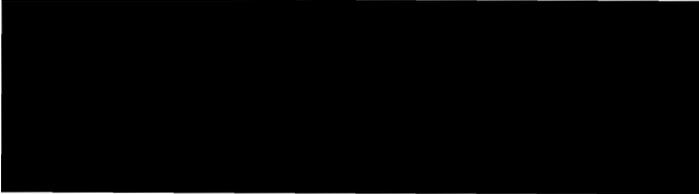




U.S. Citizenship
and Immigration
Services

identifying data deleted to
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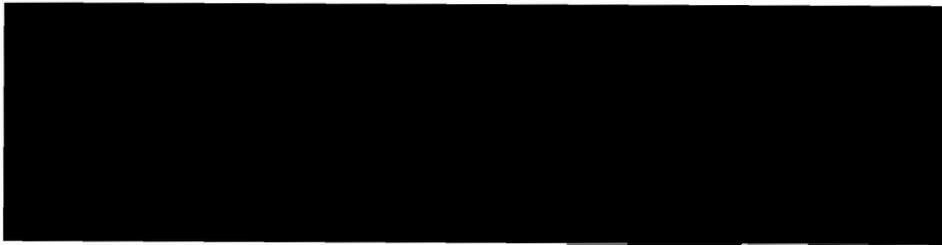
FILE: WAC 04 008 52464 Office: CALIFORNIA SERVICE CENTER Date: **FEB 14 2008**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the instant preference visa petition. The petitioner appealed. The Administrative Appeals Office (AAO) dismissed that appeal. The AAO reopened the matter pursuant to 8 C.F.R. § 103.5(a)(5)(ii) and provided the petitioner with 30 days to submit a brief. The AAO will replace its prior decision with the following. The appeal will remain dismissed.

The petitioner is a copier sales and repair firm. It seeks to employ the beneficiary permanently in the United States as an office machine servicer. 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 instant petitioner had not established that it is entitled to rely on the approved Form ETA 750 labor certification (Form ETA 750 or labor certification application) in this case 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.

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 Form ETA 750 petition in this matter was submitted by Rapid Copier Repair and Sales Incorporated (Rapid Copier). The petitioner listed on the Form I-140 visa petition, which was submitted on October 10, 2003, is DataPrint Solutions Incorporated (DataPrint).

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).

In the instant case the record contains (1) a photocopy of what appears to be the first page of a letter of intent, dated August 16, 1999, showing terms pursuant to which Rapid Copier agreed to sell its copier business to DataPrint, (2) a bill of sale dated August 23, 1999 evincing a sale, apparently pursuant to those terms, (3) letters dated March 7, 2000 and March 9, 2000 purporting to be from Lola Jackson of Rapid Copier, (4) copies of the 1998 and 1999 Form 1120, U.S. Corporation Income Tax Returns of Rapid Copier, (5) copies of the 2000, 2001, 2002, 2003, and 2004 Form 1120S, U.S. Income Tax Returns for an S Corporation of DataPrint, the instant petitioner, (6) a copy of the first page of a different version of DataPrint's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, (7) letters from counsel dated September 16, 2003 and October 9, 2003, (8) a letter dated November 30, 2005 from the petitioner's landlord, (9) an affidavit dated December 1, 2005 from the owner of the instant petitioner DataPrint, and (10) copies of invoices and other documents pertinent to the petitioner's business. The record does not contain any other evidence relevant to the relationship of the instant petitioner, DataPrint, to Rapid Copier, the entity to whom the labor certification application was issued.

The first page of the August 16, 1999 letter of intent between Rapid Copier, as seller and DataPrint, the instant petitioner, as buyer, indicates, at paragraph two, that DataPrint agreed to buy all of Rapid Copier's assets. Amounts it paid for Rapid Copier's goodwill, furniture, inventory, and equipment, and for a non-competition covenant, are also listed. The remainder of that letter of intent, including the endorsements of the buyer and seller and possibly other terms of the agreement, is not in the record.¹

The accounts receivable of Rapid Copier are not listed among the assets purchased. In fact, that asset is specifically exempted from the sale at paragraph five.

The August 23, 1999 bill of sale is between [REDACTED], president of Rapid Copier as seller, and [REDACTED], owner of DataPrint, the instant petitioner, as buyer. That document shows amounts the instant petitioner paid to Rapid Copier for its goodwill, furniture and equipment, non-competition covenant, and inventory. The accounts receivable of Rapid Copier are not listed among the assets purchased.

