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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

PUBLIC COPY

[redacted]

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Date: MAY 24 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 [redacted] 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a supermarket specializing in selling kosher whole foods. It seeks to employ the beneficiary permanently in the United States as a butcher pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).[1] 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 denied the petition, finding that [redacted] is not the successor-in-interest to [redacted], the petitioner. The director also found that neither the petitioner nor [redacted] had established its ability to pay the proffered wage from the priority date.

In adjudicating the petition, the director found that the approved Form ETA 750 labor certification was signed and filed by [redacted] but the petition (Form I-140, Immigrant Petition for Alien Worker) was signed by [redacted] The director also found that the petitioner had filed 18 immigrant visa petitions since 2003. On February 5, 2007 the director sent the petitioner a notice of intent to deny (NOID). In response to the director's NOID, [redacted] indicated that he had purchased [redacted] from [redacted] in early 2006. Further, [redacted] stated that immediately after he bought the business from [redacted] he changed the legal name of the company to "The [redacted]" while retaining the earlier name for trade purposes. [redacted] stated that he only filed one Form I-140 petition, which is the instant petition. [redacted] also responded to the director's NOID stating that he sold his company, [redacted] to [redacted] on December 17, 2005, and that between 1999 and 2005, he only filed seven applications with the Labor Department including the present one for the beneficiary. He indicated he had no knowledge of the other petitions.

On October 1, 2007, the director sent a request for evidence (RFE) requesting the petitioner to submit documentary evidence of the sale of the business from [redacted] to [redacted] In response to the director's RFE, [redacted] in his letter dated October 22, 2007 stated that he is now the new owner of [redacted]. Along with his response, [redacted] attached a copy of the business purchase agreement that [redacted] and [redacted] Braver executed on December 17, 2005. He also submitted, among other things, a copy of the agreement that he executed on June 15, 2007 to purchase the business from [redacted] [redacted] again responded to the director's RFE stating that he only filed seven labor certification applications including one for the beneficiary, but he no longer had any record regarding the other six individuals for which his company filed the labor certification applications between 1999 and 2005, nor did he remember the names of these individuals.

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[1] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Upon review of the sale agreements, the director identified defects in both agreements. First, the director stated that the signature page on both agreements has both parties signing for "The [redacted] Second, both agreements specify that the purchaser will not assume any of the liabilities or obligations of the seller.[2] For these reasons, the director concluded that there was no complete transfer of ownership from the petitioner to [redacted]c. and as a result, there was no successor-in-interest relationship between [redacted] and [redacted] On the ability to pay issue, the director stated:

> It is not clear who is filing petitions in the name of [redacted] and who is actually currently authorized to do so. Until that issue can be adequately resolved, no determination can be made as to whether the ability to pay has been established, since the number of beneficiaries on whose behalf the petitioner has filed, and the total wages they have been offered, remains unknown.

On appeal, [redacted] the current owner of [redacted], through his counsel of record maintains that his company is the successor-in-interest to the petitioner and that his company has the continuing ability to pay the proffered wage.

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.

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.[3]

The issues before the AAO are: (1) whether or not [redacted] is the successor-in-interest to [redacted] the original petitioner,[4] and (2) if so, whether [redacted]. has the continuing ability to pay the beneficiary's wage from the date that it

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[2] Article 1.3(b) of both agreements state, "Except for and limited solely to the liabilities set forth on Schedule 1.2.1(b) and the contractual obligations under the Maintenance Contracts listed on Schedule 1.1.1(j), the Purchaser shall *not assume, and shall not be liable* for, any liabilities or obligations of the Seller of any nature whatsoever, express or implied, fixed or contingent, including but not limited to any liability owing to the Shareholder or any claim, ..."

[3] 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). 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).

[4] The record reflects that the petitioner's tax identification number is [redacted] tax identification number [redacted]

purchased [redacted] and continuing until the beneficiary obtains lawful permanent residence.

