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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**

B6



FILE: [REDACTED]
SRC 07 188 50636

Office: TEXAS SERVICE CENTER Date: **AUG 02 2010**

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 on October 3, 1979 and to currently employ 15 workers. The petitioner failed to list its tax identification number on the Form I-140, Immigrant Petition for Alien Worker. 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 April 23, 2001, the beneficiary claims to have worked for Apple Jack Diner² (the entity listed as the employer on the labor certification) from December 1996 to 2001. However, counsel only submitted the 2003 through 2006 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, to support the beneficiary's claim.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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, the petitioner has established that it employed and paid the beneficiary the full proffered wage of \$20,800 in 2005 and 2006. In 2003 and 2004, the petitioner paid the beneficiary a salary of \$5,200 and \$19,400, respectively. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$20,800 and the actual wages paid to the beneficiary in 2003 and 2004. Those differences were \$15,600 in 2003 and \$1,400 in 2004. The petitioner failed to submit

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).

² The petitioner is listed on the Form I-140 as Applejack Coffee Shop, Inc. with an address of 1725 Broadway, New York, NY 10019 while Apple Jack Diner has an address of 230 West 55th Street Broadway, New York, NY 10019.

any Forms W-2 on behalf of the beneficiary for the years 2001 and 2002. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$20,800 in those years. In addition, the petitioner has filed an additional petition to sponsor another alien worker with a priority date subsequent to the priority date of the instant petition. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the wages of all the sponsored beneficiaries with the same or subsequent priority dates from their individual priority dates.

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 petitioner’s tax returns demonstrate its net income for 2001, 2002, and 2004 through 2006, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of \$45,831.
- In 2002, the Form 1120S stated net income of \$104,698.
- The petitioner failed to submit copies of its 2003 federal income tax return.
- In 2004, the Form 1120S stated net income of \$124,293.
- In 2005, the Form 1120S stated net income of \$128,334.
- In 2006, the Form 1120S stated net income of \$164,060.

As the petitioner failed to submit its 2003 income tax return, the petitioner has not established its ability to pay the proffered wage of \$20,800. For the years 2001, 2002, and 2004, it appears that the petitioner had sufficient net income to pay the proffered wage.⁴ However, as the certified labor certification was issued to [REDACTED], the AAO must determine if the petitioner, [REDACTED], [REDACTED] and [REDACTED] are one and the same or if [REDACTED] is a successor-in-interest to [REDACTED]. If the petitioner has not established that [REDACTED] and [REDACTED] are one and the same or that [REDACTED] is a successor-in-interest to [REDACTED] then the petition may not be approved.

³ 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) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 16, 2010) (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 income, credits, deductions, other adjustments shown on its Schedule K for 2004 through 2006, the petitioner’s net income is found on Schedule K of its 2004 through 2006 tax returns.

⁴ As evidenced by the Forms W-2 submitted on behalf of the beneficiary, the petitioner has established its ability to pay the proffered wage in 2005 and 2006 by actually paying the proffered wage of \$20,800.

On August 8, 2007, the director issued a request for evidence seeking evidence that [REDACTED] had a name change to [REDACTED] or that there had been a successor-in-interest to the original employer.

In response, counsel submitted a copy of [REDACTED]'s business license, issued August 26, 2004. The license listed the license type as "sidewalk café" and an address of [REDACTED]. The license did not, however, state [REDACTED] as a trade name (DBA). On appeal, counsel submits a letter from the owner of [REDACTED], a copy of a menu for [REDACTED] and another copy of the petitioner's business license, issued August 26, 2004.

The letter from the petitioner's owner states:

Please be advise[d] that I am the owner/operator of the [REDACTED] located at [REDACTED] and the business is registered under the name of "[REDACTED]" with the Better Business Bureau of New York.

The purpose for the use of the name [REDACTED] was because of a menu change and so fitting of a Diner.

I do hope that this letter will serve to clarify any issues as to the use of the [REDACTED] name.

Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986) is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20*

C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).⁵ This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

⁵The regulation at 20 C.F.R. § 656.30(d) (1987) states:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In the instant case, the petitioner has merely submitted his own statement, a copy of a menu for [REDACTED], and a copy of the petitioner's business license in the petitioner's name to show that [REDACTED] is the successor-in-interest (or one and the same) to [REDACTED]. The assertions of counsel (in the instant case, the petitioner) 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)). Furthermore, a copy of a business license is not sufficient evidence that [REDACTED] is a successor-in-interest to [REDACTED] as it does not actually show that [REDACTED] purchased the petitioner from [REDACTED] that it is [REDACTED] current owner, or that [REDACTED] are one and the same. Further, the New York Department of State, Division of Corporations, Records and Uniform Commercial Code website⁶ states:

Corporations, limited partnerships, and limited liability companies are required by statute to conduct activities under their true legal name. If a corporation, limited partnership, or limited liability company desires to conduct activities under a name other than its true legal name, a certificate complying with Section 130 of the General Business Law must be filed with the New York State Department of State. All other entities such as general partnerships, sole proprietorships, and limited liability partnerships file an Assumed Name Certificate directly with the county clerk in each county in which the entity conducts or transacts business.

The record of proceeding does not contain any evidence that the petitioner filed a certificate complying with Section 130 of the General Business Law with the New York State Department of State. Therefore, the petitioner has not established that it and [REDACTED] are one and the same.⁷

The evidence in the record does not establish the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry

⁶ See <http://www.dos.state.ny.us/corps/assdnmins.html> (accessed on July 16, 2010).

