identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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]

MAR 1 2 2010

FILE: LIN 07 176 52375 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]

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:

[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, 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is [redacted] It seeks to employ the beneficiary permanently in the United States as a cook. The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, filed by No. 1 People's People Restaurant Corp. and approved by the United States Department of Labor (DOL). The director determined that the petitioner was not the legal successor-in-interest to the employer named on the Form ETA 750 and, therefore, that the petition was submitted without an individual labor certification from the DOL for employment with the petitioner. 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.

As set forth in the director's September 7, 2007 denial, the single issue in this case is whether or not the petitioner is the legal successor-in-interest to the employer named on the Form ETA 750.

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 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 July 21, 2003. The proffered wage as stated on the Form ETA 750 is $26,000 per year. The Form ETA 750 states that the position requires two years of training and 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 November 19, 2009, the AAO sent the petitioner a Notice of Derogatory Information (NDI). It stated, in part:

> The director determined that your organization was not the legal successor in interest to the employer named on the Form ETA 750. On appeal, you submit an affidavit dated September 20, 2007, stating that "I am both the owner of [redacted] and [redacted][2] However, the tax returns submitted to the record indicate that while you are a 90% shareholder of [redacted]., the sole shareholder of [redacted] was [redacted] Therefore, it does not appear that you are the owner of both entities as sworn by you in your affidavits. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:
>
> > 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.
>
> Please provide independent, objective evidence of the ownership of both entities. Unless you can resolve the inconsistent information with independent objective evidence, the AAO intends to dismiss the appeal and enter a formal finding of fraud into the record. The AAO may also invalidate the labor certification based on fraud or

---

[1] 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).

[2] The record also contains your affidavit dated August 24, 2007, which states "I am the owner of [redacted] It further states that you own 90% of the shares of [redacted] and 65% of the shares of [redacted]

[3] The record contains IRS Forms 1120, U.S. Corporation Income Tax Returns, for [redacted] for fiscal years 2002, 2003 and 2004. It also contains the IRS Form 1120 for [redacted] for fiscal year 2005.

willful misrepresentation. See 20 C.F.R. § 656.31(d). While you may withdraw the appeal, withdrawal will not prevent a finding that you have engaged in fraud and the willful misrepresentation of material facts.

Further, you claim on appeal that the merger between [redacted] occurred on December 28, 2004. The Form ETA 750 was filed on July 21, 2003, and was certified by the DOL on December 12, 2007. The record does not establish that you informed the DOL about the merger. Therefore, in order to establish the extent to which the merger was disclosed to the DOL during labor certification proceedings, this office requests a complete copy of the Form ETA 750 as certified by the DOL, including copies of your correspondence with the DOL during the labor certification process. USCIS [United States Citizenship and Immigration Services] must be in receipt of the complete Form ETA 750 as certified by the DOL, including any attachments which the DOL incorporated into that form, before the petition may be approved. *See* section 203(b)(3)(C) of the Act; *see also* 8 C.F.R. § 204.5(a)(2)(which mandates that the Form I-140 be accompanied by the individual labor certification *as certified by the DOL*)(emphasis added).[4]

In response to this portion of the AAO's NDI, the petitioner submitted an affidavit from [redacted] dated December 16, 2009; a passport page for [redacted]; a bank statement for [redacted] and [redacted], and a copy of the Form ETA 750 certified by the DOL. In his affidavit dated December 16, 2009, [redacted] states that his wife was the 90% owner of [redacted]; however, he considered his wife's ownership as his ownership. However, the IRS Forms 1120, U.S. Corporation Income Tax Returns, for [redacted] for fiscal years 2000, 2002, 2003 and 2004 indicate that [redacted] was the sole shareholder of the corporation in fiscal years 2000, 2002, 2003 and 2004. Despite [redacted] personal belief that his wife's ownership of the corporation equated to his ownership of the corporation, he did not legally own any shares of [redacted] His affidavit dated August 24, 2007, his affidavit dated September 20, 2007, and his affidavit dated December 16, 2009, contain false information regarding ownership 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).

