(b)(6)

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

DATE: JUN 04 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner then filed a motion to reopen and a motion to reconsider the director's decision. That motion was denied by the director on September 23, 2009. The petitioner appealed the September 23, 2009 decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner[1] describes itself as a construction company. It seeks to permanently employ the beneficiary in the United States as a construction supervisor. The petitioner requests classification of

[1] The original petitioner was (Tax ID In the director's July 15, 2009 decision denying the petition, the director noted, in part, that tax returns and W-2 Forms for the years 2007 and 2008 had been submitted by (Tax ID in support of the petition and that the petitioner had not established that was the successor-in-interest to The director, therefore, did not consider those tax returns or W-2 Forms in determining the petitioner's ability to pay the proffered wage, and concluded that the petitioner failed to establish its ability to pay the beneficiary the proffered wage. Additionally, the director stated that nothing showed that the petitioner's asserted amended tax returns had been filed or that the "corrected" Schedule Ls submitted had been filed and the petitioner failed to explain the basis for the corrected Schedules with different figures sent in response to the director's RFE. The petitioner, therefore, had not established its ability to pay the proffered wage in 2003, 2004, or 2005.

It will be necessary for (Tax ID to establish that it is the successor-in-interest to (Tax ID in any future filings.

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 1986) ("*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 Elvira Auto Body. 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 Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira 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 some instances, the USCIS Service Center Directors have 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.[1] *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.[1]

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.[1] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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. 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.

In order to establish that [redacted] is the successor-in-interest to [redacted] the petitioner submitted the following documents:

- A copy of a Bill of Sale between [redacted] dated June 30, 2007. That document was signed by [redacted] as the owner of both companies and, therefore, both the buyer and the seller. The Bill of Sale purports to transfer to [redacted] "the assets and liabilities of [redacted] which were being "taken over by [redacted] at book value."

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). The petition is accompanied by a labor certification approved by the U.S. Department of Labor.

The record shows that the appeal is properly filed 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 director's decision denying the petitioner's motion to reopen and motion to reconsider states that the petitioner did not overcome the director's original grounds for denial set forth in the director's July 15, 2009 decision. In that decision, the director stated that the petitioner failed to establish that the petitioner had the ability to pay the proffered wage from the priority date onward. The director further noted in a September 23, 2009 decision denying the motion to reopen and motion to reconsider of that it appeared that a financial and/or familial relationship existed between the petitioner's president, and the beneficiary which brought into doubt the legitimacy of the job offer. Specifically, it was noted that Schedules E of Forms 1120 for 2001 and 2002 for the initial petitioner

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- An affidavit from President of (EIN Number wherein the affiant stated that he was the president and owner of (EIN Number and that all assets and liabilities of that company "were taken over by " The affiant further stated that he was "the hundred percent shareholder of the formed on September 14, 2006. In the year 2007, all the assets and liabilities were transferred from to at the book value."

- A letter dated June 28, 2002 from the petitioner's accountant stating that owned 100 per cent of the stock of and that said organization was the successor-in-interest to having taken over all the assets and liabilities of that company.

- A letter dated June 15, 2012 from President of stating that it was the intent of that company to continue to offer the beneficiary employment. Mr. further stated that it was the successor-in-interest of and continued in the same line of work as its predecessor.

The documentation submitted is insufficient to establish that is the successor-in-interest to , as set forth below, as the claimed successor has not established that it is eligible for the immigrant visa in all respects as it has failed to establish the ability of to pay the beneficiary's proffered wage from the priority date to the date of claimed transfer of ownership.

listed and the beneficiary as corporate officers. The 2001 NYC General Corporate Tax Return for lists and the beneficiary as stockholders in the corporation. Both the 2007 NYC General Corporate Tax Return and the 2007 federal tax return lists the beneficiary as the 100 per cent stockholder and the president of Both the 2007 federal tax return of lists as the owner of 100 per cent of the petitioner's stock. The beneficiary's personal tax returns and W-2 statements show that the beneficiary resides at the petitioner's stated address.[2] The petitioner attempted to address these issues by stating that the beneficiary had "mistakenly" been listed as a corporate stockholder and by allegedly filing amended federal tax returns.[3]

