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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

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 18 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled 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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a landscape contractor. It seeks to employ the beneficiary permanently in the United States as a landscape 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 beginning on the priority date of the visa petition. 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 May 21, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

As a threshold issue, the petitioner, [redacted]. is a Maryland corporation with an incorporation date of February 18, 1987. Maryland records reflect that the corporate status of [redacted] was forfeited by the State of Maryland for failure to file its property return for 2001.

On October 29, 2010, this office notified the petitioner that according to the records at the Maryland Secretary of State official website, the petitioning business was forfeited for failure to file its property tax return for 2001. The petitioner responded with a letter from the Maryland Department of Assessment and Taxation certifying that the corporation is, on the date of the certificate, in good standing and duly authorized to transact business in Maryland.

The petitioner's business operation in Maryland, which is the location of the job opportunity certified by the DOL, was forfeited by operation of law on October 7, 2002. Counsel states that the petitioner is an active business since February 18, 1987. In response to the Notice of Derogatory Information, counsel provided copies of the petitioner's federal income tax returns from 2001 to 2009 indicating that it continued operations. However, the record is devoid of evidence that the petitioner was conducting business lawfully in Maryland or in any other jurisdiction. 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 petitioner's corporate status was forfeited in 2002. Although it appears that the petitioner "revived" its corporate status in Maryland on November 5, 2010, the petitioner's corporate status was forfeited by the State of Maryland on October 7, 2002, and remained forfeited from October 7, 2002 until its revival on November 5, 2010. As such and as discussed in greater detail below, the petitioner did not exist under Maryland law and could not conduct business in that state or any other state as a legal non-entity.

The Maryland Corporations and Associations Code Annotated §3–514, prohibits an entity from doing business after forfeiture:

> (a) *Prohibition.* Any person who transacts business in the name or for the account of a corporation knowing that its charter has been forfeited and has not been revived is guilty of a misdemeanor and on conviction is subject to a fine of not more than $500.

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

> (b) *Presumption.* For the purpose of this section, unless there is clear evidence to the contrary, a person who was an officer or director of a corporation at the time its charter was forfeited is presumed to know of the forfeiture.
>
> (c) *Limitation.* A prosecution for violation of the provisions of this section may not be instituted after the date articles of revival of the corporation are filed.

Forfeiture is the process that allows the Maryland State Department of Assessments and Taxation (Department) to remove inactive entities that have not legally terminated their authority to do business or to notify active entities of an existing oversight in meeting legal filing requirements. A Maryland corporation can avoid forfeiture by filing a Form 1 (annual report/personal property return). If the Department declares the corporate charter to be forfeited, as it did in this case, the corporation becomes a non-entity. All powers of the corporation become null and void. Md. Corp. & Assns. Code Ann. §3–503(d). *See, e.g., Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1101 (Md. 2004) ("A corporation, the charter for which is forfeit, is a legal non-entity; all powers granted to Dual, Inc. by law, including the power to sue or be sued, were extinguished generally as of and during the forfeiture period"); *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287 (Md. 1998) ("[w]hen a corporation's charter is forfeited for non-payment of taxes or failure to file an annual report, the corporation is dissolved by operation of law and ceases to exist as a legal entity").

The charter of any corporation which is forfeited may be revived by filing articles of revival; filing all annual reports required to be filed by the corporation or which would have been required if the charter had not been forfeited; and paying all unemployment insurance contributions, or reimbursement payments, all State and local taxes, except taxes on real estate, and all interest and penalties due by the corporation or which would have become due if the charter had not been forfeited. The revival of a corporation's charter has the following effects: all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them; and all the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter. However, corporate action taken during a period when a corporation's charter is forfeited is null and void, and actions taken after its charter has been revived do not relate back to cure the loss of a right divested during the time the charter was forfeited. *Hill Constr. v. Sunrise Beach, LLC*, 952 A.2d 357 (Md. 2008).

In this matter, the petitioner's Maryland corporate charter was forfeited for almost five years at the time the petition was filed on August 2, 2007. Accordingly, the petitioner was a legal non-entity at the time the petition was filed. An entity which is a legal non-entity – an entity which has been dissolved by operation of law – cannot be said to be in business.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In this matter, the petition was not approvable when filed, because the job offer is not, and never was, *bona fide* because the petitioner's Maryland corporate charter was forfeited at the time the petition was filed. The petition cannot be approved for this reason.

