

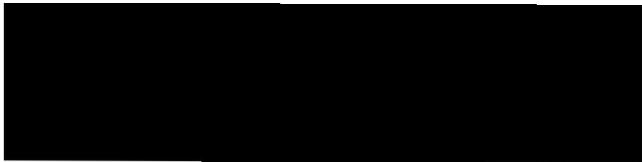


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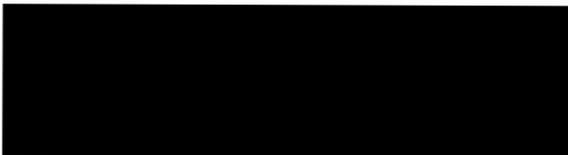
Office: TEXAS SERVICE CENTER Date:

**MAY 28 2009**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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 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 construction company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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 beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal is properly filed, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original October 17, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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,

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<sup>1</sup> The AAO notes that the petitioner listed on the Form I-140, Immigrant Petition for Alien Worker, is Sand Dollar Development Corp. However, the applicant employer listed on the Form ETA 750, Application for Alien Employment Certification, is J&R Development of Long Island, Inc. The ETA 750 was issued to RJD Concrete Construction Corporation. It is unclear from the record whether DOL amended the name of the employer prior to certification, or why the ETA 750 was issued to RJD Concrete Construction Corporation and not to J&R Development of Long Island, Inc.

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 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21.18 per hour (35 hour week) or \$38,547.60 annually.

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<sup>2</sup>.

Relevant evidence submitted on appeal includes counsel's brief and a letter, dated December 16, 2008, from [REDACTED], of [REDACTED]. Other relevant evidence includes copies of the petitioner's 2001 through 2007 Forms 1120S, U.S. Income Tax Returns for an S Corporation, and a letter from counsel, dated May 31, 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2007 Forms 1120S reflect ordinary incomes or net incomes of \$31,738, \$27,964, \$26,159, -\$149,252, -\$75,374, \$64,036, and \$563,281, respectively. The petitioner's 2001 through 2007 Forms 1120S also reflect net current assets of \$34,094, -\$14,057, \$93,567, -\$24,628, -\$42,468, -\$37,354, and \$140,253, respectively.

The letter, dated December 16, 2008, from [REDACTED] states:

As the accountant for the above mentioned taxpayer, I have reviewed the 2006 and 2007 corporate tax returns. It is of my opinion that the corporation had sufficient cash flow to pay out compensation in the amount of \$44,054.40.

Both of these years showed a material net profit and had sufficient gross income to pay far in excess of the above stated amount. In addition, the subcontracted labor expense far exceeds the required amount as well.

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<sup>2</sup> 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).

Counsel's letter, dated May 31, 2006, states:

Please be advised that Sand Dollar Development Corporation purchased all the assets and assumed all the liabilities of RJD Concrete Construction Corporation. The shareholders of Sand Dollar Development Corporation are the same shareholders of RJD Concrete Construction Corporation.

On appeal, counsel asserts:

The Center Director failed to consider the subcontracted labor expense listed on the corporate tax returns in the consideration of the petitioner's ability to pay the proffered wage of \$44,054.40 from the priority date until the beneficiary obtains lawful permanent residence. A review of each corporate tax return submitted reveals on line 19 and statement 1 (2001 and 2002) and statement 3 (2003-2007) expenditures for subcontractor labor in an amount as follows,

2001 - \$101,253 (statement 1)  
2002 - \$617,567 (statement 1)  
2003 - \$141,037 (statement 3)  
2004 - \$368,487 (statement 3)  
2005 - \$340,312 (statement 3)  
2006 - \$448,798 (statement 3)  
2007 - \$1,102,387 (statement 3)

These expenditures can and will be utilized by the petitioner to pay the proffered wage to the beneficiary (see accountant's letter Exhibit 4!) when he joins the petitioner as an employee when he receives lawful permanent residence. The Center Director concedes the petitioner's ability to pay the prevailing wage in 2001, 2002, 2004, and 2005. For years 2003, 2006, and 2007, the subcontractor expenditures evidence sufficient and ample funds to pay the proffered wage. The treatment of the beneficiary as an employee will proportionally reduce the subcontractor's expenditures. Since sufficient funds exist from subcontractor expenditures from the priority date to the beneficiary's receipt of lawful permanent residence, the petitioner has conclusively demonstrated the ability to pay the proffered wage. The petitioner has sufficient capital to pay the proffered wage.

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 April 23, 2001, the beneficiary does not claim the petitioner as a past or present employer.<sup>3</sup> In addition, counsel has not submitted any Forms W-2 or Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, as proof of the beneficiary's employment with the petitioner. Therefore, the petitioner has not established that it employed the beneficiary in the pertinent years (2001 through 2007), and it is obligated to show that it had sufficient funds to pay the entire proffered wage of \$38,547.60 in those years.

