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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: NEBRASKA SERVICE CENTER Date: MAY 05 2010

LIN 06 167 51770

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 a laundry and dry cleaning services business. It seeks to employ the beneficiary permanently in the United States as a dry cleaning supervisor. 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). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. Therefore, the director denied the petition.

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 11, 2007 notice of decision, at issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 as certified by the DOL and submitted with the 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 18, 2001.[1] The proffered wage as stated on the Form ETA 750 is $11 per hour with a 35 hour per week workweek ($20,020 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). This office considers all pertinent evidence in the record, including new evidence properly submitted on appeal.[2]

The evidence in the record shows that the petitioner is structured as an [redacted] corporation. On the petition, the petitioner claimed to have been established in 1990 and to currently employ 8 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 13, 2001, the beneficiary did not claim to have worked for the petitioner.[3]

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

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[1] United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner has petitioned for a second beneficiary. That petition has a priority date of April 17, 2001 and it was approved on January 6, 2005. The beneficiary in that matter was allowed to adjust to lawful permanent resident based on that approved petition on May 15, 2006. Thus, during 2001 through 2006, the petitioner had one additional sponsored worker whose petition was pending.

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

[3] This office notes that on the Form G-325A, Biographic Information, in the record, which the beneficiary submitted with the Form I-485, Application to Register Permanent Residence of Adjust Status, the beneficiary indicated that he worked for the petitioner in the proffered position, before the priority date, from September 2000 through March 2001. The beneficiary did not list this work experience on the Form ETA 750B, signed in 2001, where he was to list his work experience for the previous three years and any work experience relevant to the proffered position. This omission casts doubt on the information provided on that form and on all the evidence of record. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988)(which states that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the all the evidence in the record.)

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 this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or any portion of the wage during all or part of the relevant period of analysis.

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 not sufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is not sufficient.

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).

The record before the director closed on June 7, 2007 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 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120S states net income[4] of $12,558.
- In 2002, the Form 1120S states net income of $19,291.
- In 2003, the Form 1120S states net income of $14,806.
- In 2004, the Form 1120S states net income of $17,698.
- In 2005, the Form 1120S states net income of $52,331.

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net income to pay the proffered wage of $20,020. The petitioner also had pending in 2001 through 2004 the petition of another full-time employee. The petitioner has not shown that it had sufficient net income to pay the additional expense of this worker's salary. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2001 through 2004.

In 2005, the petitioner did have sufficient net income to pay the proffered wage. However, the petitioner has not shown that it had sufficient net income to cover the additional expense of its other

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an [redacted] corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2009, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed April 29, 2010)(which indicate that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 and 2002, the petitioner's net income is found on line 21 of page one of the petitioner's 2001 and 2002 Forms 1120S. Because the petitioner did have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2003, 2004 and 2005, the petitioner's net income is found on Schedule K of those tax returns.

sponsored worker's wages. Thus, the petitioner has not shown that it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2005.[5]

Therefore, the petitioner has not established that it had the ability to pay the proffered wage or all its sponsored workers' wages out of its net income in 2001 through 2005.

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.[6] 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 petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2005, as shown in the table below.

- In 2001, the Form 1120S reflects net current assets of $5,619.
- In 2002, the Form 1120S reflects net current assets of $1,144.
- In 2003, the Form 1120S reflects net current assets (liabilities) of -$15,695.
- In 2004, the Form 1120S reflects net current assets (liabilities) of -$2,562.
- In 2005, the Form 1120S reflects net current assets (liabilities) of -$824.

In 2001 through 2005, the petitioner did not have sufficient net current assets to cover the proffered wage. Thus, it has not shown an ability to pay the instant wage using its net current assets. It also has not shown the ability to pay, out of its net current assets, the added expense of an additional full-time salary. Therefore, the petitioner has not shown the ability to pay the instant wage or all its sponsored workers' wages using its net current assets from 2001 through 2005.

Thus, the petitioner has not established that it had the continuing ability to pay the instant wage or all its sponsored workers their proffered wages from the priority date onwards through an examination of wages paid to the beneficiary, its net income or net current assets.