The March 7, 2000 and March 9, 2000 letters from [REDACTED] of Rapid Copier were submitted to the California Employment Development Department to provide a change in Rapid Copier's address. Those letters appear to indicate that Rapid Copier was still in business on those dates.

DataPrint's 2000 tax return shows that it is the company's initial return and that it incorporated on January 13, 2000, which other returns confirm. Those facts suggest, at least, that DataPrint was not conducting business prior to that date.

Counsel's September 16, 2003 and October 9, 2003 letters state that DataPrint purchased all the assets and liabilities of Rapid Copier in 1999, and may therefore rely on the labor certification issued to Rapid Copier. Those letters appear to indicate that Rapid Copier no longer existed during 2000.

The instant petitioner's owner's December 1, 2005 affidavit states that he and DataPrint, the instant petitioner, have been in the business of selling and repairing copy machines since 1988 at 15736 Gault Street, Van Nuys, California.

The affidavit further stated that he began looking during 1999 for an existing company to acquire. He had worked for Rapid Copier during the 1980's, found it to be an appropriate acquisition, and negotiated for its "complete acquisition." The affiant stated that he is not an attorney, did not believe one was necessary for the transaction, and drew up the transfer documents himself. He states that his true intent was to acquire all the assets and assume all the liabilities of Rapid Copier.

The affiant states,

The assets of a copier sales and repair business are the furniture and inventory. The liabilities of such a business include service contracts obligating the business to service and repair the

¹ If the petitioner attempts to overcome today's decision on motion, it should provide the missing page or pages of the August 16, 1999 letter of intent, or a reason for not providing that page or those pages.

machines it sells, its lease for the premises serving as the showroom and offices, and its employee and immigration liabilities, if any.

The affiant stated, "DataPrint still maintains many service contracts assumed from Rapid Copier." Counsel provided documentation related to those pre-existing service contracts.

Finally, the affiant stated,

There was never any lapse or gap in time between the time when Rapid Copier stopped functioning and DataPrint took over Rapid Copier's operations. Rather, there was a transition of 6 months.

Of the invoices submitted, Rapid Copier issued those dated May 11, 1998, February 18, 1999, May 26, 1999, and May 28, 1999. Invoices dated February 18, 2000, March 29, 2000, April 14, 2000, June 1, 2000, January 1, 2001, and April 22, 2002 were issued by DataPrint.

A copy of a contract dated May 20, 1997 shows that Rapid Copier leased a Royal copying machine to an investment company on that date. A photocopy of a check dated October 2, 2000 and made payable to the order of DataPrint states that it is a deposit for the lease of a Sharp copier. A copy of a leasing contract confirms that transaction.

The petitioner's landlord's November 30, 2005 letter indicates that Rapid Copier leased space from him from 1990 to 2000, but sold its operations to DataPrint during August of 1999. The landlord further stated that DataPrint continued in the same space until June 2004.

Rapid Copier's 1998 and 1999 tax returns show its address as [REDACTED] in Malibu, California. The 1999 return does not indicate that it is Rapid Copier's final return, as it should have unless Rapid Copier anticipated filing another return for 2000.²

The director denied the petition on July 9, 2005; finding that whether DataPrint had acquired all of the assets and liabilities of Rapid Copier was unclear.

On appeal, counsel asserted that the intent of the parties in drawing up and signing the letter of intent and the bill of sale in evidence was to transfer all of the assets and liabilities of Rapid Copier to DataPrint. Counsel stated, "it is clear that . . . the intent [of the parties drawing up those documents] and [the] effect [of those documents was] that [the instant] Petitioner acquired the assets and assumed all the liabilities . . . of Rapid Copier . . ."

The evidence described above was in the record when the previous, now withdrawn, decision dismissing the appeal was issued on January 22, 2007. Upon withdrawal of that decision of dismissal, and reopening of this matter, the petitioner was accorded the opportunity to submit a brief.

Further, reference to public records maintained by the California Department of State and available at <http://kepler.sos.ca.gov/list.html> indicates that Rapid Copier continues to exist.

