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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090



U.S. Citizenship
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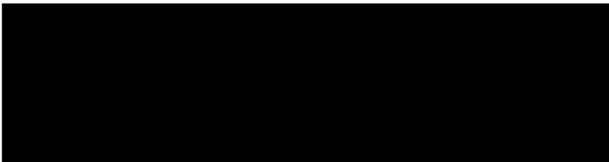
Office: TEXAS SERVICE CENTER Date:

JUL 14 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom,
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, is a dry cleaning, laundry/alteration and leather cleaning firm. It seeks to employ the beneficiary permanently in the United States as an alterations/tailor. As required by statute, an 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 demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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).

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 the granting of 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 or seasonal 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.

¹ The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 24, 2001. The proffered wage is set forth as \$11.02 per hour which amounts to \$22,921.60 per annum. The beneficiary signed Part B of the Form ETA 750 on November 24, 2003, indicating that she was unemployed from May 2001 to the present (date of signing). There is no indication that she had worked for the petitioner.

Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on July 18, 2005, by the petitioner, "Ultra Fine Cleaners," indicates that the petitioner was established on February 23, 1990, employs 5 workers, claims a gross annual income of \$217,064 and a net annual income of \$42,567.50.

Item 4 of Part A of the Form ETA 750 submitted with the I-140 petition identifies "S.J. & Sons, Inc., dba Ultra Fine Cleaners" as the name of the employer. The box in the lower right hand corner of the Form ETA 750 contains two dates. The date of April 24, 2001 is identified as the date that the local DOL first received the application. As noted above, this is the priority date. To the right of this date is another stamped date of January 5, 2004 signifying that the state regional DOL office received the application. There is another DOL receipt stamp on the upper right-hand corner of the Form ETA 750 also showing that it was "received" on January 8, 2004. The certification stamp at the bottom of the Form ETA 750 indicates that the labor certification application was certified by DOL on March 4, 2005.

A copy of the articles of incorporation filed by S.J. & Sons, Inc. with the Texas Secretary of State reflects that it was not incorporated until May 12, 2003. As set forth in the record, Ultra Fine Cleaners was not registered by S.J. & Sons Inc. as an assumed trade name in Texas until June 9, 2003. Both the incorporation of S.J. & Sons, Inc. and the registration of the trade name of Ultra Fine Cleaners under which it was doing business took place more than two years after the priority date of April 24, 2001 was assigned to the Form ETA 750 by DOL. Because the initial processing acceptance date of April 24, 2001 is shown on this ETA 750, it appears that the labor certification was filed more than two years before S.J. & Sons, Inc., dba Ultra Fine Cleaners existed as an employer under 20 C.F.R. § 656.3. The petitioner offered no objective evidence, such as copies of correspondence with DOL or other documentation to explain these anomalies. As such, the current record indicates that the Form ETA 750 cannot constitute a valid job offer because the corporate employer identified on item 4 did not exist.

It is noted that counsel's brief on appeal describes how the company was named JP & Sons, Inc., but "was changed to SJ & Sons, Inc., successor-in-interest, and the labor was certified under SJ & Sons, Inc." (counsel's brief, pp. 5-6). Counsel's response to the director's request for evidence also described how "in 2001, SJ & Sons, Inc. was doing business as JP & Sons, Inc. until one of the owners passed away in 2003. The owners' spouse and son reorganized the company into SJ & Sons, Inc. and continued its operations with Ultra Fine Cleaners and all of JP & Sons' business operations and liabilities." (Counsel's October 26, 2005, Response to Notice of Request for Evidence dated

October 26, 2005, Response No. 3). Again, as explained below, no objective documentation supporting this chain of events was submitted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even considering counsel's description of how a successor-in-interest relationship was created, it is noted that in support of the petitioner's continuing ability to pay the beneficiary's proposed wage offer of \$22,921.60, the petitioner provided copies of Form 1120S, U.S. Income Tax Return(s) for an S Corporation for 2001, 2002, 2003, and 2004. The 2003 and 2004 tax returns were filed on behalf of S.J. & Sons, Inc. The 2001 and 2002 tax returns were filed on behalf of a company identified as "J.P. & Sons, Inc." J.P. and Sons, Inc. and S.J. & Sons, Inc. each have different federal employer identification numbers (FEIN) and different shareholders.² The returns indicate that both companies filed their tax returns using a standard calendar year. This evidence suggests that more than a name change occurred, although, as mentioned above, the record of proceedings does not clearly document how S.J. & Sons, Inc. came to be a successor-in-interest to J.P. & Sons, Inc. This status requires documentary evidence that a petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor enterprise had the ability to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