On appeal, [redacted] issued an affidavit explaining why the signature page of the agreements had "[redacted]" for both parties. He also clarified the meaning of Article 1.3(b) of the agreements concerning the assumption of liabilities or obligations. In his affidavit dated March 9, 2008, [redacted] states that the signature page indicating both parties as [redacted] was an oversight by both parties and a simple typographical error. He explains that under traditional Jewish custom, a written agreement or contract for the sale of a business is not required. The agreement to sell [redacted] to [redacted], according to [redacted] was initially completed verbally and sealed with a handshake without any written agreement, and the written contract was simply an afterthought to satisfy paperwork requirements. [redacted] pecifically states in his affidavit, "Because we did not consider the written contract the primary one, although we probably should have, we executed it quickly and without a great deal of deliberation, and as a result, we did not pay particular notice to the fact that '[redacted]' was listed as both seller and buyer."

[redacted] also explains in his affidavit that Section 1.3(b) of the agreement does not mean the purchaser will not assume any liabilities or obligations of the seller, but instead, it protects the purchaser and ensures that he makes an informed purchase by requiring the seller to reveal all liabilities. On appeal, [redacted] also states in a letter dated September 14, 2009 that he purchased [redacted] from [redacted] in June 2007 and that he acquired all of the liabilities of the corporation. In addition, [redacted] ubmitted a document entitled "Post Transaction Memorandum." This document is not dated. It, however, certifies that [redacted] personally assumed all rights, duties, liabilities, obligations, and debts of [redacted] on December 17, 2005, that [redacted] appropriately took all steps necessary to incorporate [redacted] in early 2006, and that [redacted] from thereon owns all debts and liabilities of [redacted]

In order for [redacted] to be able to use the Form ETA 750 approved for [redacted] must establish that it is a successor-in-interest to [redacted] *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *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 [redacted]. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between [redacted] Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to [redacted] Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

In the present matter, the director strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in

substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[5] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[6]

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. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See 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. The purchase of assets from a predecessor will only 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.[7] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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[5] [redacted] and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "[redacted]" consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[6] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

[7] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same

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.

Applying the analysis set forth above to the instant petition, [redacted] has not established a valid successor relationship with the petitioner. The petitioner has not established that it transferred to [redacted] the essential obligations necessary to carry out the business in the same manner. As noted by the director, the buyer did not accept the liabilities of the seller. The seller states that Section 1.3 is to protect the purchaser by requiring the seller to disclose all liabilities. Nevertheless, that section clearly states that the purchaser shall not assume any of the liabilities of the seller, except those disclosed on schedule 1.2.1(b). There are no disclosed liabilities on schedule 1.2.1(b). Further, there is little evidence that the operation of the business remains the same following the transfer of ownership, and following the recent expansion of the physical plant as described in the record. Finally, as discussed below, the petitioner has not established that it has the ability to pay from the date of transfer of ownership forward. Thus, the record does not establish a valid successor relationship between the petitioner and [redacted] As such, the petition is not accompanied by an approved labor certification application on behalf of [redacted] The petition must be denied for this reason.

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manner. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Further, the petition cannot be approved, and the appeal will be dismissed because the petitioner has not established its continuing ability to pay the proffered wage from the priority date. This is so even if the AAO were to consider both the ability to pay of the petitioner until the date of transfer of ownership, and the ability to pay of the claimed successor thereafter..

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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). 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 priority date in this case fell on April 27, 2001, as that was the date when the DOL accepted the Form ETA 750 for processing. The rate of pay set by the DOL, as stated on the Form ETA 750 labor certification, [redacted] per year based on a [redacted][8] The beneficiary indicated in part B of the Form ETA 750 that he had worked as a self-employed [redacted] since 1994.

As noted above, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

To show that it had the ability to [redacted] year from April 27, 2001 the petitioner (Kosher Discount Supermarket) submitted copies of its federal tax return for 2001-2005 filed on Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return.

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[8] The total hours per week indicated on the approved Form ETA 750 is [redacted]. This is permitted so long as the job opportunity is for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). The DOL precedent establishes that full-time means at leas[redacted] or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

The director in his decision found that while the petitioner had sufficient net income and net current assets to pay the beneficiary's wage, the petitioner failed to establish that it could pay the beneficiary's wage since it had filed 18 other immigrant visa petitions since 2003.

