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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 06 116 51998

Office: TEXAS SERVICE CENTER

Date: AUG 13 2009

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a food store. It seeks to employ the beneficiary permanently in the United States as an assistant manager (retail store manager). As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case. The director also determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with six months of qualifying employment experience. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's July 15, 2008 denial, the primary issues in this case are (1) whether or not the petitioner was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case; and (2) whether or not the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a statement dated August 30, 2008, from [REDACTED] a statement dated August 30, 2008, from [REDACTED] a letter dated August 6, 2008, from [REDACTED] of Fidelity Express; and numerous receipts, invoices and billing statements issued to Snax Food Store. Other relevant evidence in the record includes the Articles of Incorporation of 6504 Incorporated; a business license issued to Snax Food Store for 2004-2005 by

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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 Hillsborough County, Florida tax collector; and an Assignment of Lease Agreement dated May 16, 2002 between No. 4, Inc. and 6504, Inc.

In this case, the labor certification was issued to Snax Food Store #4. The I-140 petition was filed by Snax Food Store #4. However, Snax Food Store #4 is a fictitious name.² The petitioner asserts that No. 4 Inc.³ dba Snax Food Store #4 filed the Form ETA 750, and that 6504 Inc.⁴ dba Snax Food Store #4 is the successor-in-interest to No. 4 Inc.

The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Prior to July 16, 2007, the petitioner was permitted to substitute a beneficiary under certain circumstances. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the petitioner, 6504, Incorporated, must demonstrate that the predecessor entity, No. 4 Inc., had the ability to pay the proffered wage from the priority date in March 2001 until the date of the purported change in ownership. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

As noted by the director in his decision, the petitioner has failed to provide sufficient evidence that it is the successor-in-interest to the original employer. The director noted that the Assignment of

² According to the Florida Department of State Division of Corporations website, the fictitious name 'Snax Food Store #4' is registered to 6504, Incorporated. See <http://www.sunbiz.org/scripts/ficidet.exe?action=DETRREG&docnum=G06174900238&rdocnum=G05094900075> (accessed July 20, 2009). The federal employer identification number listed on Form I-140 belongs to 6504, Incorporated. Therefore, we will accept that 6504, Incorporated dba Snax Food Store #4 is the petitioner in the instant case.

³ According to the Florida Department of State Division of Corporations website, No. 4 Inc. was incorporated on July 21, 1993, and was dissolved on March 21, 2005 in the State of Florida. See http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=P93000051012&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=NO4&names_filing_type= (accessed July 20, 2009).

⁴ According to the Florida Department of State Division of Corporations website, 6504 Incorporated was incorporated on January 22, 2002, and is currently an active corporation in the State of Florida. See

http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=P02000009977&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=6504&names_filing_type= (accessed July 20, 2009).

Lease Agreement indicates that while the petitioner assumed the lease location for the store, the Assignment of Lease Agreement does not establish that the petitioner assumed all of the rights, duties, obligations, and assets of the original employer. On appeal, the petitioner submits a statement dated August 30, 2008, from Mr. [REDACTED] indicates that he and his brother-in law, [REDACTED] owned Snax Food Store #4 together until "sometime after" filing the Form ETA 750 in February 2001. He states "my brother-in-law and I did not do anything formal regarding the paperwork describing this transaction." He states that a notary created a new corporation for the business, and that he kept running the business with the same name. Further, on appeal, the petitioner submits a statement dated August 30, 2008, from [REDACTED]. Mr. [REDACTED] states that he was the only owner of No. 4, Inc., although [REDACTED] helped him run the business. He indicates that the business has been in full operation since July 21, 1993, and that [REDACTED] assumed all of the assets and liabilities of the business. However, he states that "no official document was ever done, since we are family and we never felt the need for it." Further, on appeal, the petitioner submits a letter dated August 6, 2008, from [REDACTED] of Fidelity Express, indicating that "[REDACTED] has been doing business with Fidelity Express since February 18, 2000. The petitioner also submits numerous receipts, invoices and billing statements issued to Snax Food Store on appeal.

To establish itself as a successor-in-interest, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In the instant case, the petitioner has established that it continues to operate the same type of business as the original employer. However, the petitioner has not established that it assumed all of the rights, duties, obligations, and assets of the original employer. The record does not contain a purchase agreement, merger agreement, bill of sale or any other documentation evidencing that the petitioner obtained assumed all of the rights, duties, obligations, and assets of the predecessor entity. While the petitioner asserts that it is the successor-in-interest to the original employer, it has also failed to establish the date on which the alleged transfer occurred. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that it is the successor-in-interest to the original employer.

