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

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: JUL 16 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Texas Service Center (director), denied the immigrant visa petition and certified the decision to the AAO. The matter is now before the Administrative Appeals Office on certification.[1] The director's decision to deny the petition will be affirmed.

The petitioner, [redacted] describes itself as a construction business. It seeks to permanently employ the beneficiary in the United States as a carpenter. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

A Form I-140, Immigrant Petition for Alien Worker was initially filed in 2007 by a different petitioner on behalf of the instant beneficiary, which sought to substitute him into a labor certification approved by the U.S. Department of Labor (DOL) on behalf of another beneficiary. The director denied the petition as abandoned. On July 27, 2011, a different employer than that listed on the labor

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[1]Certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on:
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> . . .
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> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

certification has filed a Form I-140 petition on behalf of the instant beneficiary with the same labor certification filed in support of the 2007 Form I-140. Therefore, the instant filing seeks to substitute both the original petitioner on the labor certification, as well as substitute the beneficiary for the one listed on the original labor certification. The director has denied the petition based on the petitioner's failure to establish its ability to pay the beneficiary the proffered wage and certified his decision to the AAO.[2, 3]

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.[4]

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[2]The director discusses the petitioner's successor-in-interest status and the petitioner's ability to pay the proffered wage, as well as the beneficiary's experience. The AAO withdraws the director's decision to accept a petition seeking a labor certification substitution of a different employer and different alien, as well as the director's conclusion that the beneficiary has the experience required for the position offered. 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).

Previously, when a Form ETA 750 was filed and accepted by the DOL, the DOL would permit the substitution of a successor employer *if it occurred before a final determination where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.309(c)(2). See Horizon Science Academy*, 06-INA-46 (BALCA Mar. 8, 2007)[when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages]; *See also American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991)[substitution made before final rebuttal to CO]; *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June 13, 1990). DOL would also allow a new employer to substitute where it is the same job opportunity in the same area of intended employment. *See also Law Offices of Jean-Pierre Karnos*, 03-INA (BALCA May 20, 2004) [where there was a new employer who took over the law practice of Karnos on his death, a new labor certification does not have to be filed for an accountant applicant where it is the same job opportunity in the same area of intended employment including the same job duties and wages.]

However, DOL no longer permits substitutions or modifications of the labor certification. 20 C.F.R. § 656.11.

[3]The director allowed the petitioner thirty (30) days to send a brief or other written statement following certification to address the basis of the decision, however the petitioner failed to submit any response.

[4] 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). *See Matter of*

Labor Certification Validity

In the instant matter, the ETA Form 9089, Application for Permanent Employment Certification was originally filed by [redacted] The priority date established by this ETA Form 9089 is December 5, 2005. The priority date is the date that the labor certification application (ETA Form 9089) was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.11 states the following:

> Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Additionally, the regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the *Application for Alien Employment Certification* (Form ETA 750) or the *Application for Permanent Employment Certification* (Form ETA 9089).

The Act does not provide for the substitution of aliens in the permanent labor certification process. DOL's regulation became effective July 16, 2007 and prohibits the substitution of alien beneficiaries

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Soriano, 19 I&N Dec. 764 (BIA 1988).

on permanent labor certification applications and resulting certifications, as well as prohibiting the sale, barter, or purchase of permanent labor certifications and applications. The rule continues the Department's efforts to construct a deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program. *See* 72 Fed. Reg. 27904 (May 17, 2007).

In this case, the initial Form I-140, Immigrant Petition for Alien Worker was filed on July 11, 2007 by "Renovations Plus" on behalf of the instant beneficiary in this case, [redacted]' as a substitution for the original beneficiary, [redacted] on the ETA Form 9089. The prior Form I-140 filing by [redacted] was prior to July 16, 2007 and the substitution was accepted. It is noted however, that this labor certification was never signed by [redacted] and does not comply with 20 C.F.R. § 656.17(a). As such it should have been rejected. The Form I-140 was subsequently denied on March 23, 2010, based on abandonment.

As noted above, on July 27, 2011, a separate entity not listed on the ETA Form 9089, [redacted]' filed the present Form I-140 on behalf of the instant beneficiary [redacted] and submitted the same ETA Form 9089, which identified [redacted] as the original beneficiary in Section J and [redacted] as the employer.[5] However, as the instant Form I-140 was filed after July 16, 2007, the petitioner is not able to substitute the beneficiary. The petition was, therefore, filed without a valid certified labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i) and should have been rejected.

Successor-in-interest employer

Regulatory guidelines permit a United States employer to file an employment-based immigrant visa petition (Form I-140) on behalf of an alien it wishes to employ. As in this case, to be properly filed, it must be accompanied by any required individual labor certification. *See* 8 C.F.R. § 204.5(a).