The petitioner's new counsel³ filed a brief with this office. In his Statement of Facts counsel asserted, "On August 23, 1999 [Rapid Copier] was acquired by [DataPrint], whom [sic] assumed all of the rights, duties, and obligations of [Rapid Copier]."⁴

With the brief counsel provided a sworn affidavit, dated December 6, 2007, from the petitioner's owner. The sixth paragraph of that affidavit states, in its entirety,

My true intent in this acquisition, and the understanding of all the parties involved, was to acquire all of the assets and assume all of the liabilities of Rapid Copier Repair & Sales, Inc. This was my intent and this was the effect of DataPrint's acquisition of Rapid Copier Repair & Sales, Inc.

Counsel also cites a September 10, 1993 letter written by the Chief of the Nonimmigrant Branch, INS Adjudications in response to an attorney's inquiry. Counsel cites that letter for the proposition that, in order to qualify as a successor-in-interest, an acquiring company need merely acquire a substantial amount of the assets of its predecessor. Counsel urges that even if DataPrint Solutions is found not to have acquired all of the assets of Rapid Copier, it should be found to be the true successor of Rapid Copier as it acquired a substantial amount of those assets.

Counsel also asserted that funds represented by ownership by Rapid Copier of shares of a mutual fund during 1999 should be included, at least in part, in calculations pertinent to Rapid Copier's ability to pay additional wages during 1998. Although counsel stated that the value of the shares on some unstated date during 1999 was \$129,167.82,⁵ he provided no evidence in support of that assertion.

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. The value of the mutual funds counsel asserts that Rapid Copier held during 1999 will not be included in the analysis of Rapid Copier's ability to pay the proffered wage during 1998 or at any other time.⁶

³ A copy of a Form G-28 duly executed on December 6, 2007 by the petitioner's owner accompanied the brief.

⁴ This office notes that whether the instant petitioner acquired all of Rapid Copier's rights, duties and obligations is contested, and was inappropriately included in the statement of facts.

⁵ Counsel stated, ". . . the Original Petitioner had available money marketing funds of \$96,243.60 and \$32,924.22 in a mutual fund . . ." Those amounts total \$129,167.82.

⁶ This office questions whether amounts that Rapid Copier had in a money market account or a mutual fund at some point during 1999, even if properly evidenced, would demonstrate its ability to pay additional wages during 1998 or at any other time. This office need not reach that issue, however, as no evidence was presented pertinent to those funds.

Finally, counsel cites non-precedent decisions of this office for various propositions. Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that Citizenship and Immigration Services (CIS) precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect, *per se*.

Previous counsel asserted, in the original brief on appeal, that the instant petitioner is Rapid Copier's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). Counsel also cited an October 17, 2001 letter from Efren Hernandez III, Director, Business and Trade Services, Office of Adjudications of the then Immigration and Naturalization Service. Counsel stated that, consistent with the requirements of that letter, the instant petitioner took on all of the immigration liabilities of Rapid Copier, thus becoming its true successor and the petitioner in the instant petition.

When a company seeks to rely on a labor certification application issued to another company, the substituted 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 intending employer. *See Matter of Dial Auto Repair Shop, id.*

In the instant case, the director found that the record does not clearly indicate that all of Rapid Copier's assets were transferred to the instant petitioner, DataPrint. In fact, the director's finding was insufficiently strong. As was noted above, paragraph five of the letter of intent demonstrates that the drafter, who owns DataPrint, fully intended to exempt Rapid Copier's accounts receivable from the sale, and that Rapid Copier agreed to that exemption. This fact belies the assertion of DataPrint's owner, made in his December 1, 2005 and December 6, 2007 affidavits, that he intended to acquire all of the assets of Rapid Copier.

Although previous counsel did not stridently argue the point, he appeared to rely, in the alternative, on the theory that the petitioner must acquire only the immigration related obligations and liabilities to qualify as a true successor. This office is aware that the October 17, 2001 letter from Efren Hernandez III, Director, Business and Trade Services of the Office of Adjudications of CIS states that, "a company is a successor in interest when it has taken on all of the immigration-related liabilities of the company it has acquired."