On May 29, 2012, the AAO issued a "Notice of Intent to Dismiss and Derogatory Information" notifying the petitioner that according to the records of the New York Secretary of State, its corporate status had been dissolved on August 8, 2008. The petitioner was given an opportunity to address the issue. The AAO noted that if the petitioner is a different entity than the labor certification employer then it must establish that it is a successor-in-interest to the labor certification employer. The AAO further noted that the prior assertions of the petitioner that it had "mistakenly" listed the beneficiary on several of the petitioner's tax returns as a shareholder did not appear to be credible. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL's Division of Foreign Labor Certification as follows:

> The regulations require a 'job opportunity' to be 'clearly open.' Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. *See Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). The petitioner was given an opportunity to

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[2] Based on a search of public records, the petitioner's address appears to be a personal residence.

[3] Although the petitioner submitted amended and filed tax returns for some years, subsequent to the director's denial, other "amended" returns do not contain an Internal Revenue Service (IRS) stamp to exhibit filing the amended returns with the IRS. The portion of the "amended returns" for 2003, 2004, and 2005 show changes to page 1 total income, but do not evidence that claimed "corrected" Schedule Ls were amended and filed with the IRS. As noted by the director in his April 16, 2009 NOID and July 15, 2009 decision, nothing shows that the "corrected" Schedule Ls were filed.

address these concerns and informed that "[t]he AAO will be unable to substantively adjudicate the appeal without a meaningful response to the issues set forth in this notice." The "Notice of Intent to Dismiss and Derogatory Information" informed the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner responded to the AAO's "Notice of Intent to Dismiss and Derogatory Information" on July 29, 2012 and submitted the following documentation:

- A copy of a Bill of Sale between and dated June 30, 2007. That document was signed by as the owner of both companies and, therefore, both the buyer and the seller. The Bill of Sale purports to transfer to "the assets and liabilities of which were being "taken over by at book value."

- An affidavit from President of (EIN Number wherein the affiant stated that he was the president and owner of (EIN Number and that all assets and liabilities of that company "were taken over by The affiant further stated that he was "the hundred percent shareholder of the formed on September 14, 2006. In the year 2007, all the assets and liabilities were transferred from to at the book value."

- A letter dated June 28, 2002 from the petitioner's accountant stating that owned 100 per cent of the stock of and that said organization was the successor-in-interest to having taken over all the assets and liabilities of that company.

- A letter dated June 15, 2012 from President of stating that it was the intent of that company to continue to offer the beneficiary employment. further stated that it was the successor-in-interest of and continued in the same line of work as its predecessor.

The petitioner, however, failed to address, in response to the AAO's "Notice of Intent to Dismiss and Derogatory Information," the discrepancies noted above concerning the stock ownership of the present petitioner or its stated predecessor, or the apparent familial relationship between the beneficiary and This information is crucial to a determination as to whether a bona fide job offer existed upon which a labor certification could be certified and a Form I-140 petition filed. Since the petitioner failed to address this issue or submit requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14).

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).

It is further noted that the petitioner has failed to establish the ability to pay the proffered wage from the priority date onward.

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

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $23.80 per hour ($49,504 per year). The Form ETA 750 states that the position requires two years of experience in the proffered profession.

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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[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). 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).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $174,106, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, 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 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'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 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'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. The petitioner submitted W-2 Forms for 2003, 2004 and 2005 which show wages paid to the beneficiary, but less than the full proffered wage. Those sums are as follows:

- 2003 - $20,400
- 2004 - $20,800
- 2005 - $28,800

Thus, it will be necessary for the petitioner to establish the ability to pay the difference between wages paid to the beneficiary and the full proffered wage in those years. Those sums are as follows:

- 2003 - $29,104
- 2004 - $28,704
- 2005 - $20,704
- In all other relevant years the petitioner must establish the ability to pay the full proffered wage of $49,504.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10,

2011). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on May 18, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request

for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 through 2006 as shown in the table below.