For the purpose of filing a labor certification, the regulation at 20 C.F.R. § 656.3 defines an "employer" as a person, association, firm or a corporation that is located in the United States that possesses a valid Federal Employer Identification Number (FEIN). A FEIN is a unique Internal Revenue Service (IRS) identifier of tax-filing entities. As noted above, current DOL rules provide that substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although this DOL regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." It is unlikely in a current labor certification proceeding that DOL would permit an employer possessing a different FEIN, as in this case, to use a labor certification previously issued to a different employer. Here, the petitioner seeks to substitute itself for another after DOL certification, unlike in the BALCA cases above, issued prior to the 2007 regulation change banning substitutions, where the substitution was approved by DOL prior to certification. The claim to substitute the employer on the labor certification will not be accepted in this matter.

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[5] This is the same labor certification that was submitted in the 2007 Form I-140 filing.

Similarly, for a Form I-140 to be properly filed with USCIS, it must reflect that the petitioner is the same employer (or successor-in-interest to the employer) which secured the accompanying labor certification. Form I-140s filed by an employer attempting to use a labor certification issued previously to a different employer will not be approved because they are not accompanied by a valid labor certification unless DOL approved the substitution prior to the certification, where the labor certification would then be issued to the entity filing the Form I-140. The exception to this guidance may only be permitted if the Form I-140 petitioner can establish that it is the successor-in-interest to the employer identified on the labor certification.

For pending Form I-140 petitions accompanied by approved labor certification USCIS reviews issues of successor-in-interest relationships in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*"). *Matter of Dial Auto* is 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.

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. *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.[7] *See generally* 19 Am. Jur. 2d *Corporations* § 2170

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[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

(2010).

Eligibility for the immigration benefit may be shown if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). 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. 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. Therefore, 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.

In this case, it is noted that the director issued an extensive request for evidence (RFE) on October 12, 2011, instructing, *inter alia*, that the petitioner to submit evidence relevant to the existence of a successor-in-interest relationship between the petitioner and [redacted]. He requested documentation that the two entities were in the same metropolitan statistical area, evidence of a transfer of ownership between the entities such as a contract of sale, mortgage closing statements, documentation of the transfer of real property, audited financial statements of both entities for the year in which the transfer occurred, and copies of financial instruments used to execute the transfer of ownership, as well as evidence of the existence of business operations of [redacted] including federal tax returns for 2010, and current, valid city, county, state or federal government business licenses.

In response, the petitioner submitted only a copy of DOL wage statistics for the Long Island region and the Hudson valley region of the state of New York, presumably attempting to show that the wages are slightly higher for carpenters in the Long Island region where the petitioner is located. 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).

In this case, as noted above, DOL current regulations pertinent to pending labor certification applications, would not permit the current petitioner to substitute itself on a labor certification that had been issued to a different employer and already certified.[8] DOL approved no change related to

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and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

[8]Additionally, even the Board noted in *Law Offices of Jean-Pierre Karnos* that the new employer had established that the labor market had been adequately tested in the same area of employment.

the employer prior to certification. Further, as noted above, USCIS is bound by the principles set forth in *Matter of Dial Auto Repair.* The petitioner has not claimed that it is a successor-in-interest and has submitted no evidence of transfer of ownership or that it acquired the essential rights and obligations of the predecessor necessary to carry on the business.

Ability to Pay the Proffered Wage

As noted above, a petitioning successor must establish eligibility for the immigrant visa in all respects and 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. As set forth below, the AAO finds that even if the petitioner were considered as a successor to Renovations Plus, which it is not, it has failed to demonstrate the continuing financial ability to pay the proffered wage.[9]

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

As noted above, the priority date in this matter is December 5, 2005. The proffered wage as stated on the ETA Form 9089 is $19.95 per hour ($41,496 per year).

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[9]The director misstates in his decision that the petitioner need only establish the ability to pay the proffered wage from the date of filing the petition. The AAO withdraws this portion of the director's finding, but concurs that the evidence fails to establish the petitioner's ability to pay the offered wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on May 14, 2010 and to currently employ five workers. The 2010 Form 1120S, U.S. Income Tax Return from an S Corporation is the only tax return submitted from the petitioner in this proceeding. On the ETA Form 9089, signed by the instant beneficiary on June 30, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage, or any wages, during any relevant timeframe.

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).

In this case, the petitioner submitted no evidence of the predecessor business, [redacted] ability to pay the proffered wage. Even if the petitioner had shown that it is a successor entity to [redacted] which it has not, the petition could not be approved on this basis. The ability to pay the proffered wage has not been established for 2005, 2006, 2007, 2008 or 2009.[10] The petitioner's tax return shows that:

- In 2010, the Form 1120S stated net income[11] was -$836.

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[10]The New York Department of State, Division of Corporations online website indicates that Renovations Plus was dissolved as of January 27, 2010. *See* http://appext9.dos.ny.gov/corp_public/CORPSEARCHENTITY_INFORMATION?p_na...(accessed on July 13, 2012). The petitioner did not begin operations until May 14, 2010, suggesting that any full-time permanent job offer from the priority date onward had lapsed and that the position did not remain a realistic permanent full-time job offer from the priority date onward.

