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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: **DEC 03 2009**

SRC 07 061 51892

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.

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

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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, Chinese-style food. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 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 Form ETA 750, 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 April 12, 2004. The proffered wage as stated on the Form ETA 750 is $25,418.00 per year. The Form ETA 750 states that the position requires two 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.[1]

On the I-140 petition the petitioner claimed to have been established in 1998 and to currently have 10 employees. On the Form ETA 750, signed by the beneficiary on April 2, 2004, the beneficiary did not claim to have worked for the petitioner.

According to Florida state corporate records, the petitioner's corporate status in Florida is "inactive" as of September 16, 2005. The Florida Department of State, Division of Corporations website states that the last action taken with respect to the petitioner was "admin dissolution for annual report." According to Florida law, a Florida corporation may be dissolved if "The corporation has failed to file its annual report and pay the annual report filing fee by 5 p.m. Eastern Time on the third Friday in September." *See* Fl. Stat. Ann. §607.1420. A corporation which has been administratively dissolved may not carry on any business except for taking action to wind up its affairs. *See* Fl. Stat. Ann. §607.1421. Therefore, the petitioner no longer exists and can no longer be considered a legal entity in the United States. This calls into question the petitioner's continued eligibility for the benefit sought.

On appeal, counsel states that the petitioner, [redacted] reorganized in 2004 and formed [redacted] Counsel states that [redacted] is the successor-in-interest to [redacted] In support of this, counsel submitted copies of an Assignment of Lease and Guaranty of Lease. These documents show that, on February 10, 2005, [redacted] assigned all of its right, title and interest in a lease for premises located in Miami, Florida to [redacted]

On September 15, 2009, this office sent a Notice of Derogatory Information (NDI) to the petitioner. The Notice stated that the evidence in the record was insufficient to establish that [redacted] had been a successor-in-interest to the original petitioner because, although counsel submitted the Assignment of Lease and Guaranty of Lease, there was no evidence that [redacted] had assumed all of the rights, duties, and obligations of the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Further, the notice stated that it appeared that [redacted], the alleged successor-in-interest to the original petitioner, had been dissolved in the state of Florida as of January 26, 2009. Thus, even if it was established that [redacted] was a successor-in-interest to the petitioner, it did not appear that [redacted] was eligible for the benefit sought.

A response to the NDI was submitted by counsel on October 15, 2009 in which counsel acknowledged that [redacted] had been voluntarily dissolved, but stated that [redacted] is the successor-in-interest to [redacted] Counsel also submitted evidence to show that [redacted] is currently active – a copy of a Local Business Tax Receipt dated July 7, 2009 showing that [redacted] is the owner of [redacted] located at [redacted] which is the address listed on the I-140 petition. In addition,

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

counsel submitted evidence to establish that [redacted] was the successor-in-interest to the original petitioner and that [redacted] was the successor-in-interest to [redacted] Specifically, counsel submitted an Assignment and Assumption of Obligations which purports to transfer all of the "interest, rights, duties, obligations, privileges and appurtenances" of [redacted] to [redacted]. This document is not dated, thus it is unclear when the transfer from [redacted] to [redacted] occurred. However, it is noted that the Assignment of Lease which was previously submitted is dated February 10, 2005 and had an effective date of January 1, 2005. Therefore, it would appear that the transfer from [redacted] to [redacted] occurred in 2005.

Counsel also submitted an Assignment and Assumption of Obligations which purports to transfer all the "interest, rights, duties, obligations, privileges and appurtenances" of [redacted] to [redacted] This document is not dated, thus it is unclear when the transfer from [redacted] to [redacted] occurred.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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 evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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. The record does not contain evidence that the petitioner employed and paid the beneficiary at any time since the priority date was established.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st 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).

As noted above, it appears that did not become a successor-in-interest to [redacted] Inc. until 2005. In order to maintain the original priority date, it must be demonstrated that the predecessor entity, [redacted], had the ability to pay the proffered wage from the priority date in 2004 until the date of the change in ownership in 2005. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). However, the 2004 tax return for [redacted] demonstrates that its net income was $19,945.00 in 2004. Therefore, [redacted] did not have sufficient net income to pay the proffered wage in 2004.

The record contains copies of the corporate tax returns for [redacted] for the years 2005 and 2006 which show that [redacted]. had net income of $180,588 in 2005 and $125,233 in 2006. Therefore, [redacted] had sufficient net income to pay the proffered wage in 2005 and 2006.

Counsel states that [redacted] became the successor-in-interest to [redacted] in 2007. A successor-in-interest must establish its ability to pay the proffered wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does not contain any evidence, such as tax returns, annual reports, or audited financial statements, showing that [redacted] has the ability to pay the proffered wage. Therefore, the record does not establish that [redacted] had sufficient net income to pay the proffered wage from the date that it became successor-in-interest to [redacted]

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] 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 able to pay the proffered wage using those net current assets. The 2004 tax return for [redacted] demonstrates that its year-end net current assets were -$9,333.00. Therefore, [redacted] did not have sufficient net current assets to pay the proffered wage in 2004. As noted above, the record does not contain any evidence, such as tax returns, annual reports, or audited financial statements, with respect to [redacted]. Therefore, the record does not establish that [redacted] had sufficient net current assets to pay the proffered wage.

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

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.[3]

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.

[redacted]

[3] Furthermore, it is noted that the evidence in this matter does not warrant approval under a totality of the circumstances analysis. *See Matter of Sonegawa,* 12 I&N Dec. 612. The decision in *Sonegawa* related to a petition filed during uncharacteristically unprofitable or difficult years in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. 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. Clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, no unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa.* The petitioner did not establish a pattern of profitable or successful years or that it has a sound business reputation. Therefore, petitioner has not established that it has the ability to pay the proffered wage.