To establish a valid successor-of-interest, the petitioner should have included such documents as copies of any executed agreements of transfer, escrow statements, deed transfers, bill(s) of sale, and executed copies of the pertinent UCC, fictitious trade name and other state or municipal records that clearly establish the history and transfer of ownership of the business from J.P. & Sons, Inc. to S.J. & Sons, Inc. Although the director's request for evidence did not articulate specific items of proof to be submitted related to this relationship, it remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner's failure to clarify these defects renders the petition ineligible for approval on this basis.

To further add to the complications, the I-140 petitioner is only identified by the business' assumed trade name of Ultra Fine Cleaners and claims to have a FEIN of [REDACTED], which, according to the corporate tax returns, belonged to the first company, J.P. & Sons, Inc. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and

²The 2001 and 2002 corporate tax returns filed by J.P. & Sons, Inc. show [REDACTED] and [REDACTED], and [REDACTED] each held 25% of the stock. The 2003 tax return filed by S. J. & Sons, Inc. show that [REDACTED] owned 100% in 2003 and 61.20219% in 2004, with [REDACTED] owning the other 38.79781% in 2004.

attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Notwithstanding this observation, this decision will also review the financial documentation submitted to the record to determine if the ability to pay the proffered wage has been established by the appropriate entities.

The tax returns contain the following information:

	2001 (J.P. & Sons)	2002 (J.P. & Sons)	2003 (S.J. & Sons)	2004 (S.J. & Sons)
Net Income ³	\$ 3,584	-\$ 4,191	\$ 1,965	-\$ 3,324
Current Assets	\$ 15,276	\$ 17,681	\$ 14,179	\$14,638
Current Liabilities	\$ 17,767	\$ 66,717	\$124,533	\$29,784
Net Current Assets	.\$ 2,491	-\$ 49,036	-\$110,354	-\$15,146

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current

³ Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) line 17e (2004) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner or its predecessor-in-interest had additional deductions shown on Schedule K for 2001-2004, the petitioner's net income is found on Schedule K of its tax return.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Additionally, the petitioner provided copies of three checks, dated in September 2005, payable from the petitioner to the beneficiary for the respective amounts of \$440.80, \$440.80, and \$881.60, as well as a letter, dated May 18, 2005 from [REDACTED] general manager of S.E.H. Enterprises, Inc. [REDACTED] states that he is the petitioner's accountant and vouches for the petitioner's ability to pay the proffered wage. He asserts that amounts taken as "Compensation of Officers" must be added back to net income because they represent profits distributed to officers and are reported on the officers' individual tax returns. He also maintains that depreciation and amortization must be added back to net income because they are non-cash deductions. He also states that the personal financial statements of the petitioner's shareholders indicate that they could support, if necessary, the company's obligations. An unaudited financial statement consisting of an income statement, a detail of general expenses, and a balance sheet (as of 9-30-04) for the period of 01-01 to 9-30-04 was also submitted to the record.

The director denied the petition on November 9, 2005. He concluded that the petitioner had failed to demonstrate its ability to pay the proffered wage through either its net income or net current assets. He also observed that the checks payable to the beneficiary reflected that they had been negotiated and were not probative of the petitioner's ability to pay the proffered salary.

On appeal, the petitioner, through counsel, asserts that its continuing ability to pay the proffered wage of \$22,921.60 to the beneficiary is supported by the a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004). This memorandum refers to making a positive determination of a petitioner's ability to pay the proffered wage when it has employed the beneficiary and has also paid or currently is paying the proffered wage. Counsel provides copies of the petitioner's general ledger entries showing the payments to the beneficiary reflected by the copies of the September 2005 checks mentioned above as proof of having paid the proffered wage to the beneficiary as contract labor.

