U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 1 8 2008

EAC 05 187 52653

IN RE: Petitioner:
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:

[redacted]

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

The petitioner is a grocery store. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).[1] As set forth in the director's March 8, 2006 denial, the director determined that the petitioner had not established that it was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case and that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director questioned the validity of the sales agreement between the petitioner and the employer listed on the Form ETA 750, noting that it is not evident that the document is an official, legal and binding sales agreement, that it is not clear that the document was filed with a state governing agency, and that the two entities are located at completely different addresses. The director denied the petition accordingly.

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.

The three issues in this case are: (1) whether or not the petitioner was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case; (2) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and (3) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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 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.

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[1] The instant petition is for a substituted beneficiary. An employer initiates the substitution process by filing a Form I-140 petition on behalf of the alien to be substituted. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. An employer must submit Part B of Form ETA 750, signed by the substituted alien. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996). This office notes that the petitioner failed to submit a new Form ETA 750B for the substituted beneficiary.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $29.37 per hour ($61,089.60 per year). The Form ETA 750 states that the position requires three years of experience in the job offered.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel submits a letter dated March 20, 2006. Relevant evidence in the record includes the 1998 IRS Form 1120, U.S. Corporation Tax Return, for [redacted].; the 2000, 2001, 2003 and 2004 IRS Forms 1120, U.S. Corporation Tax Returns, for [redacted].; and an Agreement dated January 1, 2001 between [redacted] and [redacted] (the Agreement) indicating that [redacted] agreed to transfer title to its assets and liabilities to [redacted] on January 31.[3] The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. In response to the director's request for evidence dated October 14, 2005, the petitioner claimed to have been established in 1997, to have a gross annual income of $779,854.00, to have a net annual income of $125,731.00 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

On appeal, counsel asserts that the petitioner took over all of the assets and liabilities of a predecessor company, Bracha Fast Food, that the contract of sale between the petitioner and Bracha Fast Food does not have to be filed with a government agency, and that the petitioner and Bracha Fast Food have shown sufficient income to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic 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). In

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] The year of such transfer is not included in the Agreement.

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 Sonegawa*, 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 first examine whether the petitioner 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

In this case, the labor certification was issued to [redacted]. The I-140 petition was filed by [redacted]. [redacted] and [redacted] are separate companies with separate tax identification numbers. The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the petitioner must demonstrate that the predecessor entity had the ability to pay the proffered wage from the priority date in 1998 until the date of the change in ownership in January 2001. Moreover, the petitioner must establish the financial ability of the successor enterprise to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). As noted by the director in her decision, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer. The record does not contain a bill of sale or any other documentation evidencing that the petitioner obtained title to the assets of the predecessor entity after execution of the Agreement. There is also no indication that the petitioner agreed to assume a lease for the premises that is the subject of the Agreement, nor any indication that the petitioner owns the premises. The petitioner submitted no new evidence on appeal. Instead, counsel submitted a letter dated March 20, 2006 stating that the petitioner took over all of the assets and liabilities of the former company. 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). 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 regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The director issued a request for evidence to the petitioner on October 14, 2005. The director requested that the petitioner submit , among other items, certified tax transcripts of the companies' tax returns from the IRS for 2000, 2001 and 2004 and the number of foreign individuals the petitioner has filed petitions for within the past 12 months. Although specifically and clearly requested by the director, the petitioner declined to provide the companies' tax return transcripts issued by the IRS for tax years 2000, 2001 and 2004. The returns submitted by the petitioner simply indicate that they were received by the IRS-the petitioner failed to provide tax return transcripts. Further, the petitioner failed to provide information regarding the number of foreign individuals the petitioner has filed petitions for within the past 12 months. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Even assuming that the petitioner has established that it is the successor-in-interest to [redacted] the petitioner has not established that the predecessor entity had the ability to pay the proffered wage from the priority date in 1998 until the date of the change in ownership in January 2001, or that the petitioner had the ability to pay the proffered wage from the date of the change in ownership.[4] For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 9, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available. The tax returns demonstrate net income for [redacted] for 1998 and for [redacted] for 2000, 2001, 2003 and 2004, as shown in the table below.[5]

- In fiscal year 1998, the Form 1120 stated net income for [redacted] of $66,279.00.[6]
- In 2000, the Form 1120 stated net income for [redacted] of $73,739.00.[7]
- In 2001, the Form 1120 stated net income for [redacted] of $90,903.00.
- In 2003, the Form 1120 stated net income for [redacted] of $119,338.00.
- In 2004, the Form 1120 stated net income for [redacted] of $125,731.00.

Therefore, for the relevant years for which tax returns were submitted, [redacted] had sufficient net income to pay the proffered wage of $61,089.60 in 1998, and the petitioner had sufficient net income to pay

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[4] This office notes that the New York Department of State website indicates that [redacted] was dissolved by proclamation on March 24, 1999. *See* http://appsext8.dos.state.ny.us/corp_public/corpsearch.entity_search_entry (accessed March 3, 2008). Therefore, it was not an existing corporation in January 2001, the date that the petitioner alleges it purchased all of the assets and liabilities of [redacted] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. *Id.* At 591-592.

[5] The petitioner failed to submit the 1999 and 2000 tax returns for [redacted] and the 2002 tax return for [redacted] Therefore, the petitioner failed to establish the ability to pay the proffered wage for those years.

[6] The 1998 fiscal year for [redacted] ran from June 1, 1998 to May 31, 1999.

[7] The 2000 income tax return for [redacted] is not dispositive assuming that [redacted] Inc. became the successor-in-interest to Bracha Food Inc. on January 1, 2001.

the proffered wage of $61,089.60 in 2001, 2003 and 2004. However, the petitioner failed to establish the ability to pay the proffered wage for 1999, 2000, and 2002.

Therefore, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer. Even assuming that the petitioner had established that it is the successor-in-interest to [redacted], the petitioner has not established that it or its predecessor 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.

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

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.[8] The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	blank
	College Degree Required	blank
	Major Field of Study	blank

[8] 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*, 229 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 applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

With the petition, the petitioner submitted a letter dated November 1997 from [redacted]. in India stating that the beneficiary worked as a Manager/Supervisor from May 1995 to November 1997.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) ***General.*** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) ***Skilled workers.*** If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The letter from [redacted]. does not indicate that the beneficiary worked full-time for that employer. However, even assuming the beneficiary worked full-time for [redacted] from May 1995 to November 1997, the letter demonstrates only two years and six months of managerial experience.[9] Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position with three years of experience in the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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[9] In the director's request for evidence dated October 14, 2005, the director requested that the petitioner submit, among other items, additional evidence to establish that the beneficiary possesses the required three years of experience as a general manager as of the priority date of January 13, 1998, including corroborating evidence of the beneficiary's experience with [redacted] Although specifically and clearly requested by the director, the petitioner declined to provide additional evidence of the beneficiary's prior work experience. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).