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**U.S. Citizenship
and Immigration
Services**

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FILE: [redacted]
SRC 05 162 51975

Office: TEXAS 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, 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 dry cleaner. It seeks to employ the beneficiary permanently in the United States as a manager. 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(i)(1) states,

Any United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(3) [of the Act] as a skilled worker, professional, or other (unskilled) worker.

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 20, 2001. The prospective employer named on that form is the instant petitioner, [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$30,264 per year.

The Form I-140 petition in this matter was submitted on May 18, 2005. On the petition, the petitioner stated that it was established during August 2002 and that it employs six workers. The petition states that the petitioner's gross annual income is \$193,688 and that its net annual income is \$9,382. On the Form ETA 750, Part B, signed by the beneficiary on October 30, 2003, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in El Lago, Texas.

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.¹

In the instant case the record contains (1) copies of the 2001 and 2002 Form 1120S, U.S. Income Tax Returns for an S Corporation of [REDACTED] of the same address as the petitioner, (2) copies of the 2003 and 2004 Form 1120, U.S. Corporation Income Tax Returns of the petitioner, [REDACTED] (3) a letter dated July 7, 2005 from the petitioner's president, (4) copies of monthly statements pertinent to the petitioner's bank account, (5) copies of monthly statements pertinent to bank accounts of [REDACTED] (6) 2002 Form W-2 Wage and Tax Statements (W-2 forms) showing wages [REDACTED] paid to its owners, (7) 2003 W-2 forms showing wages the petitioner paid to its owner² and its president,³ (8) 2004 W-2 forms showing wages the petitioner paid to its owner, its president and another employee⁴, (9) [REDACTED] Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2001, 2002, and 2003, (10) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for the third and fourth quarters of 2003 and for all four quarters of 2004, (11) Safini's 2001, 2002, and 2003 Form 940-EZ and W-3 transmittals, (12) the petitioner's 2003 and 2004 Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Returns, (13) the petitioner's 2004 W-3 transmittal, and (14) a July 15, 2003 agreement to transfer the petitioning business from [REDACTED] as seller to the petitioner as buyer. 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.

Safini's tax returns show that it is a corporation and that it incorporated on February 4, 1998. Its 2003 return does not indicate that it was [REDACTED] final return.

The 2001 tax return provided shows that [REDACTED] declared Schedule K, Line 23 Income of \$8,713. At the end of that year [REDACTED] had current assets of \$4,433 and current liabilities of \$3,226, which yields net current assets of \$1,207.

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 An addendum to Schedule K on the petitioner's tax returns identifies the owner as [REDACTED] who is the person to whom the amounts shown on one of the W-2 forms were paid.

³ The petitioner's president, [REDACTED] is shown on Safini's tax returns as its part-owner.

⁴ The other employee to whom the petitioner issued W-2 forms [REDACTED] is shown on [REDACTED] tax returns as its other part-owner.

The 2002 tax return provided shows that [REDACTED] declared Schedule K, Line 23 Income of \$10,320. At the end of that year [REDACTED]'s current liabilities exceeded its current assets.

2003 tax return shows that it declared a loss of \$8,336 during that year. At the end of that year [REDACTED] had current assets of \$37,336 and current liabilities of \$18,347, which yields net current assets of \$18,989.

The petitioner's tax returns show that it is a corporation, that it incorporated on August 19, 2002, and that it reports taxes pursuant to accrual convention accounting and the calendar year. The petitioner's 2003 tax return does not indicate that it was the petitioner's first Form 1120 tax return.

The 2003 tax return provided shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,495. At the end of that year the petitioner's current liabilities exceeded its current assets.

The 2004 tax return provided shows that the petitioner declared taxable income before net operating loss deduction and special deductions of \$9,382. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's quarterly returns for the last two quarters of 2003 show that the petitioner paid total wages of \$12,250 and \$16,200 during those quarters, respectively, for a total of \$28,450. The petitioner's 2003 Form 940-EZ shows that it paid total wages of \$37,750 during that year. The difference demonstrates that the petitioner paid total wages of \$9,300 during the first and/or second quarters of 2003.