Further, the director found that the petitioner did not establish a continuing ability to pay the proffered wage. The AAO agrees.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner's U.S. Income Tax Returns for an S Corporation reflect that the company was established on February 18, 1987 (attached). The petition indicates that it currently employs six workers. The Form ETA 750 was accepted on March 26, 2001. The proffered wage as stated on the Form ETA 750 is $12.00 per hour[2] which equates to $24,960 per year based on a 40-hour week.

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, 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 petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided Forms W-2 showing the wages it paid to the beneficiary for his work during the time periods shown in the table below.[3]

- In 2001, the beneficiary was paid $21,534.77 ($3,425.23 less than the proffered wage).[4]

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[2] The petitioner lists an overtime rate of one and one-half times the regular rate on the labor certification but does not state that overtime is regularly required.

[3] The beneficiary's W-2 forms are issued to the beneficiary under the social security number 683-98-2363. The beneficiary's 2005, 2006, 2008 and 2009 Forms 1040 Individual Tax Returns, however, indicate a tax identification number of 920-75-2957. Absent clarification of this inconsistency in the record, the AAO is not inclined to accept the W-2 forms as persuasive evidence of wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). It is also noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. See *Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

[4] The 2000 W-2 Wage and Tax Statement Form is for a time period before the priority date.

- In 2002, the beneficiary was paid $18,356.38 ($6,603.62 less than the proffered wage).
- In 2003, the beneficiary was paid $18,372.78 ($6,587.22 less than the proffered wage).
- In 2004, the beneficiary was paid $18,744.25 ($6,215.75 less than the proffered wage).
- In 2005, the beneficiary was paid $19,302.76 ($5,657.24 less than the proffered wage).
- In 2006, the beneficiary was paid $20,596.26 ($4,363.74 less than the proffered wage).
- In 2007, the beneficiary was paid $18,522.00 ($6,438.00 less than the proffered wage).
- In 2008, the beneficiary was paid $23,793.41 ($1,166.59 less than the proffered wage).
- In 2009, the beneficiary was paid $24,515.90 ($444.10 less than the proffered wage).

Assuming these W-2s represent wages paid to the beneficiary, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for the years 2001 through 2009. The petitioner must show that it can pay the remaining wages for the years 2001 through 2009.

The petitioner also provided some of the beneficiary's earning statements for 2007 and for the periods in 2010: July 21, 2010 to August 3, 2010, September 29, 2010 to October 12, 2010, October 13, 2010 to October 26, 2010, October 27, 2010 to November 9, 2010.[5] The AAO has considered the beneficiary's 2007 earnings as listed on the beneficiary's IRS Form W-2 Wage and Tax Statement for 2007. The petitioner also provided the beneficiary's 2005, 2006, 2008 and 2009 federal income tax returns. Without taking into account the fact that the wages were paid under a social security number not belonging to the beneficiary, these documents do not show the petitioner's ability to pay the proffered wage from the priority date, March 26, 2001, and onwards.

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. 813, 881 (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

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Accordingly, the income earned by the beneficiary cannot be considered in establishing the petitioner's ability to pay from the time of the priority date, March 26, 2001, and onwards.

[5] This statement reflects year-to-date total wages of $17,407.25.

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 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 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).

The petitioner's tax returns[6] demonstrate its net income as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net income of -$13,633.[7]

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[6] The petitioner submitted its 2000 IRS Account Transcript which is for a time period before the priority date. Accordingly, the net income would not show the petitioner's ability to pay from the time of the priority date, March 26, 2001, and onwards. Thus, the 2000 tax return will not be considered.

[7] 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 S 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) line 17e* (2004-2005) line 18* (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed as of January 25, 2011) (indicating that Schedule K is a summary schedule of all

- In 2002, the petitioner's Form 1120S stated net income of $6,697.
- In 2003, the petitioner's Form 1120S stated net income of -$5,705.
- In 2004, the petitioner's Form 1120S stated net income of $1,440.
- In 2005, the petitioner's Form 1120S stated net income of $5,365.
- In 2006, the petitioner's Form 1120S stated net income of -$44.00.
- In 2007, the petitioner's Form 1120S stated net income of -$1,075.
- In 2008, the petitioner's Form 1120S stated net income of $4,138.
- In 2009, the petitioner's Form 1120S stated net income of -$8,892.

