identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
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: JAN 26 2011

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:

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 preference visa petition was denied by the Director, Vermont Service Center.[1] The petitioner filed a motion to reopen/reconsider the denial of the petition.[2] The director granted the motion and informed the petitioner that the grounds of denial were not overcome. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a gas and auto service station. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. 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 director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, an 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.

Beyond the decision of the director, additional issues are (1) whether [redacted][3] qualifies as a successor-in-interest to the petitioner; (2) whether the petitioner has sufficient income to pay all the wages for all sponsored beneficiaries on the priority date as the petitioner has filed nine other immigrant petitions (Forms I-140) according to the electronic records of U.S. Citizenship and Immigration Services (USCIS); and, (3) whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

---

[1] The United States Department of Justice, Executive Office for Immigration Review at http://www.usdoj.gov/eoir/04/AttyDiscJul04.htm as accessed January 18, 2011, stated that petitioner's prior counsel, [redacted], had been expelled from practice before immigration tribunals on July 9, 2004, by a final order of the U.S. District Court for the District of Columbia.

[2] A chronology of the I-140 petition proceedings is as follows: The I-140 petition was filed on September 23, 2002; on May 12, 2005, the director issued a Notice of Intent to Deny (NOID) the petition and requested additional evidence to overcome the grounds for denial; as the petitioner did not respond to the NOID, the director denied the petition on October 4, 2005; on December 2, 2005, the petitioner filed a motion to reopen/reconsider the denial; the director granted the motion and on August 4, 2009, found that the grounds of denial were not overcome; and on September 4, 2009, the petitioner appealed the denial of its motion, and the matter is now before the Administrative Appeals Office (AAO).

[3] According to the Commonwealth of Virginia, State Corporation Commission website accessed January 18, 2011, at http:// cisiweb.scc.virginia.gov ... [redacted]. is an active corporation organized on September 30, 2005.

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*, 229 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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on March 8, 2001. The proffered wage as stated on the Form ETA 750 is $19.11 per hour ($39,748.80 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4]

The petitioner submitted the following evidence: The petitioner's federal income tax return (Form 1040) for 2001; a letter from the petitioner dated October 28, 2005; three copies of checks from the petitioner to the beneficiary with wage voucher information dated October 19, 2005-$1,181.85, November 2, 2005-$1,181.85, and November 15, 2005-$1,181.85; copies of the petitioner's State of Virginia VA760CG income tax statements; the petitioner's "Amended U.S. individual Income Tax Returns" (Forms 1040X) for 2002 (Original AGI[5]-$35,112.00; "Correct Amount" - $35,112.00),

[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] Form 1040, Adjusted Gross Income (AGI).

2003 (Original AGI-$82,939.00, "Correct Amount" - $72,939.00), and for 2004 AGI-$298,833.00; the beneficiary's personal federal income tax returns, the beneficiary's State of Virginia VA760CG income tax statements, and the beneficiary's Wage and Tax Statements (W-2) from the petitioner to the beneficiary for 2003-$33,633.60 and for 2004-$29,047.20;[6] a letter from the petitioner dated August 2, 2006; the petitioner's federal income tax transcripts stating for 2001-AGI-$53,442.00, for 2002-AGI-$35,112.00, for 2003-AGI-$82,939.00, and for 2004-AGI-$298,833.00; and the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) for 2003,[7] 2004, and 2005.

Accompanying the appeal, counsel submitted a legal brief dated September 1, 2009, and the following evidence: a statement from the petitioner's accountant dated August 20, 2009; an undated letter from the petitioner; copies of the petitioner's State of Virginia VA760CG income tax statements; the beneficiary's personal joint federal income tax (Forms 1040) returns for 2003, 2004, 2005, 2006,[8] and 2007; the beneficiary's Wage and Tax Statements (W-2) from the petitioner for 2003, and 2004, which are already in evidence, and for 2005-$10,701.60, and 2007-$31,799.04[9]; the petitioner's "Amended U.S. Individual Income Tax Return" (Form 1040X) dated August 19, 2004, for 2001 (Original AGI-$53,442.00; "Correct Amount"-$79,017.00); the petitioner's amended tax returns for 2002, 2003 and 2004 already submitted, and the petitioner's personal joint federal income tax (Forms 1040) returns for 2005-AGI $268,181.00; and copies of the petitioner's State of Virginia VA760CG income tax statements.