This assertion is not persuasive. It is noted that by its own terms, the Yates memorandum is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁵ The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, as noted above, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, such interpretation must comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2)

⁵See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Here, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning as of the April 24, 2001, priority date, as established by the labor certification. Demonstrating that the petitioner is paying the proffered wage in an isolated month as contract labor, may suffice to show the petitioner's ability to pay for this specified period, but the petitioner must still demonstrate its ability to pay for the remainder of the entire pertinent period of time. No other evidence of such payments to the beneficiary has been presented by counsel.

Counsel also adopts the accountant's assertions in contending that officer compensation and depreciation and amortization should be added back to the petitioner's net income. Additionally, it is argued that the shareholder loans reflected as long-term liabilities on Schedule L of the corresponding tax returns somehow demonstrate the petitioner's ability to pay the proffered wage through the shareholders' ability to lend amounts to the company. Counsel cites no legal authority compelling USCIS to evaluate shareholder loans in such a way. As noted above, in addition to net income, USCIS will also review net current assets which represent the difference between current assets and current liabilities (payable in less than a year) as a method to determine whether a corporate petitioner has sufficient reasonably available liquid assets in order to pay the proffered wage during a given period.

As noted by the director, a corporation is a separate and distinct legal entity from its owners and shareholders. The assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In *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 who have no legal obligation to pay the wage."

With regard to officer compensation, it is noted that \$49,122 was paid in 2001 and \$30,000 was paid in 2002 as reflected by the tax returns filed by J.P. & Sons, Inc. Officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary as an alterations/tailor and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. Moreover, there is also no first-hand evidence from the officer(s) that such compensation could have been foregone during the period given. Undocumented suggestions that the beneficiary would be assuming a portion of this compensation may be considered funds available to pay the proffered wage are misplaced. The petitioner failed to provide any Form 1040, U.S. Individual Income Tax Return, for this officer or other documentation to identify whose workload, if any, would be reduced. Also, there is no notarized, sworn statement from the petitioner in the record which attests to the claim that the beneficiary would assume any portion of such duties or compensation. Finally, as shown by the record, there was no officer compensation claimed in 2003 or 2004. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*,

22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Other than the amounts paid to the beneficiary in September 2005, no other compensation or employment has been documented in this matter. Therefore, the petitioner has not established its continuing ability to pay the proffered salary through employment and payment of compensation to the beneficiary.

It is additionally noted that the unaudited financial statements submitted to the underlying record and on appeal are not probative of the petitioner's ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence because they are not prepared according to general auditing standards and are the unsupported representations of management.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105 (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 the Service should have considered income before expenses were paid rather than net income.

Similarly, depreciation or other expenses will not be added back to a petitioner's net income. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

It is noted that in *Matter of Sonogawa*, the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner’s reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this case, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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).

Unlike the *Sonegawa* petitioner, this petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable. The corporate petitioner was formed only two years prior to filing the I-140. Two out of the four years relevant to this adjudication, it has declared losses as net income and has shown losses as net current assets in all four years. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

In 2001, neither J.P. & Sons, Inc.'s net income of \$3,584 nor its net current assets of -\$2,491 was sufficient to cover the proffered wage of \$22,921.60. The petitioner failed to demonstrate the ability to pay the proffered wage in this year.

In 2002, neither J.P. & Sons, Inc.'s net income of -\$4,191 nor its net current assets of -\$49,036 was sufficient to pay the proffered salary or demonstrate the ability to pay in this year.

In 2003, S.J. & Sons, Inc, dba Ultra Fine Cleaners' net income of \$1,965 was not enough to cover the proffered wage. Similarly, its net current assets of -\$110,354 was not sufficient to cover the certified salary. The petitioner did not establish its ability to pay the certified salary in this year.

In 2004, S.J. & Sons, Inc, dba Ultra Fine Cleaners' net income of \$3,324 was not enough to cover the proffered wage. Its net current assets of -\$15,146 was also not sufficient to cover the certified salary. The petitioner did not establish its ability to pay the certified salary in this year.

As noted above, it is found that the petitioner failed to document that is the successor-in-interest to J.P. & Sons, Inc. Further, the petitioner failed to establish that a continuing financial ability to pay the proffered wage as of the priority date was demonstrated by either the petitioner or its claimed predecessor-in-interest, J.P. & Sons, Inc.

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).

It is additionally noted that the labor certification filed on April 24, 2001 does not constitute a valid job offer because the corporate employer identified on the ETA 750 did not exist at that time. Therefore the job offer was not valid as of the priority date.

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. 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.