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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  
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Services

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FILE:

SRC 07 010 51868

Office: TEXAS SERVICE CENTER

Date:

MAY 26 2009

IN RE:

Petitioner:

Beneficiary:

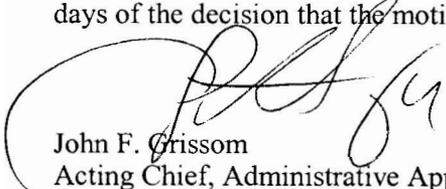
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:

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 Director, Texas Service Center (director) denied the employment-based preference visa petition based on the petitioner's failure to establish its ability to pay the beneficiary the proffered wage. The petitioner appealed to the Administrative Appeals Office ("AAO"), and asserted that it had established its ability to pay the proffered wage based on its ownership of another cleaners, the adjusted gross income of the previous owner, its business property assets, and its depreciation. The AAO remanded the petition to the director to issue an RFE related to the basis for denial, and then for the director to render a determination on the merits of the petition. The director issued an RFE. The petitioner provided a response and new evidence. The director stated that the petitioner has overcome the ground for denial and certified his decision to the AAO for review. The director's decision of March 11, 2009 will be withdrawn; the appeal will be dismissed; and the petition will remain denied.

The petitioner is a cleaners. It seeks to employ the beneficiary permanently in the United States as a shop and alteration tailor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

On certification, the petitioner does not submit any additional evidence.

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

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

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

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

(iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

...

(B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

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

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 or seasonal nature, for which qualified workers are not available in the United States.

On January 9, 2009, after the visa petition was remanded to the director for further consideration and entry of a new decision, the director requested additional evidence of the petitioner's continuing ability to pay the proffered wage from the priority date of the visa petition. The director specifically requested:

Submit a list of all your expenses for such as utilities bills, child care, clothing, phone bills, mortgages, car payments, cable bills, etc. You can also submit [a] copy of any bank accounts, certificate of deposits, money market account, and personal account, stocks that are not reflected in your evidence. Submit evidence in the form of either: copies of annual reports, prepared federal income tax returns all pages, and/or audit[ed] financial statements for 2003 through 2008. Along with the above evidence, you can also submit a copy of the beneficiary's W-2s and/or pay stubs showing your ability to pay.

The petitioner was afforded forty two days to submit the requested evidence. In response, the petitioner submitted a letter, dated February 16, 2009, from the sole proprietor; the previously submitted tax returns; copies of its 2006 and 2007 Forms 1040, U.S. Individual Income Tax Returns, including Schedule C, Profit or Loss from Business; copies of the sole proprietor's monthly recurring personal expenses for 2003 through 2008; copies of the petitioner's and Vans Cleaner's unaudited profit and loss statements for 2008;<sup>1</sup> a copy of the sole proprietor's personal bank statement for the period December 15, 2008 through January 15, 2009; a copy of the petitioner's

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<sup>1</sup> 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 management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the AAO will not consider the petitioner's 2008 unaudited financial statements when determining the petitioner's ability to pay the proffered wage of \$35,630.40.

business bank statement for the period November 22, 2008 through December 23, 2008; and a copy of Vans Cleaners' business bank statement for the period November 27, 2008 through December 30, 2008. The director found that the petitioner had overcome the reasons for the denial of the visa petition and certified his decision to the AAO.

The sole proprietor's monthly recurring personal expenses for 2003 through 2008 were listed as \$55,680, \$55,680, \$56,700, \$56,880, \$57,600, and \$58,680, respectively.

The sole proprietor's 2003 through 2007 Forms 1040 reflect adjusted gross incomes of \$33,071, \$52,733, \$96,744, \$90,819, and \$81,655, respectively.

The sole proprietor's personal bank statement for the period December 15, 2008 through January 15, 2009 shows a beginning balance of \$1,438.03 and an ending balance of \$1,164.23.

The petitioner's bank statement for the period November 22, 2008 through December 23, 2008 reflects a beginning balance of \$9,807.84 and an ending balance of \$13,958.98.

Van's Cleaners bank statement for the period November 27, 2008 through December 30, 2008 reflects a beginning balance of \$6,447.34 and an ending balance of \$14,297.04.