As noted by the director, USCIS records reflect that the petitioner has filed 20 other immigrant visa petitions since 2003. On October 6, 2010, the AAO sent a request for evidence (RFE), noting that the petitioner [redacted] has filed 20 other immigrant visa petitions since 2003.[9] As stated earlier, [redacted] claimed he had only filed six other labor certification applications between 1999 and 2005. In the RFE, the AAO specifically requested [redacted] to identify the names, duties, and positions of the six individuals that he had filed the applications for and to submit evidence of these applications.

In response to the AAO's RFE, [redacted] stated he had no recollection of the names of those six individuals, and that he no longer has any record for those individuals. As far as he remembers, [redacted] indicates that, some were applying to work as bakers and as stock persons but other than that he does not remember the specifics. He also states that none of these individuals worked at his business.[10] According to [redacted], he only filed the Form I-140 petition for the beneficiary and only the beneficiary worked at his business. [redacted] and [redacted] have indicated at various times throughout the proceeding that they have no knowledge of other petitions and other beneficiaries other than the current petition and beneficiary. [redacted] on appeal asserts that aside from these "other fraudulent petitions," [redacted] has the ability to pay the proffered wage. The record includes copies of the following evidence to demonstrate that [redacted] has the ability to pay [redacted] per week or [redacted] per year:

- [redacted] federal income tax returns filed on IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for the years 2006 through 2009;
- The beneficiary's Forms W-2 for 2003, 2004, and 2007;
- Various [redacted].'s marketing or advertisement brochures;
- Various checks and invoices issued in 2007 and 2008 to show that [redacted] was closed for 11 months between September 2007 and August 2008 due to major construction of the new building for [redacted];
- Various articles and public reviews on [redacted];
- Various pictures of the petitioner and [redacted]; and
- Various "thank you" letters from the local government and other non-profit organizations.

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[9] Twelve of the petitions were filed after the petitioner sold its business to [redacted] in December 2005.

[10] In his letter dated October 27, 2010, [redacted] states, "I lost touch with these individuals and never filed anything else for them beyond the initial labor certification applications with the New York State Department of Labor."

Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if 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 the petitioner and its claimed successor employed and paid the beneficiary during that period. If together the two companies establish by documentary evidence that they employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

In this case, the evidence in the record of proceeding shows that the petitioner was structured as a C corporation. On the petition, the petitioner claimed to have been established on January 28, 1999,[11] to have gross annual income and net annual income of [redacted] respectively, and to currently employ 16 workers. [redacted] is structured as an S Corporation, with [redacted] and [redacted] as the shareholders in 2006 and 2007.[12]

Based on the evidence submitted, the beneficiary appeared to have been employed by the petitioner in 2003 and 2004 and by [redacted]. in 2007. A review of the Forms W-2 submitted shows that the beneficiary received the following wages from the petitioner and Kosher Garden, Inc.

- [redacted] than the proffered wage).
- [redacted] than the proffered wage).
- [redacted] than the proffered wage).

In order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must show that, together with its claimed successor, it is able to pay the full proffered wage – [redacted] – in 2001, 2002, 2005, 2006, 2008, and 2009 and pay the difference between the wages actually

[11] A search of New York Secretary of State's website shows that [redacted] Inc. was incorporated on November 13, 1998.

[12] A review of [redacted]s tax returns shows that [redacted]

paid to the beneficiary and the proffered wage in 2003, 2004, and 2007, which [redacted]

In addition, as regulated by 8 C.F.R. § 204.5(g)(2) the petitioner must be able to pay the proffered wage of the current beneficiary and of all of other beneficiaries that the petitioner and its claimed successor have sponsored. These amounts can be paid through either the net income or net current assets of the two companies.

[redacted] has repeatedly stated that between 1999 and 2005, he only filed seven applications with the DOL, one of which was for the beneficiary in this case, and that he only filed the Form I-140 petition for the beneficiary, not for anyone else. With respect to the immigrant petitions filed on behalf of the 20 other beneficiaries, the petitioner admits that many of the filings are fraudulent. The AAO cannot determine which of these are fraudulent and which of these are not, particularly given that [redacted] could not provide the names of any of the beneficiaries for whom he filed applications for labor certification, other than the current beneficiary. Nevertheless, the AAO cannot conclude without further investigation that the petitioner is not legally responsible to pay the wages of the other sponsored beneficiaries. For these reasons, the AAO cannot determine that the petitioner has the ability to pay the beneficiary.