⁷ The AAO notes that all of the tax returns in the record are for the petitioner with the 2005 and 2006 returns showing an address of 1725 Broadway, New York, NY 10019 and the 2001, 2002, and 2004 tax returns showing an address of 230 West 55th Street, New York, NY 10019.

on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

Therefore, the evidence in the record is not sufficient to establish that [REDACTED] is a successor-in-interest to [REDACTED]

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.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, and 2004, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$18,208.
- In 2002, the Form 1120S stated net current assets of \$13,750.
- The petitioner failed to submit its 2003 federal income tax return.
- In 2004, the Form 1120S stated net current assets of -\$3,692.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the proffered wage of \$20,800. In addition, in 2004, the petitioner did not have sufficient net current assets to pay the difference of \$1,400 between the proffered wage of \$20,800 and the actual wages paid to the beneficiary of \$19,400. As the petitioner failed to submit its 2003 tax return, there is no evidence that the petitioner had sufficient net current assets in 2003 to pay the difference of \$15,600 between the proffered wage of \$20,800 and the actual wages paid to the beneficiary of \$5,200. Furthermore, as previously discussed there is no evidence that the petitioner and [REDACTED] are one and the same or that the petitioner is a successor-in-interest to [REDACTED], and therefore, even if the petitioner had established that it had sufficient net current assets, the petition would still be unapprovable.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

⁸According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel asserts that the petitioner has established its continuing ability to pay the proffered wage in 2001, 2002, and 2004 based on prorating the wage in 2001 from the priority date of April 25, 2001 or \$14,000 and on its net incomes in 2002 and 2004.

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

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Even assuming that [REDACTED] had established that it is the same entity or the successor-in-interest to [REDACTED] it has not established that [REDACTED] had the ability to pay the difference of \$15,600 in 2003 between the proffered wage of \$20,800 and the actual wages paid to the beneficiary in 2003.

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 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 has provided tax returns for the years 2001, 2002, and 2004 through 2006.⁹ However, as stated previously, the petitioner has not established that it is the same entity as [REDACTED], the entity to whom the labor certification was issued, or that it is a successor-in-interest to [REDACTED].¹⁰ There also is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. Further, there is no evidence of the petitioner's reputation throughout the 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 beginning on the priority date.

The second issue in this case is whether or not the affidavits submitted as evidence of the beneficiary's experience meets the requirements of 8 C.F.R. § 204.5(1)(3).

In this case, the beneficiary listed his work experience on the ETA Form 750B as having been employed by [REDACTED] from December 1996 to 2001 (no month). The beneficiary listed his job duties the same as those listed by the petitioner on the ETA Form 750A. The beneficiary further listed his work experience on the ETA Form 750B as having been employed by [REDACTED]. Again, the job duties were listed the same as those by the petitioner on the ETA Form 750A.

In his decision, the director states:

In our letter, the petitioner was requested to submit an employment letter from [REDACTED] on company letterhead. In their response, the petitioner submits an affidavit from the beneficiary's former co-worker concerning their employment at [REDACTED] restaurant. The petitioner provides no explanation for the submission of this affidavit in place of a new letter from the restaurant.

The petitioner is required to document the beneficiary's qualifying prior experience in accordance with 8 C.F.R. § 204.5(1)(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

⁹ The petitioner has failed to submit copies of its 2003 tax returns.

¹⁰ The petitioner has failed to submit a copy of a certificate complying with Section 130 of the General Business Law with the New York State Department of State. Therefore, the petitioner has not established that it and [REDACTED] are one and the same

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.

On appeal, counsel submits an affidavit, dated December 21, 2007, from the beneficiary and a copy of a previously submitted affidavit, dated November 2, 2007, from [REDACTED]. The beneficiary's affidavit explains that he was employed by [REDACTED], and was paid off the books. The beneficiary claims that the restaurant is closed and that he is unable to provide any evidence of that employment. The affidavit from [REDACTED] stated that the beneficiary was employed by [REDACTED] restaurant [REDACTED].

The regulation regarding submitting initial evidence at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

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

The regulation at 8 C.F.R. § 103.2 provides guidance in evidentiary matters. It states in pertinent part:

(b) *Evidence and processing—*

(1) *General.* An applicant or petitioner must establish eligibility for a requested immigration benefit. An application or petition form must be completed as applicable and filed with any initial evidence required by regulation or by the instructions on the form. Any evidence submitted is considered part of the relating application or petition.

(2) *Submitting secondary evidence and affidavits—*

(i) *General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be

obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

If primary evidence such as an employer letter is not available, then the petitioner should demonstrate its unavailability and submit relevant secondary evidence. In the instant case, the beneficiary has stated that his former employer is no longer in business¹¹ and has submitted an affidavit from his prior manager who confirms his employment with [REDACTED]. However, the affidavit from the beneficiary is unacceptable as he is clearly a party to the petition, and the beneficiary has not clearly shown that primary evidence is unavailable such as payroll records or pay checks. In addition, the regulations clearly state that if the beneficiary submits affidavits, he must submit two sworn affidavits that overcome the unavailability of both primary and secondary evidence. The beneficiary has not done so. Therefore, the affidavit is insufficient to demonstrate that the beneficiary has two years of full-time experience in the position offered, and the petitioner has failed to adequately document that the beneficiary has the required experience to meet the terms of the certified labor certification.

The affidavit from the beneficiary's prior manager is also unacceptable as it does not list the month the beneficiary ended his employment with [REDACTED], he has not provided the job description of the beneficiary's position, and there is nothing to confirm that the prior manager, [REDACTED], was an actual employee of [REDACTED]. Therefore, the affidavit is insufficient to demonstrate that the beneficiary has two years of full-time experience in the position offered, and the petitioner has failed to adequately document that the beneficiary has the required experience to meet the terms of the certified labor certification.

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.

¹¹ The AAO notes that the beneficiary has not submitted any evidence that corroborates his claim that Pasta D. Oro is no longer in business.