Based on the figures in this table, the petitioner did not have sufficient net income to pay the remainder of the beneficiary's proffered wage of $24,960 for the years 2001, 2003, 2004, 2005, 2006, 2007 and 2009. When the wages paid the beneficiary are combined with the petitioner's net income, the petitioner has established its ability to pay the remaining wages for the years 2002 and 2008. The petitioner is short by a minimal amount in years 2005 and 2009.

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. [8] 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 as shown in the table below.

- In 2001, the petitioner's Form 1120S stated net current assets of $2,183.
- In 2003, the petitioner's Form 1120S stated net current assets of -$4,153.
- In 2004, the petitioner's Form 1120S stated net current assets of -$3,381.
- In 2005, the petitioner's Form 1120S stated net current assets of $0.
- In 2006, the petitioner's Form 1120S stated net current assets of $2,132.
- In 2007, the petitioner's Form 1120S stated net current assets of $1,057.
- In 2009, the petitioner's Form 1120S stated net current assets of -$3,697.

The petitioner could not have paid the beneficiary's proffered wage from its net current assets for the years 2001, 2003 through 2007 and 2009.

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shareholder's shares of the corporation's income, deductions, credits, etc.).

[8] 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.

Counsel states on appeal that there are many items such as depreciation, special deductions and credits that reduce the taxable income but do not decrease the company's cash flow and financial ability to pay the proffered wage. As noted above, while depreciation does not represent a cash expenditure, neither does it represent amounts available to pay the wage. It is an actual expense and cannot be added back into income to determine a petitioner's ability to pay. *See River Street Donuts* at 118.

The petitioner cites a memorandum by [redacted]. The petitioner states that in accordance with the memorandum, USCIS should make a positive ability to pay determination when the record contains credible, verifiable evidence that the petitioner is not only employing the beneficiary but has also paid or is currently paying the proffered wage.

The [redacted] memorandum relied upon by the petitioner provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the [redacted] memorandum. However, the petitioner's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the [redacted] memorandum as the petitioner urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 26, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only on March 26, 2001, when the petitioner claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002 and onwards. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the relevant period of time. In the instant case, and giving consideration to the payment of wages to the beneficiary under another person's social security number, the petitioner failed to pay the beneficiary's full proffered wage in 2001, 2003 through 2007 and 2009.

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 petition indicates that the petitioner was established in 1987 and currently employs six individuals. The petitioner states that its gross income has been over $240,000 for the last three years and has paid over $90,000 in wages. In general, however, the petitioner's tax returns show fairly low and negative net incomes and fairly low and zero net current assets for the years 2001 through 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). The petitioner has not provided any plans or ideas to increase its profitability. The petitioner did not provide evidence of its historical growth, its reputation within the industry, a prospectus of its future business ventures or any other evidence to demonstrate its ability to pay the proffered wage from 2001, 2003 through 2007, 2009 and onwards. The petitioner did not indicate unusual circumstances which kept it from being able to show the ability to pay in 2001, 2003-2007, and 2009.

In this matter, the petition may not be approved, as the petitioner has not established a continuing ability to pay the proffered wage and because the job offer was not *bona fide* when the petition was filed due to the petitioner's forfeited status.

As noted above, the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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. An employer is defined for labor certification purposes as "a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person,

association, firm, or corporation." 20 C.F.R. § 656.3.[9] U.S. workers, for example, could not have been referred for employment to a petitioner which was operating in violation of state law.

As explained *supra*, the petitioner in this matter was formed in the State of Maryland on February 18, 1987. However, on October 7, 2002, the petitioner's corporate status was forfeited by the State of Maryland for failure to file a 2001 property return and remained forfeited until its revival on November 5, 2010. The instant petition was filed on August 2, 2007. Accordingly, the petitioner was a legal non-entity, dissolved by operation of law, at the time the petition was filed. *See e.g., Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d at 1101. The petitioner's corporate authority to seek the immigration benefit in question had been extinguished by the forfeiture of its charter in 2002. Therefore, the petition was not approvable when filed.

The appeal is dismissed and the petition is denied for the above reasons, with each considered as an alternative ground for dismissal. 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.

[9] It is noted that new DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant petition is governed by the prior regulations.