In this case, the labor certification application was filed by [redacted] on July 21, 2003, and certified by the DOL on February 12, 2007. The I-140 petition was filed by [redacted] on June 6, 2007. [redacted] are separate companies with separate tax identification

[4] Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d).

numbers. [redacted] was incorporated in the State of New York on November 18, 2004.[5] The petitioner claims to be a successor-in-interest to the employer named on the Form ETA 750.

Matter of Dial Auto Repair Shop, 19 I&N Dec. 481 (Comm. 1986), 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. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by [redacted] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted] filed the underlying labor certification. On the petition, [redacted] claimed to be a successor-in-interest to [redacted] 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 [redacted] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [redacted], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] 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 [redacted] 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 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. §

[redacted]

656.30 (1987).[6] 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, [redacted] 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.

The petitioner claims that the merger between [redacted] and [redacted]. occurred on December 28, 2004. The director noted in his decision that the merger agreement between [redacted]. submitted by the petitioner was dated December 28, 2006, nearly two years after the proposed merger date. The director also noted that [redacted] was dissolved on October 11, 2005. Further, the director

---

[6]The regulation at 20 C.F.R. § 656.30(d) (1987) states:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

noted that "the record is lacking any documentation to establish a certificate of merger, or any similar document, was filed with or received from the appropriate officials within the State of New York or any other governing authority." On appeal, the petitioner submits an affidavit from [redacted] stating that there was a typing mistake in the merger agreement, and that it was actually signed on December 28, 2004. He provides an Amendment to Merger Agreement purportedly signed on December 28, 2006, stating that the merger agreement was signed by the parties on December 28, 2004. The signatures are dated December 30, 2004. It appears that the Amendment to Merger Agreement was created after the date of the director's decision in an effort to turn the deficient merger agreement into one that would establish a successor-in-interest relationship. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). 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). Further, the petitioner did not submit any documentation to establish that a certificate of merger, or any similar document, was filed with or received from the appropriate officials within the State of New York or any other governing authority as noted by the director. 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)). We also note that the 2004 Form 1120 filed by [redacted] states that the business was sold on September 25, 2004, which does not comport with the date of the merger agreement. [redacted]. was not incorporated in the State of New York until November 18, 2004. We therefore reject the petitioner's claim that it merged with [redacted] on December 28, 2004. The petitioner has not established that it is the legal successor-in-interest to the employer named on the Form ETA 750.[7]

Even if we assume that the petitioner is the successor-in-interest to the employer named on the Form ETA 750, the petitioner has not established the ability of [redacted] to pay the proffered wage from the priority date to the date of the purported merger on December 28, 2004, and the petitioner has not established its continuing ability to pay the proffered wage from the date of the merger until the beneficiary adjusts status to lawful permanent resident.

The evidence in the record of proceeding shows that is structured as a C corporation. [redacted] was also structured as a C corporation. On the petition, the petitioner claimed to have a gross annual income of $300,479.00. According to the tax returns in the record, the petitioner's fiscal year begins on November 1 and ends on October 31 of the following year. The fiscal year for [redacted]. ran from August 1 to July 31 of the following year. On the Form ETA 750B, signed by the beneficiary on July 7, 2003,

[7] Further, in response to the AAO's NDI, the petitioner failed to submit any documentation evidencing that it informed the DOL about the merger.

the beneficiary did not claim to have worked for the petitioner or for [redacted]

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 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).

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. In the instant case, neither the petitioner nor its purported predecessor has established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 or subsequently.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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).

The AAO's NDI stated the following:

> The director noted in his request for evidence dated June 13, 2007, that the evidence establishes that [redacted]. had the ability to pay the proffered wage in 2004, but that the evidence does not demonstrate the ability to pay the proffered wage in any other year.[8] Therefore, please provide evidence to establish that [redacted] had the ability to pay the proffered wage in fiscal years 2002 and 2003, and that [redacted] had the ability to pay the proffered wage in fiscal year 2005. Further, please provide complete copies of [redacted] federal income tax returns, annual reports or audited financial statements for fiscal years 2004, 2006, 2007 and 2008.