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

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<sup>3</sup> The AAO notes that the beneficiary filed Form I-485, Application to Register Permanent Residence or Adjust Status, on March 31, 2008. The G-325A, Biographic Information, filed in conjunction with the Form I-485, and signed under penalty of perjury, by the beneficiary on February 22, 2008 reveals that the beneficiary has been employed by the petitioner since September 2001. A separate Form G-325A in the record, signed by the beneficiary on November 8, 2008, states that the beneficiary has been employed with the petitioner since June 2006. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

\* \* \*

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

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.

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), line 17e (2004-2005), or line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 21, 2008) (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 additional 2001 through 2003 and 2007 income and deductions shown on its Schedule K, the petitioner's net income is found on line 23 of Schedule K for 2001 through 2003 and line 18 for 2007. Because the petitioner did not have additional 2004 through 2006 income and deductions shown on its Schedule K, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

In the instant case, the petitioner's net incomes for 2001 through 2007 were \$31,738, \$27,964, \$26,159, -\$149,252, -\$75,374, \$64,036 and \$563,281, respectively. The petitioner could have paid the proffered wage of \$38,547.60 from its net income in 2006 and 2007 but not in 2001 through 2005.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered

in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's 2001 through 2005 net current assets were \$34,094, -\$14,057, \$93,567, -\$24,628, and -\$42,468, respectively. The petitioner could have paid the proffered wage of \$38,547.60 in 2003 from its net current assets, but not in 2001, 2002, 2004, and 2005. The petitioner has already established its ability to pay the proffered wage in 2006 and 2007 from its net incomes.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage based on its subcontractor expenditures. Counsel also claims that the director conceded that the petitioner has established its ability to pay the proffered wage in 2001, 2002, 2004, and 2005.

From the outset, it should be noted that the director's decision states that the petitioner has established its ability to pay the proffered wage of \$38,547.60 in 2003, 2006 and 2007, not in 2001, 2002, 2004, and 2005 as claimed by counsel.

With regard to the subcontractor expenditures, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the subcontractors involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her. Therefore, in the instant case, the AAO will not consider the wages paid to subcontractors when determining the petitioner's ability to pay the proffered wage.<sup>5</sup> The purpose of the instant visa category is to provide

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<sup>4</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup> It is noted that the beneficiary claims to have been employed by the petitioner since September 2001 (as stated on the beneficiary's Form G-325A). However, as the petitioner has provided no evidence of this employment in the Form of W-2's, Wage and Tax Statements, or 1099-MISC, Miscellaneous Income, the wages earned by the beneficiary during that time (September 2001 to the present) may not be considered when determining the petitioner's ability to pay the proffered wage. Further, if the beneficiary is already employed by the petitioner, he would not be replacing another

employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, 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 Sonogawa*, 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's tax returns indicate it was incorporated in 2001. The petitioner has provided its tax returns for 2001 through 2007, with only the 2003, 2006, and 2007 tax returns establishing the petitioner's ability to pay the proffered wage of \$38,547.60. The petitioner's gross

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worker. The AAO notes that the record of proceeding contains a "Find Report" from Sand Dollar Development Corporation for the period January 1, 2008 through October 3, 2008 that appears to show that Sand Dollar Development Corporation paid the beneficiary wages of \$37,203.02 for that time period. However, this report appears to be internally generated, and there is no evidence in the record that establishes that the beneficiary was actually paid these wages in 2008. In addition, even if the AAO were to accept this report as evidence that the petitioner paid the beneficiary \$37,203.02 during this time frame, the petitioner is still obligated to show that it had sufficient funds to pay the proffered wage of \$38,547.60 from the priority date of April 30, 2001 and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In the instant case, Sand Dollar Development Corporation has not done so.

receipts have varied significantly and declined by more than half from 2002 to 2003. Further, the petitioner's tax returns do not exhibit any wages paid to employees, only wages paid to subcontracted workers. 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.

On appeal, the AAO notes that there are additional issues that must be clarified should the petitioner pursue the instant case further. 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*, 299 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 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The first issue concerns counsel's letter of May 31, 2006 claiming that the petitioner "purchased all the assets and assumed all the liabilities of RJD Concrete Construction Corporation. The shareholders of [the petitioner] are the same shareholders of RJD Concrete Construction Corporation." This mere statement is insufficient evidence that the petitioner is a successor-in-interest to RJD Concrete Construction Corporation (the company the ETA 750 was issued to). The assertions of counsel 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).