[11] 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

Therefore, for 2010, the petitioner did not have sufficient net income to 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.[12] 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 return demonstrates its end-of-year net current assets for 2010, as shown in the table below.

- In 2010, the Form 1120S stated net current assets of $15,513.

Therefore, for 2010, the petitioner did not have sufficient net current assets to pay the proffered wage. Additionally, the petitioner failed to demonstrate the predecessor entity's ability to pay the proffered wage out of net current assets in 2005, 2006, 2007, 2008 and 2009.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner also submitted copies of the individual bank account statements of one of its shareholders covering March, April and May of 2011. Counsel asserts on appeal that the personal assets of this shareholder can be used to pay the proffered wage. Counsel acknowledges that the petitioner has insufficient income or net current assets in 2010 to cover the proffered wage.

USCIS will not consider the individual assets of one of the petitioner's shareholders. 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,*

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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 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 13, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K for 2010, the petitioner's net income is found on Schedule K of its tax return.

[12] 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.

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." [13]

In some cases, 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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability such 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, or the petitioner's reputation within its industry.

In the instant case, even if the petitioner had submitted its own valid labor certification, its short-term existence and meager net income and net current assets shown on its 2010 tax return does not establish its ability to pay the proffered wage. Further, as noted above, it has failed to demonstrate that it is a successor-in-interest or that the predecessor entity had the ability to pay the proffered wage beginning at the priority date.

Qualifications of Beneficiary

It is additionally noted that the petitioner failed to establish that the beneficiary is qualified for the

[13] Even if the bank account was held by the petitioning business, bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an audited financial statement or Schedule L of a corporate tax return. Cash assets would also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period.

offered position. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months (two years) in the job offered of carpenter. The instant beneficiary claims to qualify for the offered position based on experience listed on Part K of the ETA Form 9089, which he signed under penalty of perjury on June 30, 2007. He listed one job as a carpenter, working for [redacted] from January 2, 2000 to March 31, 2003. A copy of an employment verification letter[14] from [redacted] dated June 5, 2003, signed by [redacted] affirms that the beneficiary worked as a carpenter for that firm from January 2, 2000 to March 31, 2003.

However, a subsequent employment verification letter submitted in response to the director's request for evidence directly contradicts the information provided on the ETA Form 9089, the Form I-140 and the claimed employment for [redacted]. A copy of an employment verification letter from [redacted], of [redacted] signed by [redacted] who is only identified as an "authorized signatory," states that the beneficiary worked for this firm as a carpenter in the "supervision department" from May 19, 1998 to June 8, 2001. This employment was omitted from the ETA Form 9089, cannot be reconciled with the beneficiary's New York employment with [redacted] which is claimed to be from January 2, 2000 to March 31, 2003, and cannot be reconciled with the beneficiary's claimed date of entry to the United States, which is claimed to be December 1999 on both the Form I-140s that have been filed on his behalf.[15] As the record currently stands, none of the qualifying employment experience claimed by the beneficiary would be considered credible.[16]

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[14] The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A)

[15] *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

[16] Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). With regard to immigration fraud, the Act provides immigration officers with the authority to administer oaths, consider evidence, and further provides that any person who knowingly or willfully gives false evidence or swears to any false statement shall be guilty of perjury. Section 287(b) of the Act, 8 U.S.C. § 1357(b). Additionally, the Secretary of Homeland Security has delegated to USCIS the authority to investigate alleged civil and criminal violations of

Based on the foregoing, the AAO finds that labor certification filed with the Form I-140 was not valid; that the petitioner failed to establish that it is a successor-in-interest; that it failed to establish the continuing financial ability to pay the proffered wage; and that it failed to demonstrate that the beneficiary possessed the required qualifying employment experience.

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: Consistent with the foregoing, the appeal is dismissed. The petition remains denied.

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the immigration laws, including application fraud, make recommendations for prosecution, and take other "appropriate action." DHS Delegation Number 0150.1 at para. (2)(I). Section 212(a)(6)(C) of the Act governs misrepresentation and states the following: "Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

As an issue of fact that is material to eligibility for the requested immigration benefit, the administrative findings in an immigration proceeding must include specific findings of fraud or material misrepresentation. Within the adjudication of the visa petition, a finding of fraud or material misrepresentation will undermine the probative value of the evidence and lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The Act further provides that an alien may be deemed inadmissible to the United States if that alien seeks to procure, has sought to procure, or has procured a visa, admission, or other immigration benefits by fraud or willfully misrepresenting a material fact. Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182.

Additionally, a labor certification is subject to invalidation by USCIS if it is determined that fraud or a willful misrepresentation of a material fact was made in the labor certification application. *See* 20 C.F.R. § 656.30(d) which states the following: "After issuance labor certifications are subject to invalidation by [USCIS] . . . upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application." These serious discrepancies in the beneficiary's experience must be explained in any further filings.