Further, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with six months of qualifying employment experience. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on March 23, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, Mandany 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). According to the plain terms of the labor certification, the applicant must have completed eight years of grade school and four years of high school,⁵ and the applicant must have six months of experience in the job offered. Further, the applicant must have “familiarity in” product knowledge, business knowledge and “Spanish/English speaking.” The duties of the proffered job are listed as follows at Item 13 of the Form ETA 750:

Responsible for the operations of daily functions such as customer service, ordering of supplies, attending to all sales, balance the cash register at the end of the day, balance the lotto machine and make sure all functions are ready for the next day before closing the store.

On appeal, counsel submits a letter of employment certification dated August 22, 2008, from [REDACTED], Human Resources Director of Universal Limited Furniture. The letter indicates that the beneficiary began working at Universal Limited Furniture on February 5, 1993 as a salesperson, selling furniture and greeting customers; that the beneficiary was promoted to assistant manager of a store on May 10, 1993; that she was promoted to assistant administrator in the human resources department on June 6, 1994; and that she resigned on December 22, 1995. Other relevant evidence in the record includes a certificate dated April 3, 2002, from [REDACTED] Director of Human Talent at [REDACTED], and an employment data form for the beneficiary. The letter from [REDACTED] indicates that the beneficiary worked as the assistant of the Publishing Department at [REDACTED] from 1990 to 1992. Her duties included “Coordinator and Supervisor of all decorative and advertising activities of the warehouses under her charge at a national level.”

On appeal, counsel asserts that the beneficiary has the required six months of experience in the proffered job based on her duties as an assistant manager at Universal Limited Furniture.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary’s work experience, she represented that she worked full-time as an administrator assistant HR for Universal Limited Furniture from 1993 to 1995, and that she worked full-time as an advertisement assistant for [REDACTED] from 1990 to 1992. She does not provide any additional information concerning her employment background on that form.

The record of proceeding also contains a Form G-325, Biographic Information sheet, signed by the beneficiary on August 28, 2003, and submitted in connection with the beneficiary’s application to adjust

⁵ The beneficiary’s high school diploma was submitted to the record.

status to lawful permanent resident status. On that form, she indicated that her last occupation abroad was [REDACTED] in Colombia from June 1995 to July 1996.⁶ The record of proceeding also contains another Form G-325, Biographic Information sheet, signed by the beneficiary on February 10, 2006, and submitted in connection with the beneficiary's application to adjust status to lawful permanent resident status. On that form, she left blank a section eliciting information about the beneficiary's last occupation abroad.

The beneficiary's employment data form indicates that she worked as an advertising assistant manager for [REDACTED] from 1990 to 1992; that she worked as an assistant administrator HR for Universal Limited Furniture from 1993 to 1995; that she was self-employed from 1998 to February 2006; that she worked periodically for the petitioner between 1998 and 1999, and between 2001 and 2002; that she worked as an assistant manager for Khawaja Star Mart, Inc. from February 2004 to June 2004 and from February 2005 to April 2005; and that she worked as an assistant manager for the petitioner from April 2006 to the present.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

In his decision, the director determined that the beneficiary's position as the assistant of the Publishing Department at [REDACTED] from 1990 to 1992 did not qualify her for the proffered position, which requires six months of experience in the proffered job of assistant manager. The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired six months of **qualifying employment experience** prior to the priority date from the evidence submitted into this record of proceeding. While the letter of employment certification dated August 22, 2008, from [REDACTED] Human Resources Director of Universal Limited Furniture, indicates that the beneficiary worked as an assistant manager of a furniture store from May 10, 1993 to June 6, 1994, the letter is not consistent with the evidence submitted to the record regarding the beneficiary's employment with Universal Limited Furniture. On Form ETA 750B and on her employment data form, the beneficiary indicated that she worked as an assistant administrator HR for Universal Limited Furniture from 1993 to 1995. She did not mention any employment as an assistant manager during her employment with Universal Limited Furniture. Further, on the beneficiary's Forms G-325, she failed to mention her employment with Universal Limited Furniture, which would appear to be her last employment abroad based on her Form ETA 750B and her employment data form. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

⁶ This employment is not listed on the beneficiary's ETA Form 750B or her employment data form in the record.

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.

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. *Id.* at 591. The petitioner has not resolved the inconsistencies in the record regarding the beneficiary's prior employment. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 Dor v. INS*, 891 F.2d at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

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). Here, the Form ETA 750 was accepted on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$20.19 per hour (\$41,995.20 per year).