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 initial labor certification applicant had the ability to pay the proffered wage from the priority date in 2001 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 petitioner. 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 or the date of any alleged sale. Accordingly, we cannot determine whether the petitioner, Sand Dollar Development Corporation's tax returns are relevant for the entire time period from the priority date, or whether based on any date of sale, the petitioner should have submitted RJD Concrete Construction Corporation's tax returns for the years prior to any sale. 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 to the original entity. 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)). Accordingly, the petitioner has failed to adequately establish that it is the successor-in-interest to the original entity that filed the labor certification.

The additional issues below will not be part of the AAO's dismissal, but the petitioner must provide additional evidence in any further proceedings. At issue also is whether the entity that filed the labor certification, RJD Concrete Construction Corporation, or Sand Dollar Development Corporation was to be the actual employer of the beneficiary. The AAO notes that the ETA 750 states that the beneficiary would work for J&R Development of Long Island, Inc. Both entities are corporations. There is no indication that J&R Development of Long Island, Inc. was a subsidiary of RJD Concrete Construction Corporation or that RJD Concrete Construction Corporation was the owner of J&R Development of Long Island, Inc.<sup>6</sup> Additionally, we note that Sand Dollar Development Corporation lists no employee salaries so that is not clear that the petitioner will employ the beneficiary directly, or if the beneficiary would work at and be paid by another entity.

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

*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 *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

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<sup>6</sup> [http://appsext8.dos.state.ny.us/corp\\_public/CORPSEARCH.ENTITY\\_INFORMATION?](http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?), a public database (accessed on May 19, 2009), reveals that J&R Development of Long Island, Inc. was incorporated on May 28, 1998 and is still active. The same data base reveals that RJD Concrete Construction Corporation was incorporated on May 26, 1998 and was dissolved on June 7, 2007.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

These precedent cases, considered together, establish that an agency that refers workers may qualify as those workers' employer within the meaning of 20 C.F.R. § 656.3. To do so, however, it must be the beneficiary's actual employer, rather than referring potential employees to other employers for a fee. As noted above, since the petitioner, Sand Dollar Development Corporation, does not list any salaries on its tax returns, it is not clear that they will employ the beneficiary directly on a full-time basis, or whether the beneficiary would work at and be paid by a separate entity.<sup>7</sup>

Finally, it is noted that the letter submitted to document the beneficiary's experience is insufficient. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides that:

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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<sup>7</sup> The AAO notes that the beneficiary's Form G-325A states that he was employed by G-3 Builders, Inc. from January 1999 to August 2001. The database referenced in footnote 6 reveals that G-3 Builders and Remodelers, Inc. was incorporated on July 9, 1998 and is still active. The database shows that the address for G-3 Builders and Remodelers, Inc., RJD Concrete Construction Corporation, and J&R Development of Long Island, Inc. are all the same, 11 Bonac Woods Lane, East Hampton, New York 11937. In addition, the petitioner lists its address as the same as the other three entities on Form I-140. There is no evidence in the record that establishes that the beneficiary was ever employed by J&R Development of Long Island, Inc., the place of employment listed on the Form ETA 750, or by RJD Concrete Construction Corporation, the entity that DOL issued the labor certification to.

With regard to the beneficiary's prior employment experience, the letter, dated February 5, 2008, from states:

I the undersigned, employed by G 3 Builders, Inc. hereby certify the following:

1) That [the beneficiary] was employed by me as a Cabinet Maker for a period of 2 years from January, 1999 to August, 2001.

2) That my address at that time was: [REDACTED] East Hampton, New York 11937.

3) That the work hours started from 8:00 o'clock in the morning until 4:00 o'clock in the afternoon 5 days per week.

4) That the duties were:

Created and repaired cabinets. Studied blueprint or drawing and plans sequence of cutting or shaping to be performed. Marked outline or dimensions, according to blueprint or drawing specifications. Matched materials for color, grain, or texture. Operated woodworking machines cut and shape parts. Trimmed component parts of joints, using hand tools. Bored holes of insertion of screws or dowels. Glued, fitted, and clamped parts to form completed unit, using clamps. Sanded and scraped surfaces and joints or articles. Dipped, brushed or sprayed with protective or decorative materials. Installed catches and drawer pulls.

5) That I supervised his work whenever necessary.

6) That I was satisfied with his work and would not hesitate to recommend [the beneficiary] to anyone who might require services.

In the instant case, while the letter of prior experience appears to meet the requirements of 8 C.F.R. § 204.5(l)(3), it is suspect in that it is not written on the company's letterhead (the company has been in business since 1998), it does not provide the title of the employer, and it is signed by someone with the same last name as the beneficiary (possibly a relative) and lists the same address as the petitioner. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

\* \* \*

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such

inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has failed to establish its ability to pay the proffered wage, or that the I-140 petitioner is the valid successor-in-interest to the initial labor certification applicant. Additionally, in any further proceedings, the petitioner should clarify who will be the beneficiary's actual employer, and provide further evidence to demonstrate that the beneficiary has the required two years of experience to meet the terms of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.