Letters and correspondence issued by the Office of Adjudications, however, are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Similarly, the September 10, 1993 letter upon which current counsel relies does not constitute an official CIS policy statement and is not binding on this office. Even if it were, this office notes that the matter discussed was the acquisition of a business with nonimmigrant aliens currently employed pursuant to H-1B and TC⁷

⁷ This visa category was subsumed into the present TN visa category.

status, and whether those employees could continue to work for that business or must interrupt their employment to reapply. The Chief made clear that her answer was influenced by that fact that in that case the acquiring company assumed all of the assets, not of the petitioner, but of one of the particular business.⁸

In the instant case, one company is seeking to rely on a labor certification application obtained by another company to support a Form I-140 immigrant visa petition. Whether the Chief of Nonimmigrant Branch Adjudications would have given the same answer to the peripherally-related question posed is unknown. That letter does not address the present situation and, in any event, as noted, is not binding.

Matter of Dial Auto Repair Shop, on the other hand, is a precedent decision of the BIA, and is binding. As was noted above, that decision states that a substitute petitioner must show that it assumed **all** of the rights, duties, obligations, and assets of the original employer, not just those that are immigration related, and not just a substantial portion. As was noted above, the transfer in the instant case is manifestly unable to meet that test of *Dial Auto* because one of the original employer's assets was explicitly exempted from the sale. Further, as the entire agreement was apparently not presented to this office, the record does not demonstrate that no other rights, duties, obligations, and assets were omitted from the sale or even expressly excluded. The evidence does not demonstrate that DataPrint acquired all, or substantially all,⁹ of the assets of Rapid Copier.

The sworn statement of the petitioner's owner that he intended to and did acquire all of the assets of Rapid Copier might otherwise be convincing evidence, but it is flatly contradicted by the terms of the sale of the business by Rapid Copier to DataPrint as those terms were evinced on the August 16, 1999 letter of intent and, by omission, on the bill of sale.

The instant petitioner is not a true successor of the original employer pursuant to the test in *Matter of Dial Auto Repair Shop*. Therefore, the petitioner failed to demonstrate that it is entitled to rely on the approved Form ETA 750 labor certification application in this matter. As a consequence, the instant visa petition, which relies on that labor certification application, may not be approved. The visa petition was correctly denied on this basis, which basis has not been overcome on appeal or motion.

⁸ If, for instance, a corporation owned a brickyard and a photography studio, and sold the photography studio, this office might not be inclined to deny successor status because the selling corporation continued to operate the brickyard. No such scenario is presented, however, in the instant case. This case concerns only a single business, a copier sales and service company, and the issue presented is whether the petitioner is obliged to acquire all of the assets of that business, or merely a substantial amount of its assets. This office reserves its judgment on the multi-business scenario.

⁹ In an appropriate case this office might be inclined to find that substantially all, rather than all, of a company's assets must transfer in order to create successorship pursuant to the test in *Dial Auto*. One would obviously expect the selling company to retain the purchase price of the business, rendered to it by the purchaser, which amount is an asset. Even a seller's corporate status is an asset, as it enables one to open a business as a corporation without the lost time and expense of filing for corporate status. This office might not be inclined to deny successorship merely because the selling corporation continues to exist, on paper, separate from the purchasing corporation. Again, though, this office reserves judgment on that hypothetical scenario, where the petitioner demonstrates that only a few insubstantial assets were retained. That scenario is not present in the instant case.

As was noted above, the record suggests an additional issue that was not addressed in the decision of denial.

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.

Even assuming, *arguendo*, that DataPrint is Rapid Copier's true successor, DataPrint must still 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 June 12, 1998. The proffered wage as stated on the Form ETA 750 is \$18.63 per hour, which equals \$38,750.40 per year.

A successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop, id.* This raises the preliminary issue of the date upon which Rapid Copier ceded, and the instant petitioner, DataPrint, acquired, the petitioning copier business.

The invoices submitted imply that the petitioning business transferred from Rapid Copier to DataPrint sometime between May 28, 1999 and February 18, 2000. The landlord's letter indicates that the business transferred during August of 1999. The letter of intent is dated during August 1999 and the bill of sale submitted appears to confirm that the transfer was completed on August 23, 1999.

The matter is complicated by the fact that bank statements in the record show that Rapid Copier continued to maintain a bank balance at least through December 31, 1999. Further, on March 7, 2000 and March 9, 2000 [REDACTED], the former owner of Rapid Copier, was still issuing letters purporting to be from Rapid Copier, which, if she sold it during 1999, was subsumed into DataPrint and no longer in business, *per se*. Further, although the instant petitioner, DataPrint, stated on the visa petition that it was established during 1988, DataPrint's 2000 tax return shows that it is the company's initial return and that it incorporated on January 13, 2000, thus indicating that it could not have commenced business before January of 2000.