The petitioner's quarterly returns for the four quarters of 2004 show total wages of \$16,250, \$15,300, \$16,100, and \$16,500, respectively, for an annual total of \$64,150. The petitioner's 2004 Form 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Return and W-3 transmittal confirm that the petitioner paid total wages of \$64,150 during that year.

The July 15, 2003 agreement by [REDACTED] to sell the business to the petitioner lists the various assets that transferred with the sale. It does not list any duties, obligations, or liabilities as transferring with the business. In fact, paragraph 1 of Section VII of that agreement states,

In no way may this transaction be considered an assumption of Seller's liabilities by Purchaser except as explicitly stated herein. Seller shall remain solely liable for payment of all other Seller's liabilities.

The director denied the petition on October 24, 2005.

On appeal, counsel asserted that the director did not correctly consider the petitioner's depreciation deductions, its end-of-year cash, and the balances shown on its bank statements. In a letter dated November 15, 2005 submitted with the appeal and in the appeal brief counsel asserted that the petitioner is [REDACTED] successor-in-interest. Counsel further stated, "the petitioner assumed "all the rights, duties, obligations, and assets of [REDACTED] . . ." Finally, counsel stated that the beneficiary, if the petitioner were permitted to hire him,

would increase the petitioner's profitability through promotion of the business and increasing its operating efficiency. Counsel provided no evidence to demonstrate that the beneficiary would be more effective than the petitioner's current management.

In his July 7, 2005 letter the petitioner's president also argued that in determining the funds available to pay additional wages the petitioner's depreciation deductions and end-of-year cash on hand should be added to its net profit. He also asserted that the wages paid to him and the other owner⁵ of the company represent profit and should also be included in the computations pertinent to the petitioner's ability to pay the proffered wage.

Although he conceded that the petitioner's net current assets⁶ were insufficient during each of the salient years to pay the proffered wage, the petitioner's president noted that the petitioner's total assets exceeded the proffered wage in each of those years. The petitioner's president also cited the petitioner's current ratio as an index of its financial health, and its bank balances as indices of its ability to pay additional wages. The petitioner's president mistakenly referred to the 2002 tax return in the record as that of the petitioner, although it is Safini's tax return.

Counsel urges that the petitioner's Schedule L end-of-year Cash should be added to its net profits in calculating the funds available to the petitioner to pay the proffered wage. That calculation would be inappropriate. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part.

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.

⁵ [REDACTED] wrote that letter. The petitioner's Form 1120 tax returns show that [REDACTED] is the sole owner of the petitioning corporation.

⁶ The petitioner's president miscalculated the petitioner's net current assets. That computation is explained below.

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.⁷ 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 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.⁸ 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 has provided various documents pertinent to the total wage expense of [REDACTED] and the petitioner during the salient years. Counsel appears, thereby, to have implicitly asserted that the total wage expense of [REDACTED] and the petitioner is an index of their ability to pay some additional amount of additional wages.

Showing that the petitioner paid 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.

⁷ 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.

⁸ 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.

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.

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 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 president argued that amounts paid to the petitioner's owners represent profit and are funds available to pay additional wages.

s 2001, 2002, and 2003 tax returns show that and then owned

The 2001 return shows that paid no officer compensation during that year. The record contains no W-2 forms to show that any amounts to its owners.

The 2002 return shows that paid no officer compensation during that year. The 2002 W-2 forms submitted show that paid and \$21,600 and \$4,800, respectively, for a total of \$26,400 during that year.

s 2003 return shows that it paid no officer compensation. A W-2 form in the record shows that it paid \$12,600 during that year.

The petitioner's tax returns show that during 2003 and 2004 owned it.

The petitioner's 2003 return shows that it paid no officer compensation during that year. A 2003 W-2 form in the record shows that the petitioner paid its owner \$17,250 during that year. Another W-2 form shows that the petitioner paid \$9,900 during that year.

The petitioner's 2004 return shows that it paid no officer compensation during that year. A W-2 form in the record shows that the petitioner paid its owner \$18,000 during that year.

The figures from the 2002 and 2003 tax returns and W-2 forms reveal an apparent discrepancy. Typically, a small corporation's owners are also its officers. Wages paid to them are shown on a W-2 form and carried over to Compensation of Officers on the corporation's tax returns.