On appeal and throughout these proceedings, counsel indicated that the AAO should combine the petitioner's net income and net current assets and consider the resulting amount as funds available to pay the wage. This is not correct. Net income and net current assets are not two separate sets of funds available to pay the wage. Rather, net income and net current assets represent two different ways to view the funds available to the petitioner. Net income views the petitioner's funds for the year retrospectively, and net current assets view the petitioner's funds for the year prospectively. A

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[5] The record does not include information regarding the wage offered its other sponsored worker.

[6] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

net income that is greater than the amount of the proffered wage indicates that a petitioner could have paid the beneficiary the wages during the year out of its income. Net current assets that are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it reasonably anticipates being able to pay the proffered wage out of those funds.

Counsel indicated too that because the priority date in this matter is April 18, 2001, more than one-fourth of the way into the year 2001, the petitioner needs only to show an ability to pay approximately three-fourths of the proffered wage in 2001. This is also not correct. This office will not prorate the proffered wage such that the petitioner is only obliged to show an ability to pay a fraction of the proffered wage based on the fraction of the year which follows the priority date. That is, the AAO will not apply 12 months of net income towards an ability to pay a lesser period of the proffered wage, any more than it would apply 24 months of net income towards an ability to pay the annual proffered wage. USCIS will only prorate the proffered wage if the record contains evidence of the net income earned or any wages paid to the beneficiary by the petitioner during that specific portion of the year that occurred after the priority date, such as monthly income statements or pay stubs. In this instance, the petitioner has not submitted such evidence.

The May 10, 2007 letter of the petitioner's president in the record indicates that the president is willing to adjust his compensation down in order to cover the proffered wage. However, there is no notarized, sworn statement in the record which attests to the specific amount of compensation that the petitioner's president received from the petitioner and the specific amount that he would be willing and able to forego to cover the beneficiary's wage (and the other sponsored worker's wage) in support of the suggestion that USCIS should consider such compensation as funds available to pay the proffered wage. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)). Also, the petitioner's tax returns reflect minimal officer compensation, which would not cover the beneficiary's proffered wage and the second sponsored worker's wage. The tax returns reflect the following officer compensation: $7,687 in 2001; $14,804 in 2002; $8,600 in 2003; $10,600 in 2004; and $10,000 in 2005.

The petitioner and counsel indicated in these proceedings that the funds used to pay two independent contractors who worked for the petitioner during certain years in the relevant period are funds available to pay the wage. The petitioner submitted copies of the Forms 1099-MISC, Miscellaneous Income, which name these individuals. These forms indicate: that in 2001, the petitioner paid one of these stated contractors $15,300; and in 2002, the petitioner paid one of the stated contractors $12,600 and paid the other $5,400. The petitioner submitted no documentation to establish that the duties of these other workers are the same as those of the proffered position: dry cleaning supervisor. If the duties are not the same, the wages paid these contractors cannot be utilized to demonstrate the ability to pay the proffered wage.

The petitioner and counsel indicated instead that the petitioner will no longer use independent contractors and it will no longer outsource any of its work to a separate laundry and dry cleaning business because once the beneficiary is employed by the petitioner, the petitioner's own employees

will work longer hours to complete this outsourced work, under the beneficiary's supervision.[7] The petitioner and counsel indicated that these longer hours were not possible in the past because the petitioner's president had to supervise during that time, and the president was only available to supervise during a limited number of hours. This office would underscore that these assertions indicate that the funds that were used to pay independent contractors and to outsource to another business would be needed in the future to pay the petitioner's own employees. There is no documentation in the record to indicate that a certain amount of these contractors' fees or outsourcing fees would have been available to pay the instant wage or both the petitioner's sponsored workers' wages during the relevant period, if the beneficiary had been available to supervise longer shifts of the petitioner's own employees. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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 AAO notes that to support the assertion that this office should consider funds paid to subcontractors as funds available to pay the proffered wage, counsel referred to certain nonprecedent decisions of the AAO. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all USCIS employees in the administration of the Act.[8] However, nonprecedent decisions are not binding. *See R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), aff'd 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated).

