proffered wage during the period he owned the business and that MIJ was able to pay the proffered wage beginning on the date it acquired the business, as required by *Matter of Dial Auto Repair Shop, Inc.*

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<sup>7</sup> Counsel stated in a November 17, 2005 letter and in the appeal brief that MIJ acquired the business during October of 2003. 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.

<sup>8</sup> If MIJ acquired the business during October of 2003, as counsel stated, then MIJ would be obliged to show the ability to pay the proffered wage during the remaining portion of October 2003, and during November and December of 2003. The same obligation to show ability to pay the proffered wage for a partial year would exist if the business were transferred during some other year.

MIJ demonstrated that it paid the beneficiary \$7,250 during 2005. Ordinarily MIJ would be obliged to show the ability to pay the \$15,546.80 balance of the proffered wage. The petition in this matter, however, was submitted on May 28, 2003. On that date the petitioner's 2005 tax return was unavailable. On October 21, 2005 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. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The record does not contain the contract or other instrument pursuant to which the petitioning care home was transferred from [REDACTED] to MIJ, nor any other clear indication of the date that MIJ took over the business. Because the date of the transfer of the subject business is unknown the instant petitioner failed to demonstrate the original petitioner's ability to pay the proffered wage during the period it owned the business and failed to demonstrate its own ability to pay the proffered wage during the time it owned the business. The petition was correctly denied on this basis, which has not been overcome on appeal.

The remaining issue addressed in the decision of denial is whether the petitioner is entitled to rely on the approved labor certification in this case. The absence of the contract or other agreement pursuant to which the business was transferred to MIJ prevents this office from determining whether, in fact, the new owner of the business assumed all of the rights, duties, obligations, and assets of the original owner. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190, 192 (Reg. Comm. 1972)). The mere assertion of the new owner of the business is insufficient to sustain the petitioner's burden of demonstrating that it is a true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*

Further, the petitioner did not even allege in what manner the transaction was consummated, whether by a contract pursuant to an arms-length transaction, a court-ordered sale pursuant to a bankruptcy proceeding, sale of the business itself, sale of the assets of the business, either with or without the real estate, or pursuant to some other scenario. The petition was correctly denied on the basis that the petitioner had not complied with the requirements of *Dial Auto Repair Shop*, which additional basis has not been overcome on appeal.

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

The October 21, 2005 notice of intent to deny requested copies of the petitioning business's Form DE-6 wage reports from "2001 to the present." On that date wage reports through the third quarter of 2005 should have been available. Although the petitioner submitted some wage reports, the record contains no wage reports for the fourth quarter of 2001, the third quarter of 2002, all four quarters of 2003, all four quarters of 2004, and the first three quarters of 2005.

In a November 17, 2005 letter counsel stated that the original petitioner's wage reports for 2003 were unavailable because they were lost when the business transferred. Counsel also stated that the instant petitioner does not issue W-2 forms because it pays its workers as independent contractors. This office notes that amounts paid to independent contractors would not typically be shown on a Form DE-6, which explains the absence of the 2003 and 2004 quarterly wage reports. Counsel did not, however, address the absence of the reports for the fourth quarter of 2001 and the third quarter of 2002.

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.

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.