In response to the RFE, the sole proprietor stated:

It is important to note that [REDACTED] also owned another dry cleaning establishment called Vans Cleaners located at 3512 East Coast Highway in Corona Del Mar, CA 92625, three blocks from [the petitioner].

Hence, since [REDACTED] is sole owner of both dry cleaning businesses, Schedule C from both establishments are to be considered together. Moreover, since he is the sole proprietor of both, his 1040 income tax returns with Schedule C from both can also form part of evidence.

Analyses of Schedule C of [the petitioner] and Vans Cleaners.

#### 2003 Tax Year

Schedule C for Vans Cleaners showed a profit of \$51,653. This covers the shortfall from the loss at [the petitioner] of \$<13,906>. This demonstrates the employer's ability to pay the wage.

#### 2004 Tax Year

A shortfall of \$2,484 resulted from [REDACTED] profit at [the petitioner] of \$30,590 in this year. However, Schedule C of Vans Cleaners shows an operating profit of \$32,672. This more than covers the small shortfall.

2005 Tax Year

Ability was established to pay the proffered wage with an AGI (adjusted gross income of \$96,744). Moreover, Schedule C for [the petitioner] showed a profit of \$58,283 in 2005.

2006 Tax Year

Schedule C of [the petitioner] showed a profit of \$75,734 and Schedule C of Vans Cleaners showed a profit of \$35,035.

The copy of 1040 income tax return showed an AGI of \$90,819.

2007 Tax Year

Schedule C of [the petitioner] showed a profit of \$32,344 and Schedule C of Vans Cleaners showed a profit of \$73,661.

The copy of 1040 income tax return showed an AGI of \$81,655.

Attached are copies of the 1040 personal income returns and Schedule C's from 2003 – 2007. Refer to Exhibits E to I.

It should be noted that the Schedule C income for the above period of 2003 through 2007 may need to be adjusted to evaluate [redacted] ability to pay the alien wages. [redacted] ability depends on his cash income which does not appear on Schedule C. His cash income needs to be adjusted with depreciation and amortization expenses. [redacted] adjusted cash income for the above period totaled to \$1,043,692 and the annual average was \$208,738, and it was sufficient to pay the alien's wages. Refer to Exhibit A.

2008 Tax Year

Schedule C tax returns have not been finalized yet but the computer printouts of the Profit and Loss Statements of [the petitioner] and Vans Cleaners for the year 2008 [have been]. Refer to Exhibits B and B.1.

A list of personal monthly recurring expenses from 2003 through [2008] are listed as requested in attached covering: Refer to Exhibits C and C.1.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is September 19, 2003. The proffered wage as stated on the Form ETA 750 is \$17.13 per hour or \$35,630.40 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this 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, signed by the beneficiary on September 10, 2003, the beneficiary does not claim the petitioner as a past or present employer. In addition, counsel has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary that would show that the petitioner employed the beneficiary in any of the pertinent years (2003 through 2007).

Therefore, the petitioner has not established that it employed the beneficiary from the priority date of September 19, 2003 through 2007, and, thus, must establish that it had sufficient funds to pay the entire proffered wage of \$35,630.40 from the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>2</sup>

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by federal case law. *See 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 (9<sup>th</sup> Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their

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<sup>2</sup> See the AAO's original decision regarding its willingness to prorate the proffered wage to \$17,815.20 in 2003.

adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of three in Irvine, California in 2003 through 2007. The sole proprietor's adjusted gross incomes in 2003 through 2007 were \$33,071, \$52,733, \$96,744, \$90,819 and \$81,655, respectively. The sole proprietor listed his monthly personal recurring expenses for 2003 through 2007 as \$55,680, \$55,680, \$56,700, \$56,880, and \$57,600, respectively. Adding the sole proprietor's personal recurring expenses and the proffered wage of the beneficiary, the results are \$73,495.20,<sup>3</sup> \$91,310.40, \$92,330.40, \$92,510.40, and \$93,230.40, respectively. Therefore, the sole proprietor could not have paid the proffered wage of \$35,630.40 (\$17,815.20 in 2003) and supported a family of three with monthly personal recurring expenses of \$55,680, \$55,680, \$56,880, and \$57,600 annually from his adjusted gross incomes in 2003, 2004, 2006, and 2007. The petitioner could have paid the proffered wage of \$35,630 and supported a family of three with monthly personal recurring expenses of \$56,700 annually from his adjusted gross income in 2005.

