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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]

Date: JUN 16 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a short order cook pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL). The director denied the petition because the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward. The AAO dismissed the petitioner's appeal similarly finding that the petitioner could not establish its continued ability to pay the proffered wage from the December 23, 2002 priority date onwards.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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]

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.

On November 9, 2009, the AAO dismissed the subsequent appeal finding that the petitioner could not pay the proffered wage of $11.87 per hour ($24,689 per year) from the December 23, 2002 priority date onward[2] and affirmed the director's denial. The AAO specifically reviewed

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). As discussed herein, the record in the instant case provides reason to preclude consideration of the documents newly submitted only with the petitioner's motion to reopen. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] As noted in the AAO's prior decision:

> Part A, Item 12 of Form ETA 750 states the proffered wage. The instant labor certification also contains a notation below the stated rate of pay: "Please note that the position offers fixed hourly rate of $6.50 [$13,520.00 per year], but

the Forms W-2 for the beneficiary, a letter from the petitioner's CPA, and the petitioner's internally generated sales reports. The AAO specifically noted that the director's May 2, 2008 request for evidence instructed the petitioner to provide its federal income tax returns to prove its ability to pay the proffered wage and the petitioner failed to submit those tax returns either in response to the RFE or on appeal.[3] The director's decision similarly noted the petitioner's failure to submit the tax returns from 2002 onward as requested. The AAO considered the CPA's statement of the petitioner's financial position and the internally generated sales reports and found them insufficient because the documents were not audited and the record did not contain regulatory proscribed evidence of the petitioner's ability to pay.

The record shows that the motion is properly filed and timely and includes a copy of the petitioner's menu and federal tax returns for an entity with a separate tax identification number

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includes fluctuating tips. $11.75 is an approximation with tips included." On Part 6, Question 9 of Form I-140, the petitioner states that the proffered wage is $474.80 per week ($24,689.60 per year). On appeal, counsel now argues that the proffered wage is $6.50 per hour ($13,520.00 per year). This argument is rejected. The AAO will use the $24,689.60 per figure as the proffered wage, as this is the rate stated on Part A, Item 12 of the certified labor certification and on Part 6, Question 9 of the petition. It is noted that DOL regulations do not permit the *prevailing wage* to be met using discretionary bonuses and tips. 20 C.F.R. § 656.10(c). It is also noted that a cook is not one of the occupations that traditionally receives tips.

[3] The decision states:

> The director's May 2, 2008 request for evidence instructed the petitioner to provide evidence of its financial ability to pay the proffered offered wage in the form of federal tax returns. The petitioner did not submit any tax returns in its response to the RFE, nor did counsel submit any tax returns on appeal. Accordingly, the record does not contain any tax returns, annual reports or audited financial statements that would permit the determination of the petitioner's net income or net current assets. The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.) The petitioner's failure to provide this required evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. 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). 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)).

than the petitioner. The motion qualifies as a motion to reopen under 8 C.F.R. § 103.5(a)(2) as it is provides new facts with supporting documentation not previously submitted. The instant motion is granted. In viewing the new evidence, the 2002 through 2008 tax returns submitted are for an entity with a tax identification number of [redacted]. This number is separate from the FEIN listed on Form I-140 [redacted] and the beneficiary's W-2 statements for 2002 through 2008.

As noted in both the director's and the AAO's decision, the purpose of the director's RFE 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* The petitioner also had the opportunity to submit evidence on appeal as it was notified of the deficiency in the director's decision. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted only with the motion to reopen. Counsel offers no reason as to why the tax returns were not or could not have been submitted previously either in response to the director's RFE or on appeal.

The AAO further notes that even if the evidence were accepted, which it is not, the tax returns submitted do not demonstrate the ability to pay the proffered wage from the priority date onward. First, it is not clear that these tax returns could be used to demonstrate the petitioner's ability to pay as they list a different tax identification number than that listed on Form I-140 and on the beneficiary's W-2 statements. On appeal, counsel states that [redacted] the entity for which tax returns were submitted, is the sole owner of the petitioner and that both companies have a common sole owner so the two companies should be viewed as interchangeable. However, different tax identification numbers indicate that the companies are separately structured as individual entities. 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." It is not clear that the tax returns of [redacted] can be accepted to show the petitioner [redacted] – [redacted] ability to pay the proffered wage. Additionally, even if the returns could be considered to show the petitioner's ability to pay the proffered wage, which has not been established, the 2007 Form 1120S shows net income[4] of -$23,235 and net

[4] As noted in the AAO's prior decision, 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 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).

current assets[5] of -$227,928; the 2004 Form 1120S shows net income of $318 and net current assets of -$79,279; and the 2003 Form 1120S shows net income of -$29,560 and net current assets of -$286,270. Negative net income and net current assets are insufficient to demonstrate the ability to pay the proffered wage. Contrary to the claims made with the motion to reopen, the total net income and net current assets combined over a period of years cannot be considered,[6] the petitioner must establish the ability to pay the difference between the actual wage paid and the proffered wage in each year individually.

Counsel's submission of the tax returns for a separately structured, different entity,[7] for the first time with the motion to reopen is insufficient to overcome the previous decisions of the director

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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), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

[5] Net current assets are the difference between the petitioner's current assets and current liabilities. 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.

[6] The AAO views net income and net current assets as two different ways of demonstrating the petitioner's ability to pay the wage – one retrospective and one prospective, and, therefore, are considered separately, not in combination. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of the petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the two figures cannot be combined to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

[7] Counsel does not claim, and the record does not show or suggest that the tax returns submitted are for a successor entity, but rather a separately structured entity.

Matter of Dial Auto is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

and the AAO. The petitioner failed to establish that the petitioner had the continuing ability to pay the proffered wage from the priority date through the present.[8] Therefore, the petition cannot be approved.

Matter of Dial Auto involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body.

Considering *Matter of Dial Auto* 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 Matter of Dial Auto*, 19 I&N Dec. 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*, 19 I&N Dec. at 482. Here, again, counsel does not claim, and the record does not suggest that one company is the successor to the other, but instead that they are separate entities based on the separate tax identification numbers.

[8] The AAO considered *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), in its decision and whether the totality of the circumstances would warrant favorable consideration. The AAO noted that there was no evidence of any uncharacteristic business expenses or evidence of the petitioner's reputation in the industry. The petitioner submitted a menu on appeal, but nothing to establish its reputation or any uncharacteristic expenses or losses. Counsel cites to the tax returns submitted in support of its ability to pay, but as addressed above, the petitioner has not explained why the tax returns were not previously submitted. *Soriano* precludes their consideration and, based on the separate tax identification numbers, it is not clear that they would be accepted as evidence of the petitioner's ability to pay the proffered wage. Nothing submitted with the petitioner's motion to reopen would allow us to conclude that the petitioner's totality of the circumstances would warrant favorable consideration in this case.

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 motion to reopen is granted and the decision of the AAO dated November 9, 2009 is affirmed. The petition remains denied.