Even if the AAO were to consider only the current beneficiary in determining whether the petitioner has the ability to pay, the petitioner has not established such ability.

If the petitioner were to pay the beneficiary's wage through its net income, USCIS will consider the net income figure reflected on the petitioner's and the claimed successor's federal income tax returns, 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 the Service 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 record before the AAO closed on October 6, 2010 with the receipt of [redacted] submissions in response to the AAO's RFE. As of that date, [redacted]'s 2010 federal tax return was not yet due. Therefore, [redacted] income tax return for 2009 is the most recent return available. The petitioner's and [redacted] income tax returns demonstrate their net income (loss) for 2001-2009, as shown in the table below.

- In 2001 the petitioner's Form 1120 stated net income (loss) [redacted]
- In 2002 the petitioner's Form 1120 stated net income (loss) [redacted]
- In 2003 the petitioner's Form 1120 stated net income (loss) [redacted]
- In 2004 the petitioner's Form 1120 stated net income (loss) [redacted]
- In 2005 the petitioner's Form 1120 stated net income (loss) [redacted]
- In 2006, Kosher Garden, Inc.'s Form 1120S stated net income (loss)[13] [redacted]

[13] As indicated above, the petitioner was structured as a C Corporation from 2001 to 2005. For a C corporation, USCIS considers net income (loss) to be the figure shown on Line 28 of the Form 1120.

[14] As indicated above, [redacted]. is structured as an S Corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be

- In 2007, [redacted] Form 1120S stated net income (loss) of [redacted]
- In 2008, [redacted] Form 1120S stated net income (loss) of [redacted]
- In 2009, [redacted] Form 1120S stated net loss (loss) of [redacted]

Therefore, the petitioner, as shown above, had sufficient net income to pay the beneficiary's wage. However, [redacted] did not have sufficient net income to pay the proffered wage from 2006 after it took over the business from the petitioner.

As an alternate means of determining the ability to pay the beneficiary's wage, USCIS may review the petitioner's and its subsequent successor's net current assets. Net current assets are the difference between current assets and current liabilities.[16] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 16 through 18. If the total of the entity'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 net current assets (liabilities) for 2005-2009, as detailed in the table below.

- In 2006, the Form 1120S stated net current assets (liabilities) of [redacted]
- In 2007, the Form 1120S stated net current assets (liabilities) of [redacted]
- In 2008, the Form 1120S stated net current assets (liabilities) of [redacted]

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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, 2006, at http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf (accessed on April 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the AAO observes that the petitioner had additional income, credits, deductions, and other adjustments from sources other than a trade or business. Therefore, the corporations' net income (loss) between 2005 and 2009 is found on Schedule K of its tax returns.

[15] The AAO will consider both the petitioner's and [redacted] net income and net current assets for purposes of the ability to pay adjudication.

[16] 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.

- In 2009, the Form 1120S stated net current assets (liabilities) of [redacted]

Therefore, the AAO concludes that the petitioner has failed to establish that [redacted] had the continuing ability to pay the beneficiary's proffered wage beginning in 2006.

Finally, 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 [redacted] routinely earned a gross annual income of about [redacted] During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's claimed successor, [redacted] is a viable business. The record contains various newspapers or magazine articles, awards, and certifications indicating the company's growth and expansion. Unlike *Sonegawa*, however, [redacted] has not submitted any evidence, explaining why the company was unable to generate sufficient income or why it did not have sufficient net current assets to pay the beneficiary's wage from 2006. Counsel for [redacted]. indicates on appeal that the business had to be closed for 11 months due to major building reconstruction between September 2007 and August 2008. Even if we consider this factor as the reason why [redacted]. could not pay the proffered wage in 2007 and 2008, this factor alone does not explain why [redacted]. was unable to pay the proffered wage in 2006 and 2009. The record contains no evidence that reflects the occurrence of an uncharacteristic business expenditures or loss in 2006 and 2009 that would explain [redacted] inability to pay the proffered wage in those years.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra.* Accordingly, after a

review of the petitioner's tax returns and other evidence, the AAO is not persuaded that [redacted]. has that ability. The petition will be denied for this additional reason.

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.