This office would also note that the petitioner's various bank statements submitted into the record will not be viewed as evidence of its ability to pay the wage. First, bank checking account statements are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel and the petitioner have not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow denote additional available funds that were not reflected on its tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets.

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[7] The petitioner indicated that the amounts that it paid this other laundry and dry cleaning company are listed on the copies of its General Ledger in the A-file and as "Contract Svcs" on Statement 2, (attachment to the Form 1120S), which delineates "Other Costs" set forth on each Form 1120S, Schedule A, line 5 in the record.

[8] Also, the regulation at 8 C.F.R. § 103.9(a) indicates that precedent decisions must be designated and published in bound volumes or as interim decisions.

The assertions made 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 or both its sponsored workers' wages from the priority onwards.

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.

Here, the immigrant petition indicates that the petitioner was incorporated in 1990 and has 8 employees. The petitioner has not established any marked historical growth since incorporating. It has not effectively established for the record that the beneficiary, as dry cleaning supervisor, would be replacing a former employee or an outsourced service. The record also indicates that the total wages that the petitioner paid were $12,500 in 2001; $4,798 in 2002; $15,500 in 2003; $17,100 in 2004; and $24,100 in 2005. That is, the total wages paid were less than the instant wage in all years for which the petitioner provided tax returns, except for 2005. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; or the petitioner's reputation within its industry. 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 or all its sponsored workers' wages.

Beyond the decision of the director, the petitioner has not established that the beneficiary had the experience needed to qualify for the proffered position as of the priority date. 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 Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO conducts appellate review on a *de novo* basis.)

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

The Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of dry cleaning supervisor. Here, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	
	High School	No Specific Requirement
	College	
	College Degree Required	
	Major Field of Study	

The applicant must also have two years of experience in the job offered, the duties of which are listed at Item 13 of the Form ETA 750A as: "Supervise & coordinate activities of workers engaged in drycleaning (sic) & pressing clothing & household articles: Determine standards & rates of production. Assign duties. Observe progress of work & confer with workers to resolve problems & grievances. Plan improved methods & review records. Perform other related duties as needed."

Item 15 of Form ETA 750A does not list any other special requirements needed to qualify for the position.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part 15, where the beneficiary is required to list any work experience relevant to the proffered position, he stated that he worked as a dry cleaning supervisor at [redacted] from February 1990 to July 1992. He stated that he was managing partner at [redacted] Pakistan (construction business) from October 1992 to May 1998. He also stated that he was president of [redacted] (import/export business) from May 1999 to October 2000. He did not provide any additional information concerning his employment background that is relevant to the proffered position on that form.

The petitioner submitted into the record a letter dated February 21, 2001 which indicates that the beneficiary worked at [redacted] from February 1990 through July 1992. The letter states that the beneficiary's duties as "Supervisor" consisted of "hiring, training and supervising the laundry and dry cleaning workers, keeping records and managing daily operation of

business." At the bottom of the letter is an illegible signature, and there is no information regarding the name and title of the signatory of that letter.

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 experience letter submitted is deficient in that it does not include the name and title of the individual at [redacted] who wrote the letter, as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Also, the letter does not indicate whether the beneficiary worked part-time or full-time in this position at [redacted] Thus, it is not clear from the record whether the beneficiary had acquired two years of full-time work experience in the proffered position by the priority date, as required by the Form ETA 750. The petitioner did not submit any other letters to document the beneficiary's work experience.

Thus, the petitioner has not provided an experience letter sufficient to establish that, as of the priority date, the beneficiary had the necessary qualifications for the proffered position as stated on the Form ETA 750.

Also going beyond the decision of the director, evidence in the record indicates that the petitioner is currently dissolved; thus, the AAO finds that the job offer defined on the petition is not a *bona fide* job offer.

On February 17, 2010, this office notified the petitioner that according to the records available at the official Florida Department of State, Division of Corporations website, the petitioner is currently dissolved. *See* [redacted]

This office also notified the petitioner that if it is currently dissolved, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer.

Also, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(which states that 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.) It is incumbent upon 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. *See Id.*

This office allowed the petitioner 30 days in which to provide evidence that the records maintained by the Florida Department of State, Division of Corporations website were not accurate and that the petitioner remains in operation as a viable business and was in operation during the pendency of the petition and appeal.

