

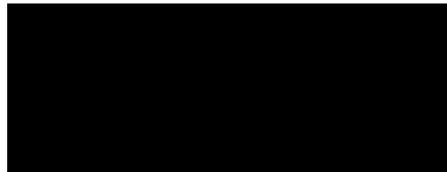


U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: **SEP 08 2010**

IN RE:

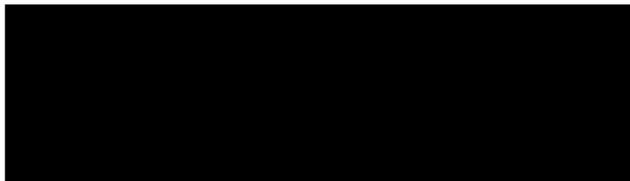
Petitioner:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a restaurant which seeks to classify the beneficiary as a bookkeeper pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). The director determined the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

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 nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The above regulation sets forth the requirement that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. See 8 C.F.R. § 204.5(d).

As a threshold issue, it must be determined whether the petition is accompanied by an individual labor certification from the USDOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). The original employer identified in the Form ETA 750 filed on April 30, 2001 was a [REDACTED] corporation called [REDACTED]. This corporation apparently ceased operating the restaurant operation located at [REDACTED], [REDACTED], at some point in 2002, 2003, or 2004. Regardless, in 2004, the petitioner, a separate and distinct [REDACTED] corporation, purportedly acquired the restaurant business and

continues to operate the enterprise. Consequently, the only way for the petitioning corporation to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*).

*Matter of Dial Auto* is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act.

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and United States Citizenship and Immigration Services (USCIS) has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to

the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In this matter, the petitioner submitted a sales agreement and bill of sale, both dated March 28, 2004, which indicate that the petitioner acquired all of the assets of the [REDACTED] the restaurant located at [REDACTED]. The petitioner paid \$100,000.00. The assets included the lease, leasehold improvements, fixtures, furniture, machinery, equipment, telephone number, goodwill, inventory, and a liquor license. The seller agreed in paragraph 2 of the sales agreement to retain the business until closing and to operate the restaurant in the normal customary manner. Based on an executed receipt submitted into the record, the closing occurred on July 15, 2004 (even though the bill of sale was signed over three months earlier). Accordingly, the record sufficiently establishes that the petitioner is the successor-in-interest to the original filer of the Form ETA 750.

Therefore, as explained in *Matter of Dial Auto*, the petitioner must establish that both it and its predecessor-in-interest have the ability to pay the proffered wage. This ability must be established for the predecessor-in-interest until ownership transfers to the petitioner. In this matter, it is not clear when, exactly, the petitioner began operating the business. Counsel claims in a letter submitted in response to the director's request for evidence that the petitioner began operating the restaurant in March 2003 even though it did not acquire the restaurant until 2004. As the sales agreement, which is dated March 28, 2004, indicates that the predecessor would continue to operate the business until closing, it is unclear when the predecessor's obligations ceased and the petitioner's began. As thoroughly explained below, the petitioner submitted its 2003 tax return as evidence of its ability to pay. Neither the predecessor's 2003 return, nor its 2004 return, was submitted even though the transfer occurred in one of those years. Only the predecessor's 2001 and 2002 returns were submitted. In order for the petitioner to sustain its burden, it would need to at least submit evidence of when it began operating the restaurant and evidence of its predecessor's ability to pay the

proffered wage up until that moment of transfer. This clearly occurred at some point after 2002. 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)).

Accordingly, as the record fails to establish when the transfer of the business was made to the petitioner, it cannot be concluded that either the petitioner or the predecessor-in-interest had the ability to pay the proffered wage during any of the relevant years.

In view of the above, the Form ETA 750 was accepted on April 30, 2001. It lists the proffered wage as \$15 per hour based on a 40 hour workweek which equates to \$31,200 per year, and the position requires two years experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The petitioner is structured as an S corporation. The petitioner's predecessor-in-interest was structured as a C corporation. On the petition, it claims it was established in 1994 and employed fifteen workers when the Form I-140 was filed. The firm's IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, reflects it operates on a calendar year basis. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on April 18, 2001, she indicated she had not been employed by the petitioner before that date. On her Form G-325A, Biographic Information, signed on May 11, 2007, she stated that she worked as a self-employed bookkeeper from January 2003 until May 11, 2007. The record contains copies of the beneficiary's pay stubs showing she began working for the restaurant during the pay period from August 1, 2007 to August 31, 2007 and that her employment continued after that pay period.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a beneficiary obtains lawful permanent resident status. 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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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 this 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is *prima facie* proof of the petitioner's ability to pay.