Additionally counsel submitted the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) for 2002, 2003 and 2004; the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) for 2004 and 2005; W-2 Statements issued in 2004 for the petitioner's employees; and the [redacted] Service Center, Inc.'s federal income tax returns (Forms 1120S) for 2006 and 2007.

The director, Texas Service Center, issued a request for additional evidence (RFE) to the petitioner on May 20, 2010. The director requested evidence of the petitioner's ability to pay the proffered wage from the priority date and, specifically, to indicate all of the family's household living expenses from 2001 through 2005 to include but not limited to:

> [H]ousing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, household, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny,

---

[6] The beneficiary stated wages in 2004 of $29,695.00 (Form 1040, Line 1) and additional income from a business, "taxicab," on Schedule C.

[7] The director stated in his decision dated August 4, 2009, that although W-2 Statements showing wages paid to beneficiary were submitted, the Forms 941 Statement for 2003 and 2004 also submitted to the director did not show that the business had employees. Forms 941 statements subsequently submitted did show employees.

[8] No W-2 for the beneficiary was submitted for 2006.

[9] The 2007 Form W-2 was from a corporation and not from the petitioning sole proprietorship. *See infra.*

and any other recurring monthly household expenses. All items may be subject to verification.

Further, the director stated that if the sole proprietor will use personal assets to pay the proffered wage, evidence must be submitted to verify that the sole proprietor is in possession of sufficient assets to pay the proffered wage. The director indicated examples of personal assets may be savings accounts, checking account statements, and stock account statements.

In response, counsel submitted explanatory letters and the following evidence:[10] five exhibits for years 2001 through 2005 entitled "Approximate Estimate of Monthly Expenses ....";[11] copies of the petitioner's transaction journal listing employees' wages for 2003, provided as attachments to the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) for 2003; approximately 62 copies of [redacted] and his spouse's personal joint personal bank checking statements for the period January 8, 2001, to January 6, 2004, together with a summary exhibit of the end of month balances for that period; the petitioner's "Statement Regarding My Bank Accounts" dated June 14, 2010; bank statements concerning the balance of a bank held certificate of deposit held in the joint names of the petitioner and his spouse from February 15, 2001, through August 25, 2004; approximately 58 copies of business account bank checking statements[12] for the period January 1, 2001, to December 31, 2003, together with a summary exhibit of the end of month balances for that period; approximately 38 copies of [redacted] and spouse's personal joint personal bank checking statements for the period January 8, 2001, to January 6, 2004, together with a summary exhibit of the end of month balances for that period; approximately 4 copies of [redacted] spouse's personal bank statements for the period August 22, 2003, to December 15, 2003, together with a summary exhibit of the end of month balances for that period; approximately 4 copies of business account bank checking statements for the period January 1, 2003, to December 31, 2003, together with a summary exhibit of the end of month balances for that period; the petitioner's Employers Quarterly Federal Tax Forms (Forms 941) and Employer's Annual Federal Unemployment Tax Returns (FUTA) Forms 940-EZ statements submitted by the petitioner in years 2000, 2001, and 2002; and a statement by the petitioner dated June 14, 2010.

The evidence in the record of proceeding shows that the proprietor conducted business as a sole proprietorship and is reputed to be now structured as an S corporation. On the petition, the petitioner claimed to have been established in "1/00." On the Form ETA 750B, signed by the beneficiary on March 3, 2001, the beneficiary did not claim to work for the petitioner.

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

[10] Only evidence not already submitted in the record of proceeding is listed here.

