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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

Date: APR 13 2011

Office: TEXAS SERVICE CENTER

FILE: [redacted]
SRC 07 200 51342

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed, and the petition will remain denied.

The petitioner[1] is a restaurant. It seeks to employ the beneficiary[2] permanently in the United States as an kitchen helper. 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 (the DOL). The AAO determined that there was insufficient evidence in the record to show that [redacted] the successor-in-interest to the petitioner, [redacted] and that neither [redacted] demonstrated an ability to pay the proffered wage from the priority date. The AAO dismissed the appeal and affirmed the director's decision.

As set forth in the director's denial and the AAO decision, an issue in this case is whether there is sufficient evidence in the record to show that [redacted] and\or [redacted] is\are the successor-in-interest to the petitioner, [redacted] and whether [redacted] trading and doing business as [redacted] demonstrated its 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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.

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[1] The are three entities identified in this case [redacted] and [redacted]

[2] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original Form ETA 750. Memo. from [redacted] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, Substitution of Labor Certification Beneficiaries, at 3, http://ows.doleta.gov/dmstrcc/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[3] Counsel introduced [redacted] into the record of proceeding on its motion as a reputed party of interest.

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 its 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 30, 2001. The proffered wage as stated on the Form ETA 750 is $ 8.60 per hour ($17,888.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[4]

Accompanying the petition and labor certification, counsel submitted a support letter dated May 1, 2007; the first two pages of [redacted] federal income tax (Forms 1120S) returns for 2001 and 2002; the first two pages of [redacted] federal income tax (Forms 1065) returns for 2003 and 2004; the first four pages of [redacted] federal income tax (Form 1065) return for 2005; a Form SS-4 "Application for Employer Identification Number" dated January 1, 2002, indicating that [redacted] trades and does business as [redacted] and documents pertaining to the beneficiary such as his visa and biographic passport page.

The director issued an Intent To Deny (ITD) the petition on November 29, 2007, and requested the petitioner's complete federal income tax returns for the period 2002 through 2006, and the petitioner's bank account statements for each month beginning January 1, 2002 to the present. Additionally, the director requested the petitioner's audited financial statements, annual reports, profit/loss statements, or personnel records.

In response, counsel submitted White Tiger, Inc.'s incomplete federal income tax (Form 1120S) return for 2002; [redacted] federal income tax (Form 1065) incomplete return for 2003; [redacted] federal income tax (Forms 1065) complete returns 2004, 2005, and 2006; and approximately 18 copies of [redacted] bank checking account statements for the time period January 1, 2007, to October 31, 2007.

Regarding the beneficiary, the director requested Wage and Tax (W-2) statements issued to the beneficiary by the petitioner, and the beneficiary's individual tax returns if the beneficiary worked for the petitioner. No W-2 Statements or personal tax returns were submitted.

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[4] 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).

[5] Federal Employer Identification Number.

Additionally, the director requested documents from the petitioner from the District of Columbia detailing the relationship or transition documents between [redacted] showing a change of ownership; and information concerning the change of FEINs regarding these two entities. No documents were submitted other than one from the U.S. Department of Treasury dated December 26, 2007, pertaining to the petitioner's FEIN, and one from the petitioner dated December 19, 2007.

On appeal or on motion, counsel submitted [redacted] federal income tax (Forms 1065) returns for 2007 and 2008; a Wage and Tax (W-2) statement issued to the beneficiary by the [redacted] for 2008-$10,617.56; Wage and Tax (W-2) statements issued to the beneficiary by the [redacted] for 2009-$19,005.00, and by [redacted] for 2009 for $5,256.21; a pay statement for July 2010, issued by the White Tiger Restaurant, LLC to the beneficiary in the year-to-date amount of $15,633.00; and a Certificate of Good Standing for [redacted] dated June 18, 2008.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, and is also identified as a limited partnership, and a limited liability company. On the petition, the petitioner claimed to have been established in 1996 and to currently employ ten 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 June 4, 2007, the beneficiary did not claim to have worked for the petitioner.

As already stated, an issue in this case is whether there is sufficient evidence in the record to show whether [redacted] is\are the successor to the petitioner, [redacted]

According to District of Columbia's official website (i.e. http://mblr.dc.gov/corp/ ....) accessed on March 24, 2011, White Tiger, Inc. is an active corporation registered on July 23. 1996. White Tiger Restaurant, LLC, is also an active limited liability company registered on March 13, 2009. According to the tax returns in the record, K&V Limited Partnership was organized on January 1, 2002.

