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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

B6

FILE: [REDACTED]
SRC 09 265 52164

Office: TEXAS SERVICE CENTER

Date: **AUG 23 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)

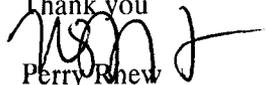
ON BEHALF OF PETITIONER:

[REDACTED]

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

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.¹ It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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

Before the AAO can evaluate the petitioner's ability to pay the proffered wage, the AAO must determine the petitioner's standing in these proceedings. *See* footnote 1.

On September 14, 2009, the petitioner filed the instant petition with the Texas Service Center. With the initial petition, the president of the petitioner submitted a letter, dated June 12, 2009, that states:

This letter serves as evidence that as owner of RJD Concrete Corp., all assets and liabilities have been transferred to my company Sand Dollar Development Corp. The transfer took place 5/26/2006 and RJD Concrete was completely dissolved 4/25/2007.

As the certified labor certification was issued to RJD Concrete Construction Corporation with the employer being J&R Development of Long Island, Inc., the AAO must determine if the petitioner, RJD Concrete Construction Corporation, and J&R Development of Long Island, Inc. are one and the same or if the petitioner is a successor-in-interest to RJD Concrete Construction Corporation or J&R Development of Long Island, Inc. If the petitioner has not established that it and RJD Concrete

¹ 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 on the date of filing, is J&R Development of Long Island, Inc. The ETA 750 cover sheet, dated December 29, 2004, was issued to RJD Concrete Construction Corporation. The record of proceeding contains no evidence that the ETA 750 was amended or otherwise changed to reflect a new 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.

(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).² 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.

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.

²The 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.

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 to show that [REDACTED] is the successor-in-interest to [REDACTED]. No mention was made regarding [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)).

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 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.

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, [REDACTED] 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 [REDACTED] 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. Even if the AAO were convinced that the petitioner is the successor-in-interest to [REDACTED] which it is not, the petitioner is obligated to show that [REDACTED] had sufficient funds to pay the proffered wage from the priority date through the date [REDACTED] was sold, merged, or transferred to the petitioner. The petitioner has not submitted any proof that [REDACTED] was a viable business or that it had the ability to pay the proffered wage. 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. Therefore, the evidence in the record is not sufficient to establish that Sand Dollar Development Corporation is a successor-in-interest to [REDACTED]. Nevertheless, the AAO will review the petitioner's tax returns in the record of proceeding.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on 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 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of cabinetmaker.

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.³

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 May 25, 2001 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.^{4 5}

³ 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).

⁴ The petitioner has submitted a copy of a "Find Report" from [REDACTED] for the period January 4, 2008 through October 3, 2008 that appears to show that [REDACTED] paid the beneficiary wages of \$37,203.02 during that 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. The petitioner has not submitted any Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income, to corroborate those payments. Going on record without supporting documentary evidence is not

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 not established that it employed and paid the beneficiary the full proffered wage of \$38,547.60 in the priority date

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)).

⁵ 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.

year or subsequently.⁶ Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage from the priority date in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding

⁶ As previously noted, the petitioner has submitted an internally generated report showing that the beneficiary earned wages in part of 2008 of \$37,203.02. However, as there is no corroborative evidence of this report, the AAO will not consider the report when evaluating the petitioner's continuing ability to pay the proffered wage from the priority date of April 30, 2001.

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 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income⁷ of \$31,738.
- In 2002, the Form 1120S stated net income of \$27,964.
- In 2003, the Form 1120S stated net income of \$26,159.
- In 2004, the Form 1120S stated net income of -\$149,252.
- In 2005, the Form 1120S stated net income of -\$75,374.
- In 2006, the Form 1120S stated net income of \$64,036.
- In 2007, the Form 1120S stated net income of \$563,281.

For the years 2006 and 2007, it appears that the petitioner had sufficient net income to pay the proffered wage. However, as previously discussed there is no evidence that the petitioner is a successor-in-interest to [REDACTED] and therefore, even if the petitioner had established that it had sufficient net income, the petition would still be unapprovable.

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

⁷ 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 August 13, 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 2001 through 2003 and 2007 federal tax returns, the petitioner's net income is found on Schedule K of its 2001 through 2003 and 2007 tax returns.

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

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 through 2007 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$34,094.
- In 2002, the Form 1120S stated net current assets of -\$14,057.
- In 2003, the Form 1120S stated net current assets of \$93,567.
- In 2004, the Form 1120S stated net current assets of -\$24,628.
- In 2005, the Form 1120S stated net current assets of -\$42,468.
- In 2006, the Form 1120S stated net current assets of -\$37,354.
- In 2007, the Form 1120S stated net current assets of \$140,253.

Therefore, for the years 2003 and 2007, it appears that the petitioner had sufficient net current assets to pay the proffered wage of \$38,547.60. Again, there is no evidence 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.

On appeal, counsel claims that the petitioner has established its ability to pay the proffered wage based on its subcontractor expenditures and on the totality of the circumstances. Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of his contention.

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.

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

one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

the instant case, the AAO will not consider the wages paid to subcontractors when determining the petitioner's ability to pay the proffered wage.⁹ The purpose of the instant visa category is to provide 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.

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

⁹ 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 worker. The AAO notes that the record of proceeding contains a "Find Report" from [REDACTED] for the period January 1, 2008 through October 3, 2008 that appears to show that [REDACTED] 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 its predecessor had sufficient funds to pay the proffered wage of \$38,547.60 from the priority date of April 30, 2001 and continuing until it was sold, merged, or transferred to the petitioner. The petitioner is obligated to show that it had sufficient funds to pay the proffered wage from the date it became a successor-in-interest to the predecessor company and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In the instant case, [REDACTED] has not done so.

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's tax returns indicate it was incorporated in 2001. The petitioner has provided tax returns for the years 2001 through 2007. However, as stated previously, the petitioner has not established that it is a successor-in-interest to [REDACTED] and there is no evidence that [REDACTED] had sufficient funds to pay the proffered wage in 2001 and continuing until it was sold, merged, or transferred to the petitioner. The petitioner's gross receipts have varied significantly and declined by more than half from 2002 to 2003. 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 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is an additional issue that constitutes an independent basis for dismissal and which must be clarified should the petitioner pursue the instant case further. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

At issue also is whether the entity that filed the labor certification, [REDACTED] or [REDACTED] was to be the actual employer of the beneficiary. The AAO notes that the ETA 750 states that the beneficiary would work for [REDACTED]. Both entities are corporations. There is no indication that [REDACTED] was a subsidiary of [REDACTED] that [REDACTED] was the owner of [REDACTED]. Additionally, we note that [REDACTED] 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:

¹⁰ http://appsext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?, a public database (accessed on August 11, 2010), reveals that [REDACTED] was incorporated on May 28, 1998 and is still active. The same data base reveals that [REDACTED] was incorporated on May 26, 1998 and was dissolved on June 7, 2007.

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.

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.^{11 12}

¹¹ The AAO notes that the beneficiary's Form G-325A states that he was employed by [REDACTED] from January 1999 to August 2001. The database referenced in footnote 6 reveals that [REDACTED] was incorporated on July 9, 1998 and is still active. The database shows that the address for [REDACTED] are all the same, [REDACTED]. 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 [REDACTED] the place of employment listed on the

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, the petitioner has not provided evidence of who will be the beneficiary's actual employer.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

Form ETA 750, or by RJD Concrete Construction Corporation, the entity that DOL issued the labor certification to.

¹² It should be noted that the regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.