[11] Less the sole proprietor's monthly insurance expenses (health, life, car) and car payment, the yearly totals as stated on the exhibits were in 2001-$52,181.28; 2002-$52,181.28; 2003-$73,829.28; 2004-$80,969.28; and in 2005-$90,473.28.

[12] The accountholder is stated as [redacted]

priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this matter, the petitioner submitted IRS Forms W-2, Wage and Tax Statements, as evidence of wages paid to the beneficiary by the petitioner in 2003, 2004, 2005, and 2007. As the 2007 Form W-2 was issued by an unproven successor entity (*see infra*), it has not been established to be relevant in this matter. Nevertheless, for the sake of argument, the differences between the proffered wage and the wages paid to the beneficiary are indicated in the following table.

Petitioner's Tax Return for Year:	Proffered Wage	Wage Paid	Difference between the Proffered Wage and the Wage Paid in Each Year:
2001	$39,748.80	$-0-	$39,748.80
2002	$39,748.80	$-0-	$39,748.80
2003	$39,748.80	$33,633.60	$6,114.40
2004	$39,748.80	$29,047.20	$10,701.60
2005	$39,748.80	$10,701.60	$29,047.20
2006	$39,748.80	$-0-	$39,748.80
2007	$39,748.80	$31,799.04	$7,949.76

In the instant case, the petitioner and [redacted] have not established that they employed and paid the beneficiary the full proffered wage from the priority date in 2001 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 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.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

Counsel has submitted five lists of the sole proprietor's "family" expenses that were submitted in response to the director's RFE. The exhibits are dated June 15, 2010, and are entitled "Approximate Estimate of Monthly Expenses ..." for years 2001 through 2005. However, on each exhibit the proprietor excluded his monthly insurance expenses (for health, life, car) and his car payment. These expenses were not listed on the exhibits. The yearly total expenses as calculated from the listed expense were in 2001-$52,181.28; 2002-$52,181.28; 2003-$73,829.28; 2004-$80,969.28; and in 2005-$90,473.28. The petitioner included an undefined monthly expenses category "Misc" (i.e. miscellaneous) on the exhibits submitted for 2001 and 2002 of $300.00 per month; thereafter the "Misc" monthly expense is defined as "credit cards + clothing + groceries" which is listed for 2003-$1000.00, 2004-$2000.00, and for 2005-$2,500.00. No explanation was provided for the lower "Misc." estimates in 2001 and 2002.[13] Further, the petitioner has not explained why health, life insurance and automobile insurance expenses and car payments should not also be included in his monthly expenses listings.[14]

---

[13] Presumably the petitioner's expenses for credit cards, clothing, and groceries would be higher than listed by the petitioner for 2001 and 2002.

[14] These expenses were listed on the petitioner's "Approximate Estimate of Monthly Expenses ..."

Further, the sole proprietor has provided a statement of his deductible personal expenses stated on Form 1040, Schedule A, as "carried" to the tax computation found on page two of the Forms 1040, Form 1040X, and to the tax transcripts submitted in the record. Two of the stated expense deductions for state and local taxes and gifts were not included on the "Approximate Estimate of Monthly Expenses ..." for years 2001 through 2005. Further, the AAO notes that the petitioner only provided two personal expense items in the monthly expenses estimate (i.e. mortgage and utility expenses) for years 2001 through 2005 while the director requested in his RFE at least eleven additional items. The proprietor has under estimated his family's personal monthly expenses based upon a review of the evidence in the record.

Further, the petitioner did not submit any documentary substantiation for the expense items provided. The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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 the instant case, the sole proprietor supported a family of six in 2001 through 2005, and five thereafter. The proprietor's amended tax returns reflect the following information for the following years:

	2001	2002
Proprietor's adjusted gross income (Forms 1040X)	$79,017.00	$35,112.00
	2003	**2004**
Proprietor's adjusted gross income (Forms 1040X)	$72,939.00	$298,833.00
	2005	
Proprietor's adjusted gross income (Form 1040X)	$268,181.00	

In 2001, 2002, and 2003, the sole proprietor's adjusted gross incomes above stated fail to cover the proffered wage of $39,748.80 and the sole proprietor's recurring household living expenses. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after

---

for 2001 through 2005 with no expense figures provided and with the comments "Deducted from work ([redacted])" and "Deducted from work [redacted]".

reducing the adjusted gross income by the amount required to pay the proffered wage. In 2004 and 2005 the proprietor could pay the proffered wage.