- In 2001, the Form 1120 stated net income of $2,657.
- In 2002, the Form 1120 stated net income of ($4,654).
- In 2003, the Form 1120 stated net income of ($1,280).
- In 2004, the Form 1120 stated net income of $904.
- In 2005, the Form 1120 stated net income of $5,116.
- In 2006, the Form 1120 stated net income of $12,370.

- The petitioner also submitted 2007 and 2008 tax returns from the (EIN As the petitioner has not established that the first entity can pay, successorship in all respects cannot be established. Those returns will not be considered for the reasons set forth above.

Therefore, for the years 2001, 2002, 2003, 2004, 2005 and 2006 the petitioner's tax returns do not state sufficient net income to pay the full proffered wage or the difference between any wages paid to the petitioner and the full proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines .1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2006 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of $57,025.
- In 2002, the Form 1120 stated net current assets of $37,371.
- In 2003, the Form 1120 stated net current assets of $35,291.
- In 2004, the Form 1120 stated net current assets of $35,591.
- In 2005, the Form 1120 stated net current assets of $40,707.

[5] 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 2006, the Form 1120 stated net current assets of $53,077.
- As noted above, the petitioner submitted 2007 and 2008 tax returns from the (EIN As the petitioner has not established that the first entity can pay, successorship in all respects cannot be established. Those returns will not be considered for the reasons set forth above.

Therefore, for the years 2001, and 2006, the petitioner's tax returns would state sufficient net current assets to pay the full proffered wage. In 2003, 2004, and 2005, the tax returns would state sufficient net current assets to pay the difference between the wages paid to the beneficiary and the petitioner's net current assets, however, it is noted, however, that the petitioner submitted amendments to its 2003, 2004 and 2005 tax returns but it has not been shown that those amended returns were appropriately filed with the Internal Revenue Service.[6] The petitioner has not, however, established the ability to pay the proffered wage, or difference between wages paid to the beneficiary and the full proffered wage in 2002, or in 2007 or 2008 based up the petitioner's net income, net current assets or wages paid to the beneficiary as it has not been established that is the successor-in-interest to the petitioner. In 2003, 2004, and 2005, the petitioner's ability to pay the proffered wage based on the petitioner's net current assets cannot be determined without evidence that the amended Schedule L's have been filed with the IRS.

On appeal, counsel asserts that it has submitted tax returns which establish the ability to pay the proffered wage or difference between wages paid to the beneficiary and the full proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

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[6] Although the petitioner submitted amended and filed tax returns for some years, subsequent to the director's denial, other "amended" returns do not contain an Internal Revenue Service (IRS) stamp to exhibit filing the amended returns with the IRS. The portion of the "amended returns" for 2003, 2004, and 2005 show changes to page 1 total income, but do not evidence that claimed "corrected" Schedule Ls were amended and filed with the IRS. As noted by the director in his April 16, 2009 NOID and July 15, 2009 decision, nothing shows that the "corrected" Schedule Ls were filed.

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 submitted the 2007 and 2008 tax returns of an entity that has not been established to be the successor-in-interest of the original petitioner. The petitioner failed to respond to the inquiry related to the beneficiary's ownership and has not established that the Schedule Ls in 2003, 2004, or 2005 were filed with the Internal Revenue Service to reflect amendments. Without such evidence, the AAO cannot conclude that the figures accurately represent what was filed with the Internal Revenue Service and the petitioner has not established its ability to pay the beneficiary's proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage or difference between wages paid to the beneficiary and the full proffered wage from the priority date onward.

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.