In 2002 and 2003 reported wages paid to its owners on W-2 forms, but reported no compensation of officers on its tax returns. During 2003 the petitioner reported no compensation of officers but reported payments to its owners on W-2 forms.

The petitioner has not been accorded an opportunity to explain this apparent discrepancy and this office will not, therefore, rely upon it in today's decision. If the petitioner attempts to overcome today's decision, however, it should be prepared to reconcile this discrepancy in accordance with the requirements of *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

In any event, has not shown that it compensated its officers or owners in any amount during 2001. The record shows that it paid wages of \$26,400 to its officers during 2002, and \$12,600 to one of its officers during 2003. The petitioner has shown that it paid \$17,250 to its sole owner during 2003, and \$9,900 to an individual whose relationship to the company is unknown. The petitioner also demonstrated that it paid \$18,000 to its owner during 2004. The petitioner asserts that the amounts paid to its owners and owners represent profit and were therefore available, if necessary, to pay the proffered wage.

Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able to forego compensation, in whole or in part, to pay the proffered wage. If the amounts paid to the owners were so large that they suggested that the recipients could easily have paid the proffered wage out of their wages, then this office would be tempted to find the ability to pay the proffered wage inherent in the figures themselves. But no evidence or circumstance in this case suggests that outcome. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages. The amounts that Safini and the petitioner paid to their respective owners have not been shown to have been available to pay additional wages.

Counsel asserted that hiring the beneficiary would increase the petitioner's profits. Counsel indicated that the beneficiary, as the petitioner's manager, would manage the petitioner in such a way as to increase its efficiency and profitability. He offered no evidence, however, that the beneficiary can render a service so vastly superior to that of the petitioner's present management that his employment would greatly profit the petitioner. 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.

If the petitioner were to hire the beneficiary, the expenses of employing the beneficiary would offset, at least in part, whatever amount of gross income the beneficiary would generate, if any. That the amount remaining, if any, would be sufficient to pay the beneficiary's wages, or even to offset any portion of it, is speculative. The petitioner has submitted no evidence that the net income generated by the beneficiary would offset the beneficiary's wages. Absent any such evidence, this office will make no such assumption.

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

In a November 16, 1994 transcript the Director, Vermont Service Center, stated that a sufficiently favorable ratio of current assets to current liabilities would lead the Service Center to the assumption that the petitioner is able to pay a proffered wage. Notwithstanding the opinion of the Director, Vermont Service Center,¹¹ however, the current ratio is a measure of a petitioner's ability to cover its existing debts with its existing liquidity. It is not a measure of the ability to absorb additional expenses. Unlike the petitioner's current ratio, its net current assets, that is, the difference between the petitioner's current assets and its current liabilities is an index of the ability to absorb additional expenses, such as additional wages.

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

The 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

¹¹ This office is not bound by the opinion of the Director, Vermont Service Center.

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, the petitioner did not establish that it paid any wages to the beneficiary.

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 \$30,264 per year. The priority date is April 20, 2001.

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

The analysis of the petitioner's continuing ability to pay the proffered wage beginning on the priority date is complicated by the fact that the evidence shows that the business transferred on July 15, 2003. Prior to that date [REDACTED] owned the business. From that date forward the petitioner owned the business.

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-in-interest 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.* 19 I&N Dec. 481 (Comm. 1986).

During 2001 [REDACTED] reported Schedule K, Line 23 Income of \$8,713.¹³ That amount is insufficient to pay the proffered wage. At the end of that year [REDACTED] had net current assets of \$1,207. That amount is also insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of other funds at [REDACTED] disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated that [REDACTED] was able to pay the proffered wage during 2001.

During 2002 [REDACTED] reported Schedule K, Line 23 Income of \$10,320. That amount is insufficient to pay the proffered wage. At the end of that year [REDACTED] had negative net current assets. The petitioner is unable, therefore, to demonstrate [REDACTED]'s 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 other funds at [REDACTED]'s disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated that Safini was able to pay the proffered wage during 2002.