The petitioner has submitted [redacted] federal income tax returns (Forms 1120S) for 2006 and 2007, as proof of the petitioner's ability to pay the proffered wage, which tax returns state that the corporation is structured as an S corporation with two shareholders (i.e. [redacted] and [redacted]). For a corporation, USCIS will examine the corporation's net income and net current assets for the years for which federal income tax returns have been submitted.

Beyond the decision of the director, as a preliminary issue to the introduction in this matter of another entity's financial documents[15] the petitioner must establish a valid successor relationship for immigration purposes by satisfying three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, the petitioner must submit evidence of the ability of both the predecessor entity and the purported successor to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2); the predecessor entity must be able to pay beginning on the priority date until the date the transfer of ownership to the successor is completed, while the purported successor, in this instance the [redacted], must demonstrate its continuing ability to pay the proffered wage from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

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. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See generally Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. Black's Law Dictionary 1473 (8th ed. 2004); *see also Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law, the purchase of assets from a predecessor will only

[15] 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."

result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold. *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

There is insufficient evidence in the record to document the transfer and assumption of the ownership of all, or the relevant part of, the proprietorship to the corporation, [redacted], which the AAO notes, according to the tax returns submitted, is only 70% owned by the proprietor. This is an additional reason for ineligibility for the benefit sought. 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)).

Assuming for sake of argument that the corporate tax returns of [redacted]., are relevant in this matter, in the case of *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 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).

[redacted] federal income tax returns (Forms 1120S) for 2006 and 2007 demonstrate its net income as shown in the table below.

- In 2006, the Form 1120S stated net income[16] of <$22,659.00>.[17]
- In 2007, the Form 1120S stated net income of <$47,034.00>.

Assuming for the sake of argument that [redacted] is the successor in interest to the proprietor, for years 2006 and 2007, from an examination of wages paid by [redacted] Inc. to the beneficiary and [redacted] net income, [redacted] could not pay the proffered wage.

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.[18] 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 2006, the Form 1120S stated net current assets of $63,163.00.
- In 2007, the Form 1120S stated net current assets of <$13,486.00>.

---

[16] 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 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed January 19, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because [redacted] had additional deductions and other adjustments shown on its Schedules K for 2006 and 2007, [redacted] net income is found on Schedule K of its tax returns.

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

[18] 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.

Assuming for the sake of argument that [redacted] is the successor in interest to the proprietor, for 2007, from an examination of wages paid by [redacted] to the beneficiary, and [redacted] net current assets, [redacted] could not pay the proffered wage.

Since the petitioner has not demonstrated by sufficient evidence that [redacted]. is the successor in interest to the proprietor, 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 in 2001, 2002, 2003, 2006 and 2007 through an examination of wages paid to the beneficiary, or net income or net current assets. In 2004 and 2005, the proprietor could pay the proffered wage.

On appeal, counsel asserts that a statement provided by the petitioner's accountant and additional Form 941 statements for 2003 demonstrate that the proprietor had employees during 2003, and that the beneficiary was employed as an auto mechanic. Counsel is correct in part. The beneficiary's personal Form 1040 tax returns show that during the time he was employed by the petitioner, the beneficiary also worked as a taxi cab driver.

The petitioner's accountant in his letter dated August 20, 2009, stated that the petitioner could pay the proffered wage but discusses the petitioner's AGI as originally stated in his Forms 1040 federal tax returns, but not as amended. For purposes of this discussion, the AAO used those AGI figures in the amended returns. The accountant's statement will not be discussed further.