Unless the business sold at the turn of the year, either DataPrint is obliged to show the ability to pay the proffered wage during the closing months of 1999, when it owned the business, or Rapid Copier is obliged to show the ability to pay the proffered wage during some portion of the beginning of 2000, when it owned the business. The evidence conflicts as to the month and year during which the business transferred.

The record contains various documents and assertions pertinent to the petitioners' ability to pay the proffered wage during various years. They include Form W-2 Wage and Tax Statements, tax returns of Rapid Copier, and tax returns of DataPrint. An issue is raised by the fact that the record contains two conflicting versions of DataPrint's 2001 return.

The record contains an apparently complete copy of the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation and a competing page one that also purports to be from the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation.

The complete version of the petitioner's 2001 return shows that it declared ordinary income of \$55,799 during that year. The corresponding Schedule L shows that at the end of that year DataPrint had current assets of \$136,205 and current liabilities of \$87,433, which yields net current assets of \$48,772. Thus, according to that version of the petitioner's return, it was able to pay the proffered wage during that year.

The other version of the 2001 tax return contains entirely different figures. The complete version just described stated that the petitioner had total assets of \$180,101, gross receipts of \$736,004, cost of goods sold of \$296,434. Those same figures on the figures on the single page of the 2001 return were \$292,276, \$655,787, and \$348,802.

Further, whereas the full version said that DataPrint incurred no Line 9, Repairs and Maintenance expense during that year, the single page version put that expense at \$8,960. The complete version of the petitioner's tax return shows that it incurred Line 13 Interest expense of \$27,221. The single page version deducted only \$4,967 for interest.

The single-page version also states that the petitioner declared a loss of \$56,339, rather than a profit of \$55,799. Because no corresponding Schedule L was submitted with the single-page version of the petitioner's 2001 tax return, the net current assets claimed on that version cannot be computed.

Different accountants prepared the two versions of the 2001 tax return. A representative of the petitioner signed the single page on March 5, 2003. That signature appears to match that of [REDACTED], the president of DataPrint, on the December 1, 2005 affidavit. The accountant signed the complete version of the tax return on May 21, 2005. Whether either or both of those manifestly different versions of DataPrint's 2001 tax return was ever submitted to IRS is unknown to this office.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988). Absent independent objective evidence this office finds that the tax returns submitted are extremely suspect and cannot qualify as credible evidence able to reliably show either that the original employer had the ability to pay the proffered wage when it owned the copier business, or that the instant petitioner has had the ability to pay the proffered wage since it acquired the business.

If the petitioner attempts to overcome today's decision on motion it should address this issue, not merely in argument, but with independent objective evidence as required by *Matter of Ho, id*, and with an explanation of how the petitioner's income and expenses came to be misstated on at least one of the two versions of the 2001 tax return that were submitted to CIS in support of the instant visa petition. The petitioner should also demonstrate, rather than merely allege, which of the two versions was submitted to IRS.

Even if the tax returns and other evidence submitted pertinent to the ability of the two entities to pay the proffered wage were reliable, they do not seem to support the proposition that the original employer, Rapid Copier, would have been able to pay the proffered wage when it operated the business.

The record contains (1) the first pages of Rapid Copier's 1998 and 1999 Form 1120, U.S. Corporation Income Tax Return, (2) a letter from the beneficiary dated May 26, 2003, (3) Form 1099 Miscellaneous Income statements, and (4) Form W-2 Wage and Tax Statements. No other evidence relevant to the ability of Rapid Copier to pay the proffered wage when it owned the business was submitted.

The record does contain copies of the 1998 and 1999 Form 1040 U.S. Individual Income Tax Returns of Gregory Spaulding, the owner of DataPrint, and his wife. Schedules C attached to those forms show that Mr. Spaulding operated a copier business during those years, though its relationship to the business he subsequently purchased from Rapid Copier is unknown. Whether the petitioner submitted those returns to support the proposition that Rapid Copier was able to pay the proffered wage during 1998 and 1999, when it owned the business, is unclear. This office perceives no relevance of those returns to Rapid Copier's ability to pay the proffered wage and will not consider them further.

The first page of Rapid Copier's 1998 Form 1120, U.S. Corporation Income Tax Return, shows that it declared a loss of \$21,854 as its taxable income before net operating loss deduction and special deductions during that year. Because the corresponding Schedule L was not submitted, this office is unable to compute its net current assets.