In response, counsel submitted a letter which indicates that the petitioner has dissolved and that a different entity now operates a dry cleaning service at the same address as the petitioner. The letter claims that this entity is a successor-in-interest to the petitioner and that it wishes to sponsor the beneficiary. In support of this claim, counsel submitted a statement dated March 4, 2010 in which the president of the entity now located at the original petitioner's address stated that he had purchased the petitioner's "dry cleaning business, but did not purchase the corporation." The president indicated that his business continues to operate a dry cleaning establishment at the same location as the petitioner, and that his business would like to sponsor the beneficiary as a successor-in-interest to the petitioner. Counsel also submitted a copy of a Broward County Local Business Tax Receipt. This document indicates that an official receipt for fees paid was issued to the entity now located at the petitioner's address, the owner of which is the president named in the above March 4, 2010 statement, and that this receipt is valid from October 1, 2009 through September 30, 2010. In addition, counsel submitted a document dated March 3, 2009 which indicates that the petitioner's president assigned its license and telephone number and all of its rights, title and interest in its former "doing business as" business name to the entity now located at the petitioner's address.

Successor-in-interest scenarios generally involve a situation in which one company filed the labor certification on behalf of the beneficiary, but a different company is listed as the employer on the Form I-140, Immigrant Petition for Alien Worker. The petitioner listed on the Form I-140 then seeks to establish that it is a valid successor-in-interest to the business listed on the labor certification so that it may go forward with the same labor certification and sponsor the beneficiary.

The AAO finds that the record does not include sufficient evidence that the entity currently located at the petitioner's address qualifies as a successor-in-interest to the petitioner.

In *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986),[9] the petitioner, Dial Auto Repair Shop, Inc. (Dial Auto), filed an immigrant petition on behalf of an alien beneficiary for the

[9] *Matter of Dial Auto Repair Shop, Inc.* is an AAO decision designated as a precedent decision 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).

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 Commissioner held, in relevant part, that:

> Additionally, the representations made by the petitioner concerning the relationship between [redacted] and itself are issues which have not been resolved. In 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 Immigration and Naturalization Service (INS), now USCIS], 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.

The INS and USCIS have, 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. If the petitioner's claim was untrue, the Commissioner stated that the underlying labor certification could be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (1987).[10] The Commissioner also held that "[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." The Commissioner determined that the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations

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[10]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.

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 regarding the manner in which Dial Auto had acquired the business of Elvira Auto Body and of seeing a copy of "the contract or agreement between the two entities."

Thus, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established: if the job opportunity is the same as that 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 evidence submitted in support of 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.

Here, the record does not contain a bill of sale showing that the stated successor purchased the original petitioner and the petitioner's assets or any other documentary evidence which specifically sets forth the manner by which the stated successor acquired the petitioner.

The evidence submitted does not set forth the organizational structure of the predecessor prior to the transfer, (if, in fact, there was a direct transfer), or the current organizational structure of the stated successor. The record does not include documentary evidence which establishes that the stated successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The record does not include documentary evidence that the stated successor is continuing to operate the same type of business as the predecessor. The record does not include documentation which shows that the manner in which the business is controlled by the stated successor is substantially the same as it was controlled before the claimed ownership transfer. Currently in the record, there are only unsupported assertions regarding these various successor-in-interest qualifying factors, which were made by the stated successor and by counsel. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

Therefore, the AAO finds that the evidence submitted is not sufficient to establish that the stated successor is, in fact, a successor-in-interest to the original petitioner. There is, however, clear evidence in the record that the original petitioner is dissolved, and as such the AAO finds that the job

offer defined on the petition is not a *bona fide* job offer. Thus, for this additional reason, the petition may not be approved.[11]

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

[11] Further, any successor-in-interest must also establish the financial ability of the predecessor enterprise to have paid the certified wage from the priority date onwards, and its own ability to pay the wage after the successor assumes the essential rights and obligations of the prior company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In this case, the stated successor did not submit evidence to establish the original petitioner's ability to pay the wage from the priority date forward, or of its own ability to pay the proffered wage following its stated assumption of the business.