Counsel by his letter dated June 15, 2010, asserts that the petitioner's adjusted net income minus expenses for each year, 2001 through 2005, demonstrates that there were sufficient funds to pay the proffered wage. For example, counsel states that the adjusted gross income in 2001 was $79,017 and that the proprietor's expenses were in that year $52,884.00, leaving a positive difference of $26,133.00. Assuming for the sake of argument that counsel is correct in his calculation and that the figures given are reliable based upon the evidence submitted, the difference between $26,133.00, and the proffered wage of $39,748.80, is <$13,615.00>. Therefore, counsel's own calculations show that the petitioner had insufficient income in 2001 over his expenses to pay the proffered wage.

As already stated above, the sole proprietor has under estimated his family's personal monthly expenses. The AAO cannot analyze or review the proprietor's estimate of monthly expenses for years 2001 through 2005 which did not include other expense items in the record of proceeding as well as items mentioned in the director's RFE but excluded. If USCIS and the AAO fail to believe that a fact stated in the petition is true, the USCIS and AAO 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).

Counsel further states that wages paid to the beneficiary by the proprietor since 2003 together with counsel's calculations of the proprietor's adjusted gross income minus recurring monthly expenses are evidence of the ability to pay. The AAO notes that the priority date is 2001 and that the

petitioner is responsible to demonstrate its ability to pay the proffered wage from that date. *See* 8 C.F.R. § 204.5(g)(2). As already stated above, the AAO rejects counsel's calculations and the petitioner's estimates of recurring monthly expenses. Again as already stated, there were substantial differences since 2001 between the proffered wage and wages paid to the beneficiary not supplemented by either AGI, when including reasonable recurring personal expenses, or the negative net incomes stated by [redacted]

According to counsel, the balances in the bank statements submitted are evidence of the petitioner's ability to pay the proffered wage. Counsel asserts that the amounts stated in the petitioner's bank checking account from 2001 through 2003 are evidence of the petitioner's ability to pay the proffered wage. Counsel's reliance on the monthly closing balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. 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 reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions). Finally, even though these bank statements are presented as evidence of "net current assets," there is no evidence of any liabilities that would have offset the availability of these funds to pay the proffered wage. Regardless, even if these funds were established to have been available to pay the proffered wage, which they have not, the appeal could not be sustained for the other reasons set forth herein.

Counsel contends that wages paid to [redacted] in 2001 and 2002 (who has left the proprietor's employ in 2002), is evidence of the petitioner's ability to pay the proffered wage. While it is not explained in the record, the AAO notes that while employed [redacted] received a substantial salary, and in 2006 an S Corporation was formed by the proprietor and a [redacted] as 30% shareholder in the [redacted]. Whether this is the same [redacted] is not known, but [redacted] interest in the business and its profits should be elucidated. Further, the suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Wages paid to others cannot be used to prove the ability to pay the proffered wage.

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. 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 [redacted], 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 conducted business as a sole proprietorship since 2001 and is reputed to be now structured as an S corporation since 2006. From 2003[19] through 2005, the proprietor stated substantial gross receipts. Despite these receipts, the proprietor's adjusted gross income was insufficient to pay the proffered wage in 2001, 2002, and 2003.

There is a statement in the record by the petitioner dated June 14, 2010, that "our business suffered [a] loss in 2002 largely due to the event of September 11, 2001, which had created a slowdown in our business." 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. 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. The AAO also notes that the petitioner's tax transcripts suggest the proprietor's business profits as stated on Form 1040, Schedule C in both 2001 and 2002 were very similar, $38,074.00 and 33,021.00 respectively, and appear not to support the petitioner's contention. Furthermore, there is no evidence that the petitioner's purported successor suffered an uncharacteristic loss in 2007, which was a year in which the alleged successor had both negative net income and negative net current assets.

