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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JAN 2 3 2015 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a consulting engineering and architectural firm. It seeks to permanently employ the beneficiary in the United States as an intermediate architect. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

At issue in this case is whether the immigrant petition was filed by the employer named in the ETA Form 9089 or a valid successor-in-interest, whether the beneficiary possesses the experience required by the terms of the labor certification, and whether the petitioner demonstrated the ability to pay the proffered wage from the priority date onward.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). [1] The priority date of the petition is June 28, 2012.[2]

As set forth in the regulation at 8 C.F.R. § 204.5(c), a "United States employer desiring and intending to employ an alien" may file a Form I-140 and that immigrant petition must be accompanied by a valid labor certification. *See* 8 C.F.R. § 204.5(l)(3)(i). The regulation at 20 C.F.R. § 656.40(c)(2) makes clear that "a permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application, . . . and the area of intended employment." Read in conjunction, the regulations require the same entity, or a successor-in-interest, to file as the employer on both the labor certification and the immigrant petition.

In the instant case, the employer on the labor certification is listed as Inc. with an address of and a Federal Employer Identification Number (FEIN) of The employer listed as the petitioner on the Form I-140 is with an address of and a FEIN of As the employer on the labor certification and immigrant petition differ, a successor-in-interest relationship must be established for the Form I-140 to have been validly filed.

United States Citizenship and Immigration Services (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

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

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).

The Commissioner's decision 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.[3] *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.[4]

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.[5] *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

[3] Merger 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 "mergers," 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).

[4] 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.

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

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.

The petitioner submitted an Asset Purchase Agreement dated March 31, 2012 stating that [redacted] bought office equipment and furniture, rights to use the name, telephone and fax numbers, internet domains, and "all goodwill of" [redacted] The Agreement precludes assumption of [redacted] liabilities by [redacted] The Agreement further states that [redacted] would continue operating its business until November 20, 2012, by which time it would change its name with the Florida Secretary of State to be able to continue its business if it so decided.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. The Agreement submitted allows for [redacted] to continue its operations at its election so that the business as a whole was not transferred. In addition, it states at Item 9.D that the employees of [redacted] would remain employed by that company, implying that [redacted] would continue operations even after some of its assets had been sold per the Agreement. A February 3, 2014 letter from [redacted] states that the beneficiary was employed by [redacted] through November 20, 2012 indicating that [redacted] was in operation through at least that date.

In addition, the date of the Agreement, March 31, 2012 predates the filing of the labor certification as well as the Form I-140. If [redacted] intended to employ the beneficiary, it had the opportunity to file the labor certification under its own name and FEIN because it had already entered into the Asset Purchase Agreement with [redacted] as of the June 28, 2012 priority date. Evidence in the record from the Florida Department of State Division of Corporations indicates that [redacted] existed as an active corporation in the State until September [redacted] which was well after the date of the Agreement and the filing of the Form I-140 immigrant petition. The Agreement demonstrates that two companies existed as of March 31, 2012 and operated separately for a time, including the beneficiary's employment by [redacted] until November 2012.

On appeal, counsel cites a Memorandum from [redacted] Acting Associate Director, Domestic Operations, Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions;

Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37). HQ 70/6.2 AD 09-37, August 6, 2009. This Memorandum restates the standard iterated above 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.

Counsel states on appeal that is involved in the same service industry, purchased the right to use the name along with associated goodwill, and also purchased assets from Counsel further asserts that no essential obligations were assumed in carrying out the business in the same manner as because the industry is not reliant upon physical merchandise or assets, but rather is in the service industry. However, the Agreement specifically precludes transferring all liabilities and obligations and not just those unique to the industry or physical merchandise and assets.

The Asset Purchase Agreement sets out that purchased the name, internet domains, and goodwill of but that Agreement did not set out that was becoming a successor-in-interest to as opposed to purchasing assets to benefit its business. Nothing in the record establishes that is the successor-in-interest to As no successor-in-interest has been established, the petition is not accompanied by a valid labor certification and may not be approved. See 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i).

In addition, the evidence in the record indicates that ceased operations on September 27, 2013. If the employer listed on the labor certification is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

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. 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 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).

Here, the ETA Form 9089 was accepted on June 28, 2012. The proffered wage as stated on the ETA Form 9089 is $57,150 per year. The ETA Form 9089 states that the position requires a Bachelor's degree in Architecture plus 60 months of experience in the job offered of intermediate architect.

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 in 2012 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 9, 2012, the beneficiary claim to have worked for [redacted] since October 31, 2007.

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, 144 (Acting Reg'l Comm'r 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, 614-15 (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 submitted the following Internal Revenue Service (IRS) Forms W-2:

- A 2012 IRS Form W-2 states that [redacted] paid the beneficiary $9,962.40.
- A 2012 IRS Form W-2 states that [redacted] paid the beneficiary $37,536.80.
- A 2013 IRS Form W-2 states that [redacted] paid the beneficiary $60,101.13.

As stated above, the record does not establish that [redacted] is the successor-in-interest to the employer named on the labor certification. As a result, the wages paid by [redacted] may not

be considered in determining the ability to pay the proffered wage to the beneficiary. Because the wages paid in 2012 are less than the proffered wage, must demonstrate the ability to pay the difference between the actual wage paid and the proffered wage in 2012, which is $47,187.60 and the full proffered wage in 2013.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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.*, 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 also Taco Especial*, 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 St. Donuts, 558 F.3d 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,* 719 F. Supp. at 537 (emphasis added).