The first page of Rapid Copier's 1999 tax return shows that it declared a loss of \$55,764 as its taxable income before net operating loss deduction and special deductions during that year. Because the corresponding Schedule L was not submitted, this office is unable to compute its net current assets.

A 1998 Form 1099 Miscellaneous Income statement shows that during that year Rapid Copier paid Daniel Cuvas (sic), presumably the beneficiary, non-wage compensation of \$19,949.

The beneficiary's May 26, 2003 letter states that he used the name [REDACTED] for work purposes during the four previous years. A 1999 W-2 form shows that Nat'l Administrative Services, Inc. paid Jose Castellon \$9,000 during 1999.¹⁰ Whether the petitioner is alleging that Nat'l Administrative Services, Inc. was the payroll agent of Rapid Copier is unclear. That amount will not be considered in the analysis of Rapid Copier's ability to pay the proffered wage.

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

¹⁰ The social security number provided for [REDACTED] on that W-2 form was 568-43-2027. The same social security number was provided on a 2001 W-2 form from Professional Employer Solutions, Inc., a 2002 W-2 form from Rhythm Rhyme Music Time, Inc. and a 2003 W-2 form from Elite Management, Inc., all of which purport to have been issued to [REDACTED]. This office notes that no such social security number has ever been issued.

petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner established that Rapid Copier paid the beneficiary non-wage compensation of \$19,949 during 1998. Although amounts paid on a Form 1099 may be for provision of materials, rather than for labor, this office finds, based on the assertion that the beneficiary worked for the petitioner during that year, that the petitioner paid the beneficiary that amount for performing the duties of the proffered position during that year. The petitioner is obliged to show that Rapid Copier was able to pay the balance of the proffered wage during that year. The evidence in the record does not demonstrate, however, that either Rapid Copier or DataPrint paid the beneficiary any compensation during any other year.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

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 typically¹¹ 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 priority date is June 12, 1998. The proffered wage is \$18.63 per hour, which equals \$38,750.40.

The petitioner established that Rapid Copier paid the beneficiary \$19,949 during 1998 and must show that it was able to pay the \$18,801.40 balance of the proffered wage. The page of Rapid Copier's 1998 tax return that was submitted shows that it declared a loss. The petitioner is unable, therefore, to demonstrate Rapid Copier's ability to pay any portion of the proffered wage out of its profit during that year. Because the petitioner did not submit the corresponding Schedule L, this office cannot compute Rapid Copier's 1998 end-of-year net current assets. The petitioner is unable, therefore, to demonstrate Rapid Copier'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 any other funds at the disposal of Rapid Copier during 1998 with which it could have paid the balance of the proffered wage. Even if the evidence submitted were presumed to be reliable, the petitioner would not have demonstrated that Rapid Copier was able to pay the proffered wage during 1998.

The petitioner has not established that Rapid Copier paid any wages to the beneficiary during 1999 and is obliged to show that Rapid Copier was able to pay the entire amount of the proffered wage during that year. The page of Rapid Copier's 1999 tax return that was submitted shows that it declared a loss. The petitioner is unable, therefore, to demonstrate the ability of Rapid Copier to pay any portion of the proffered wage out of its profit during that year. Because the petitioner did not submit the corresponding Schedule L, this office cannot compute Rapid Copier's 1999 end-of-year net current assets. The petitioner is unable, therefore, to demonstrate the ability of Rapid Copier 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 the disposal of Rapid Copier during 1998 with which it could have paid the balance of the proffered wage. Even if the evidence submitted were presumed to be reliable, the petitioner would not have demonstrated that Rapid Copier was able to pay the proffered wage during 1999.

Even if the evidence submitted were credible, the petitioner would not have demonstrated that Rapid Copier was able to pay the proffered wage during 1998 and 1999, and the petition should still have been denied on that basis.

The petitioner failed to demonstrate that it is the original employer's true successor within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, and that it is therefore entitled to rely on the approved Form ETA 750 labor certification application. The petitioner also failed to demonstrate its continuing ability to pay the

¹¹ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2) and *Matter of Dial Auto Repair Shop, 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). The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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ORDER: The AAO's decision, dated January 22, 2007, is withdrawn and replaced with the foregoing. The appeal remains dismissed and the petition remains denied.