Relevant evidence in the record includes IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002, 2003, 2004 for the petitioner, 6504 Incorporated dba Snax Food Store #4; unaudited financial statements for 6504 Incorporated for tax year 2002;⁷ IRS Form 1120S, U.S.

⁷ The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of

Income Tax Return for an S Corporation, for 2001 for No. 4 Inc.; IRS Forms W-2, Wage and Tax Statement, issued by 6504 Incorporated for 2002, 2003, 2004, and 2005; and IRS Forms W-2, Wage and Tax Statement, issued by No. 4 Inc. for 2001.

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 1992⁸ and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 26, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the 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, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner.

However, the beneficiary's IRS Form W-2 for 2001 shows compensation received from No. 4 Inc. of \$8,300.00. The petitioner claims that it is a successor-in-interest to No. 4 Inc., and the AAO has determined that it is not. However, if we assume that the petitioner is the successor-in-interest to No. 4, Inc., in order to maintain the original priority date, the petitioner, 6504 Incorporated, must demonstrate that the predecessor entity, No. 4 Inc., had the ability to pay the proffered wage from the priority date in March 2001 until the date of the purported change in ownership. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). Therefore, even if we assume that the petitioner is the successor-in-interest to No. 4, Inc. and that the transfer took place in 2002,⁹ for the years 2001, 2002, 2003, 2004 and 2005, the petitioner has not established that it or its

management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁸ The petitioner, 6504 Incorporated dba Snax Food Store #4, was incorporated on January 22, 2002.

⁹ The date of the Assignment of Lease Agreement is May 16, 2002.

successor-in-interest employed and paid the beneficiary the full proffered wage, but it did establish that No. 4 Inc. paid partial wages in 2001. Since the proffered wage is \$41,995.20 per year, the petitioner must establish that it can pay the full proffered wage from May 16, 2002 through December 31, 2002, and in 2003, 2004 and 2005. Further, the petitioner must establish that No. 4, Inc. can pay the proffered wage from January 1, 2002 to May 16, 2002, and that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$33,6951.20 in 2001.

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). 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.

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 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 21, 2006, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence dated March 28, 2006. As of that date, the petitioner’s 2005 federal income tax return was due, but was not provided. The petitioner provided tax returns for 2001, 2002, 2003 and 2004, as shown in the table below.

- In 2001, the Form 1120S for No. 4 Inc. stated net income¹⁰ of \$62,492.00.
- In 2002, the Form 1120S for 6504 Inc. stated net income¹¹ of \$31,927.00.
- In 2003, the Form 1120S for 6504 Inc. stated net income of \$48,838.00.
- In 2004, the Form 1120S for 6504 Inc. stated net income of \$26,550.00.

Therefore, based on its net income, the petitioner has not established that it can pay the full proffered wage from May 16, 2002 through December 31, 2002, and in 2004. Further, the petitioner has not established that No. 4, Inc. can pay the proffered wage from January 1, 2002 to May 16, 2002. The petitioner has established that No. 4, Inc. can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2001. In addition, the petitioner has established that it can pay the full proffered wage in 2003.

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

¹⁰ Ordinary income (loss) from trade or business activities as reported on Line 21.

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 sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had an additional deduction shown on its Schedule K for 2002, the petitioner’s net income is found on Schedule K of its tax return. The petitioner’s net income is found on Line 21 of its tax returns for 2003 and 2004.

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,

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 provided tax returns for 2002 and 2004, as shown in the table below.

- In 2002, the Form 1120S for 6504 Inc. stated net current assets of \$120,384.00.
- In 2004, the Form 1120S for 6504 Inc. stated net current assets of \$0.00.

Therefore, based on its net current assets, the petitioner has not established that it can pay the full proffered wage in 2004. Further, the petitioner has not established that No. 4, Inc. can pay the proffered wage from January 1, 2002 to May 16, 2002.

Therefore, even if we assume that the petitioner is the successor-in-interest to No. 4, Inc., from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that the predecessor entity, No. 4 Inc., had the ability to pay the proffered wage from the priority date in March 2001 until the date of the purported change in ownership, or that the petitioner had the ability to pay the proffered wage from the date of the change in ownership through an examination of wages paid to the beneficiary, net income or net current assets.

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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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

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.

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 was not incorporated until after the filing of the labor certification application. The petitioner's gross receipts were \$520,268.00 in 2002 and \$551,031.00 in 2003, but its gross receipts decreased to \$88,050.00 in 2004. The petitioner has not established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.¹³ The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

¹³ When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*. 345 F.3d 683.