According to counsel, the business operated by [redacted] as a sole proprietorship was transferred or merged into to a corporation in which the sole proprietor remained the majority shareholder. However, no documentation was provided evidencing this reputed transfer other than the 2006 and 2007 tax returns of [redacted] A review of the Form 1120S tax returns demonstrated that in both years the corporation could not pay the proffered wage. There is insufficient evidence in the record of proceeding that [redacted]. is the successor in

[19] The petitioner failed to submit complete Form 1040 tax returns for 2001 or 2002 so its gross receipts are not known. In 2003 gross receipts were $2,776,091.00 and rose to $3,615,752.00 in 2005.

interest to the proprietor. Based upon what is known, the petitioner has employed the beneficiary, but the petitioner has not submitted evidence that it paid the beneficiary the proffered wage.

Additionally, USCIS records indicate that the petitioner has filed approximately nine other immigrant I-140 petitions[20] since the petitioner's establishment in 2001. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until each beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wages for the beneficiaries of the other nine petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries for which the petitions were denied, whether those beneficiary have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to those beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition in years 2001, 2002, 2003, 2006, and 2007 it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved Form ETA 750 and ETA Form 9089 labor certifications.

Counsel has not contended or provided sufficient evidence of the occurrence of any uncharacteristic business expenditures, losses, or an adverse event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. The petitioner has not provided evidence of a turn-around of the petitioner's business fortunes, or expectations of increased profitability. 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.

Beyond the decision of the director, an additional issue is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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).

The job qualifications for the certified position of an auto mechanic are found on the Form ETA 750 Part A, Item 13, and describe the job duties to be performed as follows:

> Repair and service vehicles for automotive service station. Determine nature of malfunction and extent of damage through conference with customers, manuals, charts and experience. Remove, replace and/or repair parts of automobile utilizing mechanic and hand tools.

[redacted]

The Form ETA 750 states that the position requires two years experience in the occupation of auto mechanic.

According to the Form ETA 750B, the beneficiary stated under penalty of perjury that he had been unemployed from July 2000 to "present (i.e. March 3, 2001). From November 1997, to May 2000, the beneficiary stated that he was employed as an auto mechanic by [redacted] Pakistan, in an auto work shop in which he stated he "repaired, serviced and overhauled vehicles, and fixed parts if necessary."

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 sole statement submitted in the record by the service manager of [redacted] concerning the beneficiary's qualifications is a short statement in the English language dated August 8, 2000, which states:

> TO WHOM IT MAY CONCERN
>
> It is certified that [the beneficiary] worked in this organization as a Mechanic from November 97 to May 2000.
>
> As a Mechanic he got vast experience and extensive knowledge about Engine, Drive train, Chassis and Electrical systems of all kind of automobile.
>
> During his period of service I found his work to be very satisfactory and I am confident to recommend him to any prospective Employee.

There is no other statement in the record according to the regulation at 8 C.F.R. § 204.5(l)(3) to substantiate the beneficiary's qualifications as an auto mechanic and there is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to

perform the duties of the proffered position. The beneficiary does not meet the detailed terms of the labor certification which requires, in part, the repair of damaged vehicles using mechanic and hand tools and conferencing with customers, examining manuals and charts. The petition will be denied on this basis as well.[21]

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.

---

[21] *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring sufficient evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). The AAO notes that the director indicated that although the petition stated the offered job was "manager, auto service station" who manages "the gas station by making employee hours and ordering supplies, etc.," the labor certification states that the proffered job is "auto mechanic." According to an undated statement of the proprietor in the record, "Due to some unknown errors from my accountant\book keeper it appears that [the beneficiary] worked as a Manager, which is not correct." Further, the proprietor placed the beneficiary on his payroll in 2003, but according to the beneficiary's personal tax returns he also worked as a taxi cab driver after that date. Although not a basis of this decision, if this matter is pursued the proprietor or its successor in interest, if applicable, must be prepared to establish that the beneficiary had the *bona fide* intent to work as an auto mechanic for the petitioner immediately or in the foreseeable future in his qualifying endeavor or in a related field according to the job stated under the terms of the labor certification. *See* 8 C.F.R. § 204.5(c) and *Matter of Sunoco*, 17 I & N, Dec. 283 (BIA 1979). 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).