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the

business in the same manner as the predecessor. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

The labor certification accepted by the DOL on April 30, 2001, and certified on March 15, 2006, states that the employer, which is the petitioner herein, is [redacted]. The I-140 petition also identifies the petitioner in the same manner and also states its [redacted] There is no correspondence in the record between the petitioner and the DOL concerning a transition in ownership between [redacted]

As already stated, the director requested documents from the petitioner from the District of Columbia detailing the relationship or transition documents between [redacted]. No such evidence was submitted.

The director also requested information concerning the reputed change of FEIN regarding these two entities. As already stated, no documents were submitted other than a statement from the U.S. Department of Treasury dated December 26, 2007, pertaining to the petitioner's FEIN number and a letter from the petitioner dated December 19, 2007.

The U.S. Department of Treasury letter dated December 26, 2007, was sent to [redacted] stating that "its" [redacted] and that number should be used on its federal income tax returns. However, according to a letter submitted from the president of [redacted] is the parent entity with a different [redacted] Inc., "was established [with] the [redacted] Therefore, based upon evidence of two different FEINs, and the above statement, [redacted] continues to be an active entity today.

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. According to the president of [redacted] and partner of [redacted] the latter entity was "started purely for operational purposes" for the restaurant. It unclear what the president means by his statement but it appears to mean that [redacted] remains as the owner of the business with the responsibility of operations moved to [redacted] There is no mention by the president of a sale or transfer of

the business.

Based upon the record, the president and partner of both entities affirmed that [redacted] still exists today as does [redacted] No evidence of a merger, sale[6] or the reorganization of [redacted] was introduced. [redacted]. continues as the petitioner. The AAO notes that although this issue was raised by both the director and by the AAO in its decision dated July 28, 2010, counsel still has failed to submit sale documentation to substantiate what are bare assertions that a transfer of assets occurred. The AAO finds that the petitioner has not established that [redacted] is\are the successor-in-interest to the petitioner, [redacted]

An additional issue is whether [redacted], trading and doing business as [redacted] demonstrated its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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, United States 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

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[6] Counsel in his letter dated June 4, 2007, states that in January 2002, the restaurant business "underwent a corporate reorganization that resulted in the corporate structure being changed from incorporation [sic] [redacted] to a partnership [redacted] and that there was a sale of the company to the partnership." No corporate sale documents were submitted to substantiate a sale, and the statements found in the record from the president of [redacted] indicate that there was no sale. Further, in 2002, the first page of a 2002 Form 1120S tax return was submitted for [redacted] the reputed year of the sale and none for the reputed new owner, [redacted] Counsel's statements concerning a sale of the company in 2002 are inconsistent with other statements in the record such that the AAO cannot determine the truth of the matter. Further, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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.

There is no evidence that the beneficiary has been in the petitioner's employ. As already stated, a Wage and Tax (W-2) statement was issued to the beneficiary by [redacted] Wage and Tax (W-2) statements were issued to the beneficiary by the [redacted] for 2009-$19,005.00, and by [redacted] for 2009 for $5,256.21. Further, a pay statement for July 2010 was issued by the [redacted] to the beneficiary in a year-to-date amount of $15,633.00. Since counsel has not demonstrated by sufficient evidence that [redacted] are the successor(s)-in-interest to [redacted] the wage documentation submitted is not persuasive evidence of the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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)).

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 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 118. "[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).

Although the petitioner has been in business since 1996, the petitioner has failed to submit complete tax returns for [redacted] which tax returns are presumably readily available to the petitioner. For an S corporation, USCIS considers net income to be the figure shown on Line 21 of the Form 1120S, U.S. Corporation Income Tax Return, or from its Schedule K where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business. The regulation at 8 C.F.R. § 204.5(g)(2) requires copies of petitioner's annual reports, federal tax returns, or audited financial statements to demonstrate its net income. The petitioner failed to provide complete, signed and dated income tax returns. Clearly, unsigned, undated and incomplete tax returns were not submitted to the IRS. The probative value of the incomplete documents as evidence is diminished substantially. The petitioner had an additional time on appeal to submit more complete and persuasive evidence, but neglected to do so.