The record before the director closed on February 12, 2014 with the receipt by the director of the petitioner's submissions in response to the director's November 20, 2013 request for evidence. As of that date, the petitioner's 2013 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2012 is the most recent return available. The only tax return submitted was the 2012 IRS Form 1120S for which stated a net income[6] of $15,670. Because has not been established as the successor-in-interest, this net income may not be considered in determining the ability to pay the difference between the actual wage paid and 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.[7] Net current assets are the difference between the petitioner's current assets and current liabilities.[8] 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 IRS Form 1120S demonstrates net current assets in 2012 of $0. These net current assets are insufficient to establish the ability to pay the difference between the actual wage paid and the proffered wage even if they could be considered.

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 from the priority date

[6] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed December 23, 2014) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional adjustments on its Schedule K for any year, the petitioner's net income is found on line 21 of page one of its tax returns.

[7] On appeal, counsel states that the entire amount of the petitioner's assets should be considered instead of the net current assets. Counsel provides no legal basis for this assertion.

[8] 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.

onward through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the amount of the proffered wage should be prorated for 2012. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, no such evidence was submitted.

Counsel also states that the evidence submitted concerning financial situation should be considered in determining the ability to pay the proffered wage. As stated above, as Consulting has not been shown to be a successor-in-interest to the employer listed on the labor certification, its financial assets may not be considered in determining the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (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 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, has not established that it is a successor-in-interest to No tax returns or other regulatory prescribed evidence was submitted to demonstrate that has the ability to pay the proffered wage and does not appear to be an operational business. In addition, no evidence was submitted to demonstrate that

enjoys a good reputation or suffered an uncharacteristically bad year to excuse a temporary inability to pay the 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.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating 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 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in Architecture.
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Bachelor's Degree in Architecture plus five years post-graduate experience on residential and commercial projects. Must have experience in all phases of design, including MEP, construction documents and construction administration. Must be proficient in BIM and CAD.

The labor certification states that the beneficiary qualifies for the offered position based on her experience as a CAD drafter with from October 31, 2007 through June 28, 2012; as an architect with from July 10, 2006 through September 28, 2007; as an architect with from August 2, 1999 through December 10, 1999; as an intern with from August 5, 1998 through December 23, 1998. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains the following experience letters:

- An October 11, 2012 letter from Project Manager for stating that the beneficiary began working as a CAD Drafter on October 31, 2007.
- A February 3, 2014 letter from Mr. stating that the beneficiary was employed by from October 31, 2007 to November 20, 2012 pursuant to a contract with the
- An October 10, 2012 letter from , Director of , stating the beneficiary worked as an architect from August 2, 1999 through December 10, 1999.
- An October 10, 2012 letter from an associate with stating that she worked with the company from January 2007 to March 2008 and the beneficiary worked as an architect from July 10, 2006 to September 28, 2007.
- A January 27, 2014 letter from legal representative of (formerly stating that the beneficiary was employed as an architect from July 2006 to September 28, 2007.
- A January 24, 2014 letter from accounting assistant for stating that the beneficiary was employed as an architect from July 2006 to September 28, 2007.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.[9] Specifically, the petitioner indicates that questions J.19 and J.20, which ask

[9] 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 60 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not

. . . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

substantially comparable[10] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that her position with the petitioner was as a CAD drafter, and experience in an occupation other than intermediate architect is not accepted. As the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in a different position, the experience may not be used to qualify the beneficiary for the proffered position.

The letters from [redacted] establish that the beneficiary has just over 19 months of experience as an architect.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Beyond the decision of the director, it is unclear that the petitioner will be the beneficiary's employer. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under…section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3[11] states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, publicly available information indicates that [redacted] operates at the address given for the petitioner on the labor certification and Form I-140. The website for [redacted] states that the firm works in "partnership with [redacted] *See* http:/[redacted] (accessed January 22, 2015). It is noted that the president

[10] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
>
> . . .
>
> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[11] The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

of the appellant, is and the website states that Mr. is also the owner of In any further filings, the petitioner must submit evidence to demonstrate which company will actually be employing the beneficiary.[12]

Although not a basis for this decision, it is further noted that the labor certification failed to include qualifications required for the position. Pursuant to the Florida statute regulating professions and occupations, § 481.223(1)(c) Fla. Stat. (2014), no person may:

> (a) Practice architecture unless the person is an architect or a registered architect . . .
>
> (c) Use the name or title "architect" or "registered architect," or "interior designer" or "registered interior designer," or words to that effect, when the person is not then the holder of a valid license issued pursuant to this part.

The record does not reflect that the beneficiary of the instant petition possessed the required license to use the title of "intermediate architect" as of the priority date. Instead, a search of Florida's licensing portal indicates that the beneficiary was first licensed on March 11, 2013. *See* http://www. (accessed January 20, 2015). Further, the record does not reflect that the actual minimum requirements of the offered position of intermediate architect, including the requirement for a license, were listed on the ETA Form 9089, Application for Permanent Employment Certification.

In any further filings, please submit a copy of the beneficiary's architect license to demonstrate that she met the minimum requirements for the offered position of intermediate architect as of the priority date of June 28, 2012. Please also submit all evidence concerning the actual minimum requirements of the position as those requirements were explicitly and specifically expressed during the labor certification process to the Department of Labor (DOL) and to potentially qualified U.S. workers. Such evidence should include a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), all online, print and additional recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. Please also include any other communications with the DOL that may be probative of the minimum requirements, such as correspondences or documents generated in response to an audit.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

[12] A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).