[8] Counsel's reliance on the balances in the bank account of [redacted] is misplaced. 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner failed to provide complete copies of [redacted] federal income tax returns, annual reports or audited financial statements for fiscal years 2004, 2007 and 2008.[9] Therefore, the petitioner has failed to establish its ability to pay the proffered wage in fiscal years 2004, 2007 and 2008.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The tax returns demonstrate the net income for [redacted] and [redacted], as shown in the table below.

- In fiscal year 2002, the Form 1120 for [redacted] stated net income of $3,615.00.
- In fiscal year 2003, the Form 1120 for [redacted] stated net income of -$76,414.00.
- In fiscal year 2004, the Form 1120 for [redacted] stated net income of $31,139.00.
- In fiscal year 2005, the Form 1120 for [redacted], the Form 1120 stated net income of -$37,214.00.
- In fiscal year 2006, the Form 1120 for [redacted], the Form 1120 stated net income of $10,471.00.

Therefore, for fiscal year 2004, the petitioner established that [redacted] had sufficient net income to pay the proffered wage.[10] For fiscal years 2002 and 2003, the petitioner did not establish that [redacted] had sufficient net income to pay the proffered wage. For fiscal years 2005 and 2006, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[11] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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

---

[9] The petitioner's 2004 fiscal year would have run from November 18, 2004 (the date of its incorporation) to October 31, 2005.

[10] The 2004 fiscal year for No. 1 People's People Restaurant, Inc. ran from August 1, 2004 to July 31, 2005.

[11] 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.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for [redacted], as shown in the table below.

- In fiscal year 2002, the Form 1120 for [redacted] stated net current assets of $6,986.00.
- In fiscal year 2003, the Form 1120 for [redacted] stated net current assets of $2,251.00.
- In fiscal year 2005, the Form 1120 for [redacted] stated net current assets of $11,986.00.
- In fiscal year 2006, the Form 1120 for [redacted] stated net current assets of -$2,611.00.

Therefore, for fiscal years 2002 and 2003, the petitioner did not establish that [redacted] had sufficient net current assets to pay the proffered wage. For fiscal years 2005 and 2006, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it or its purported 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, except that for fiscal year 2004, the petitioner established that [redacted]. had sufficient net income to pay the proffered wage.

In response to the AAO's NDI, in an affidavit dated December 16, 2009, [redacted] asserts that his business was hurt a couple of years after the terrorist attacks of September 11, 2001 and that after the purported merger, the petitioner's business slowed. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001. A mere broad statement that its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. 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)).

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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 was incorporated in 2004, less than three years prior to filing the Form I-140. Based on its IRS Forms 941, Employer's Quarterly Federal tax Returns, in the record, the petitioner employed 6 part-time employees in 2005 and 2006. The petitioner's gross receipts were $300,479.00 and $342,070.00 and it paid minimal salaries and wages of $14,376.00 and $22,415.00 in fiscal years 2005 and 2006, respectively. The petitioner did not establish its reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

Even if we assume that the petitioner is the successor-in-interest to the employer named on the Form ETA 750, the evidence does not establish the ability of [redacted] to pay the proffered wage from the priority date to the date of the purported merger on December 28, 2004, and the evidence does not establish the petitioner's continuing ability to pay the proffered wage from the date of the merger until the beneficiary adjusts status to lawful permanent resident.[12]

---

[12] The director noted that the bank statements submitted to the record indicate that [redacted] is doing business as [redacted] In its NDI, the AAO asked the petitioner to submit evidence to establish the fictitious name(s) of [redacted] The petitioner indicated in its response that its fictitious name is [redacted] but it failed to submit evidence to support its claim. 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 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). We note that the New York State Department of State's website does not indicate a fictitious name for the petitioner. *See* [redacted]

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]