In response to the RFE on remand, the petitioner claims that it has established its ability to pay the proffered wage of \$35,630.40 based on its and Vans Cleaners' Schedule C's, depreciation, amortization, and its bank statements.

The petitioner is mistaken. As stated in the AAO's original decision, a depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

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<sup>3</sup> See footnote 2.

Therefore, the AAO will not consider depreciation when determining the petitioner's ability to pay the proffered wage of \$35,630.40.

The petitioner's claim that its amortization deduction should be included in the calculation of its ability to pay the proffered wage is also unconvincing. *Black's Law Dictionary*, 83 (6<sup>th</sup> ed. 1990) defines amortization as the allocation (and charge to expense) of the cost of other basis of an intangible asset over its estimated useful life. Intangible assets which have an indefinite life (e.g., goodwill) are not amortizable. Examples of amortizable intangibles include organization costs, patents, copyrights and leasehold interests. A reduction in a debt or fund by periodic payments covering interest and part of principal, distinguished from: (1) depreciation, which an allocation of the original cost of an asset computed from physical wear and tear as well as the passage of time, and (2) depletion, which is a reduction in the book value of a resource (such as minerals) resulting from conversion into a salable product. The operation of paying off bonds, stock, a mortgage, or other indebtedness, commonly of a state or corporation, by installments, or by a sinking fund. An "amortization plan" for the payment of an indebtedness is one where there are partial payments of the principal, and accrued interest, at stated periods for a definite time, at the expiration of which the entire indebtedness will be extinguished. There is no evidence in the record of proceeding that the petitioner could postpone or neglect to pay its periodic payments covering interest and part of the principal of its debts involving intangible assets. The assertions of counsel (the petitioner in this case) do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 also contends that its bank statements should be considered when determining its ability to pay the proffered wage. However, in the instant case, the petitioner has only submitted one personal bank statement (December 15, 2008 through January 15, 2009) which is not enough evidence to show that the petitioner had enough funds to pay the proffered wage from 2003 to 2007. The petitioner would have needed to have a monthly balance of \$6,124.60 in 2003, \$7,609.20 in 2004, \$7,709.20 in 2006, and \$7,769.20 in 2007 in order to pay the beneficiary the proffered wage and to pay his monthly recurring personal expenses. In addition, with regard to the sole proprietor's business checking account, these funds are most likely shown on Schedule C of the sole proprietor's returns as gross receipts and expenses. Business checking account statements may only be utilized as part of a "totality of circumstances" analysis.

The AAO notes that the sole proprietor appears to be trying to use the incomes on his Schedule C's instead of his adjusted gross income as shown on Page 1 of its Forms 1040. However, as noted above, sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*,

703 F.2d 571 (7<sup>th</sup> Cir. 1983). Therefore, a sole proprietor may not establish its ability to pay the proffered wage based solely on its Schedule C.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner has provided its tax returns for 2003 through 2007, with only the 2005 tax return establishing the petitioner's ability to pay the proffered wage of \$35,630.40 and support a family of three in 2003 through 2007. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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.<sup>4</sup>

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<sup>4</sup> The AAO notes that the Form ETA 750 was signed by the prior owner of the petitioner. If the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. 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 petitioner and continues to operate the same type of business as the petitioner. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the petitioner had the ability to pay the proffered

For the reasons discussed above, the petition may not be approved.

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 director's decision of March 11, 2009 on certification will be withdrawn; the appeal will be dismissed; and the petition will remain denied.

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wage from the priority date in 2003 until the date of the change in ownership. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does not establish that the current business is the successor-in-interest to the prior business. The record does not contain an asset purchase agreement, bill of sale or any other documentation evidencing that the petitioner was purchased by the current business entity. The fact that the petitioner is doing business at the same location as the predecessor or even using the same name does not establish that the petitioner is a successor-in-interest. 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)). In any further proceedings, the petitioner would need to demonstrate that it obtained all the rights, duties, obligations, and assets of the prior business.