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of April 30, 2001 until the visa petition was filed on June 1, 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the requisite period, USCIS next examines the net income figures reflected on the petitioner's federal income tax returns without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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).

For a C corporation such as the predecessor-in-interest, which filed the visa petition and operated the restaurant during 2001 and 2002 before it was purchased by the petitioner, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120. The petitioner filed as an S corporation beginning in 2003. The tax returns demonstrate net income as follows:<sup>2</sup>

Year	Net Income
2001	-\$56,299
2002	-\$42,242
2003	\$17,086
2004	-\$22,970
2005	-\$9,976
2006	\$43,629

Therefore, for the years 2001 through 2005, neither the petitioner nor its predecessor had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s (or its predecessor’s) ability to pay the proffered wage, USCIS may review net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be

<sup>2</sup> Where an S corporation’s income is exclusively from a trade or business, 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 (1997-2003), line 17e (2004-2005), line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>.

<sup>3</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

able to pay the proffered wage using those net current assets. The petitioner's (and its predecessor's) tax returns demonstrate its net current assets for the required period, as shown in the table below:

<u>Year</u>	<u>Net Current Assets (\$)</u>
2001	-\$19,308
2002	\$0
2003	\$62,710
2004	-\$70,593
2005	\$2,415
2006	-\$54,465

Therefore, for the years 2001, 2002, 2004, 2005, and 2006 the petitioner did not have sufficient net current assets to pay the proffered wage. It also cannot be concluded that the petitioner had the ability to pay the wage in 2003 because it had not been established that it had acquired the business as of that date. See *supra*.

Therefore, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, specifically in 2001, 2002, 2003, 2004, and 2005.

Counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that when an employer is a corporation owned by a sole shareholder who states that his or her person assets would be used by the corporation to pay the wage, one must consider both the individual and corporate tax return to arrive at a rational understanding of whether the employer has the ability to pay. Counsel does not state how a USDOL Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. The precedent decisions followed by USCIS are designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal, counsel submits a letter dated March 4, 2008 from an Assistant Vice President of the [redacted] office of [redacted] addressed to Dr. [redacted] indicating that throughout 2001 and 2002, he held cash and readily marketable securities in excess of \$250,000. Counsel also submits Dr. [redacted]'s personal tax returns for 2001 and 2002. Counsel states that this letter and tax returns document the available assets of the previous owner of [redacted] and establishes he had the ability to pay the proffered wage to the beneficiary during 2001 and 2002. The IRS Forms 1120 for [redacted] list "[redacted]" as the owner of 50% of the stock for 2001 and 2002. Dr. [redacted] or any other 50% owner are not listed on the tax returns. It is noted that [redacted] was the authorized officer who signed as the sole shareholder on March 28, 2004 when the ownership of the company passed to the petitioner. However, even had he been listed on the tax returns as holding 100% of the corporation's stock, USCIS does not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. A corporation is a separate and distinct

legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also submit the petitioner's Bank of America monthly statements for 2004 and 2005 and argues that these whole bank statements showing all transactions prove that there was at all times money with which to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise 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. 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 reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate the petitioner could not continuously pay the proffered wage from the day the Form ETA 750 was accepted for processing by the USDOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa, supra*. The petitioning entity in *Sonogawa* had been in business for over 11 years. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the

petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner is operating a restaurant business that originated in 1994. [REDACTED] only paid wages and salaries of \$60,535 in 2001 and \$5,650 for 2002. In 2002, the enterprise appears to have ceased operating at some point because its gross receipts were only \$7,494 for the entire year, a small amount for an operating restaurant. On appeal, counsel submits write-ups that were e-mailed to her from the petitioner which appeared in Washingtonian Magazine in May 2004, April 2005 and January 2006. [REDACTED] in 2006 and the [REDACTED] in March 2005 recommending the restaurant to its readers. These write-ups, while encouraging persons to dine at the restaurant do not constitute evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets or lift the reputation of the restaurant beyond that of other restaurants regularly subject to similar reviews in the local area. Additionally, there are no unusual events or circumstances that enhance the reputation of the company within its industry and there is no evidence showing that the petitioner is replacing a former employee or an outsourced service. Also, as noted above, the record is devoid of evidence establishing when and how the petitioner began operating the restaurant in 2003. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.