Assuming for the sake of argument, that the one and two page federal tax returns can be examined, the petitioner stated net income (Form 1120S, Line 21) in 2001-$31,386.00, and in 2002-<$4,686.00>.[7]

[7] The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Therefore, assuming the incomplete tax returns have probative value in this matter, there was insufficient net income stated in the tax return for 2002 to demonstrate that the petitioner could pay the proffered wage.[8]

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.[9] 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 incomplete tax returns for 2001 and 2002 do not demonstrate its end-of-year net current assets. For reasons already stated in this discussion, the net current assets of [redacted] are not relevant to the determination the petitioner's ability to pay the proffered wage as successorship has not been adequately demonstrated.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it 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.

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[8] Again, assuming for the sake of argument that the federal tax returns of [redacted] can be examined (no tax returns for [redacted] were submitted), the incomplete or complete Forms 1065 stated net income or loss in 2003-<$987.00>; in 2004-<$14,900.00>or <$5,367.00> depending upon which tax return submitted into evidence was the return filed with the IRS; in 2005-$11,298.00; in 2006-$16,653.00; in 2007-$24,095.00; and in 2008-$12,099.00. Since the proffered wage is $17,888.00, [redacted] net income or loss falls below the proffered wage in 2003, 2004, 2005, 2006, and 2008. Since there is insufficient evidence of a transfer of the restaurant business to the partnership, and there is evidence to the contrary in the record, wages reputedly paid by [redacted] to the beneficiary cannot under the circumstances be used in the determination of the petitioner's ability to pay the proffered wage. The standing of [redacted] as a party in this proceeding has not been revealed by the petitioner.

[9] 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.

[10] There were only four tax years in which the petitioner provided a Schedule L for [redacted] In 2003 its net current assets were <$58,137.00>; in 2004 <$85,030.00>; in 2005-<$80,609.00>; in 2006-<$25,813.00>; in 2007-$21,996.00; and in 2008-$7,228.00. Since the proffered wage is $17,888.00, [redacted] net current assets valuation fall below the proffered wage in 2003, 2004, 2005, 2006, and 2008, although, as stated, no successorship has been demonstrated.

On appeal, counsel asserts that:

> [The director] failed to exercise discretion in denying the underlined [sic] petition for alien worker. The decision was based on an arbitary [sic] and capricious policy that ignores the traditional standard of "totality of circumstances" vital to administrative proceedings.

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. 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. 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 established in 1996, and employs ten workers. The petitioner has submitted incomplete tax returns but according to the Forms 1120S of [redacted], its gross receipts in 2001 were $562,947.00, and in 2002 were $510,969.00. Assuming for the sake of argument that the complete and incomplete tax returns of [redacted] are persuasive evidence of [redacted] ability to pay the proffered wage, in 2003 the partnerships' gross receipts figures were $549,445.00; in 2004-$689,815.00; in 2005-$623,057.00; in 2006-$627,248, in 2007-$714,427.00; and in 2008-$721,294.00. However, as stated, the net incomes stated were generally insufficient to pay the proffered wage from what may be discerned from mostly incomplete tax returns. As noted in 2004, the petitioner submitted two different returns with markedly different figures. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.,* 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker (SRC 08 077 54091) in 2008. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date.

According to counsel, the terrorist attacks of September 11, 2001, affected the petitioner's business prospects adversely until 2004. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. The business' gross receipts (of [redacted]. and the partnership) recited above do not demonstrate a business decline as counsel has contended. A mere broad statement by counsel that, because of the nature of the petitioner's industry, 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. Despite substantial gross receipts, [redacted]. and the partnership, failed to state sufficient net income or net current assets to pay the proffered wage. 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.

Counsel and the petitioner's accountant also contend that the depreciation and amortization[11] amounts stated on [redacted] tax returns lower its net income but do not represent a loss of funds. Assuming for the sake of argument that the partnership's tax returns are relevant here, by implication, counsel requests on appeal that the depreciation and amortization expenses charged for each year be treated as an asset. Counsel's statement is misplaced. Counsel cites no legal authority for this proposition and court decisions are contrary to counsel's assertion. *See, e.g., River Street Donuts, LLC v. Napolitano.*

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

The 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 motion is dismissed and the petition remains denied.

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[11] Intangible assets on a balance sheet are included as "other assets," and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.