During 2003 [REDACTED] declared a loss. The petitioner is unable, therefore, to demonstrate [REDACTED]'s ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year [REDACTED] had net current assets of \$18,989. That amount is also insufficient to pay the proffered wage.¹⁴ The petitioner submitted no reliable evidence of other funds at [REDACTED]'s disposal with which it could have paid the proffered wage during that year. The petitioner has not demonstrated that [REDACTED] was able to pay the proffered wage during 2003.

¹³ For the purpose of demonstrating ability to pay the proffered wage, a Subchapter S petitioner's Schedule K, Line 23 Income is considered to be its net income.

¹⁴ CIS 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. In the instant case, although Safini transferred the subject business on July 15, 2003, it continued to exist after that date and may have earned additional income during that year, which additional income was not available to pay the proffered wage. That Safini's 2003 return does not indicate that it is the corporation's final return indicates that the corporation continued to exist, and that its Form 941 quarterly returns show that it continued to pay wages during the third and fourth quarters of 2003 demonstrates that it continued in business after the July 15, 2003 sale of the subject cleaning business. CIS will not prorate the proffered wage under these circumstances. Safini must show the ability to pay the entire proffered wage during 2001, 2002, and 2003.

As was noted above, the petitioner must show the ability to pay the proffered wage beginning on July 15, 2003, the date it acquired the business. During 2003 the petitioner declared taxable income before net operating loss deduction and special deductions of \$1,495.¹⁵ That amount is insufficient to pay the proffered wage.¹⁶ 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 submitted no reliable evidence of any other funds at its disposal during 2003 with which it could have paid additional wages. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$9,382. That amount is insufficient to pay the proffered wage. 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 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.

The petition in this matter was submitted on May 18, 2005. On that date the petitioner's 2005 tax return was unavailable. On June 11, 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 petitioner failed to demonstrate that [REDACTED] was able to pay the proffered wage from the priority date, April 20, 2001 through the end of 2001. The petitioner failed to show that [REDACTED] was able to pay the proffered wage during 2002. The petitioner failed to show that [REDACTED] was able to pay the proffered wage from the beginning of 2003 through July 15, 2003, when it sold the subject business. The petitioner also failed to show that it was able to pay the proffered wage from July 15, 2003 through the end of 2003, and failed to show that it was able to pay the proffered wage during 2004. Therefore, the petitioner has not, therefore, established 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.

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

As was noted above, [REDACTED] sold the subject business to the petitioner on July 15, 2003. In such a situation, the petitioner would typically be attempting to rely on a labor certification issued to its predecessor. When a

¹⁵ The Line 28 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 analyzing its ability to pay the proffered wage.

¹⁶ The petitioner incorporated on August 19, 2002 and its 2003 quarterly returns show that it paid some wages during the first two quarters of that year. This implies that the petitioner engaged in some type of business prior to acquiring the subject cleaning business on July 15, 2003, and may have earned income prior to that priority date. Again, under these circumstances, this office will not prorate the proffered wage.

petitioner is attempting use a labor certification issued to another, it must show that it is the true successor of its predecessor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The successor/petitioner must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case, a document has been introduced showing the nature of the transaction that resulted in the transfer of the business. That document exempts the Safini's liabilities from the transfer except as specifically enumerated, and none are enumerated. The transaction evidenced by that document does not appear to result in true successorship within the meaning of *Matter of Dial Auto Repair Shop, Inc., Id.*

That analysis is not critical to the instant case, however, as the petitioner is not attempting to rely on a labor certification issued to [REDACTED]. The labor certification in this matter was issued to the petitioner, [REDACTED], of [REDACTED] in El Lago, Texas. That labor certification was submitted on April 20, 2001. The additional issue in this matter is how this is possible when the evidence shows that the petitioner, [REDACTED], incorporated on August 19, 2002 and did not acquire the cleaning business at [REDACTED] until July 15, 2003.

The petitioner appears to have submitted a Form ETA 750 Labor Certification Application stating that it was unable to locate US workers for its cleaning business in El Lago, Texas at a time when it did not own that business and did not even exist. This office finds that, among the various other flaws in this approach, a company that does not operate a business, does not employ any workers, and does not even exist does not qualify as a US employer within the meaning of 8 C.F.R. § 204.5(l)(1). The petition should have been denied for this additional reason.

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.