

identify... to
prevent clearly unwarranted
invasion of personal privacy

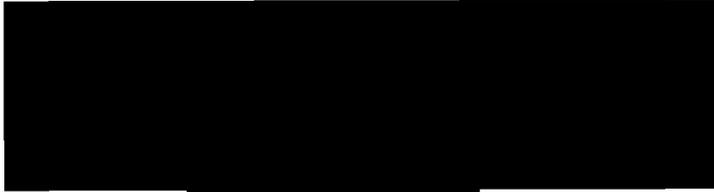
PUBLIC COPY

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:



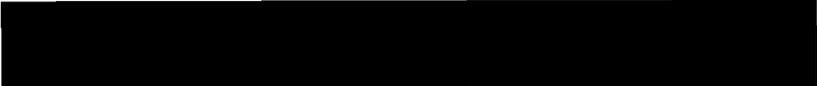
Office: TEXAS SERVICE CENTER

Date: **MAR 30 2010**

SRC 07 800 23862

IN RE:

Petitioner:



Beneficiary:

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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

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 dry cleaner. It seeks to employ the beneficiary permanently in the United States as a dry cleaning supervisor. The petition is accompanied by a copy of a webpage, accessed on March 2, 2007, showing that a Form ETA 750, Application for Alien Employment Certification, was certified by the United States Department of Labor (DOL). The petition is also accompanied by a copy of a *Center Receipt Notification Letter* for the petitioner that provides a priority date of April 25, 2001.¹ 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.

On appeal, the petitioner, through former counsel,² submits a brief relating to its ability to pay the proffered wage.

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.

As set forth in the director's September 20, 2008 denial, an 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 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

¹ The AAO notes that the original certified labor certification was not submitted and that the director did not request that the original certified labor certification be submitted. Without the original certified labor certification, the AAO is unable to determine if the information provided on the copy is true. This issue will be discussed in detail further in this decision.

² The petitioner will be treated as representing itself as it does not have an attorney authorized to practice law representing it. Current counsel was suspended from the practice of law in Florida on July 28, 2009. Additionally, former counsel, [REDACTED], submitted the appeal, but was suspended from the practice of law in Florida on October 29, 2008 and was permanently disbarred from the practice of law in Florida on January 21, 2010. See <http://www.floridabar.org/names.nsf> (accessed on March 22, 2010).

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 25, 2001. The proffered wage as stated on the uncertified Form ETA 750 is \$750 per week (\$39,000 per year). The uncertified Form ETA 750 states that the position requires two years of experience in the job offered as a dry cleaning supervisor.

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.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 February 1, 1994 and to currently employ 12 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 16, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg.

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).

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 Sonegawa*, 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 during any relevant timeframe including the period from the priority date in 2001 or subsequently. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$39,000 from the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

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

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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

The record before the director closed on July 11, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available.⁴ The petitioner’s tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.⁵

⁴ The AAO notes that the petitioner did not submit and the director did not request a copy of the petitioner’s 2007 tax return.

⁵ The AAO notes that the petitioner lists, on Form I-140, its Federal Employer Identification Number (FEIN) as [REDACTED]. However, the petitioner’s tax returns show its FEIN as [REDACTED]. Pursuant to the regulation at 20 C.F.R. § 656.3, “An employer must possess a valid Federal Employer Identification Number (FEIN).” If the two companies have separate tax identification numbers, they would be separate employers. The petition was filed with USCIS on July 27, 2007, and the petitioner has not explained this discrepancy, nor has it shown that it is a successor-in-interest to the entity with the FEIN of [REDACTED]. A full discussion regarding successor-in-interest will follow later in this decision. In addition, a review of public records at <http://www.sunbiz.org/scripts/cordet.exe> (accessed on March 22, 2010) shows that the FEIN [REDACTED] belongs to [REDACTED]. This entity was voluntarily dissolved on February 5, 2009. If the petitioning business is no longer an active business, the petition and its appeal to this office have become moot. In which case, the appeal could have been dismissed as moot. Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition’s approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer’s business in an employment-based preference case. A review of public records at <http://www.sunbiz.org/scripts/cordet.exe> (accessed on March 22, 2010) shows that the FEIN [REDACTED] belongs to [REDACTED] with

- In 2001, the Form 1120S stated net income⁶ of -\$42,493.
- In 2002, the Form 1120S stated net income of -\$10,761.
- In 2003, the Form 1120S stated net income of -\$48,232.
- In 2004, the Form 1120S stated net income of -\$32,229.
- In 2005, the Form 1120S stated net income of \$41,740.
- In 2006, the Form 1120S stated net income of \$10,242.
- The petitioner did not submit its 2007 Form 1120S.

Therefore, for the years 2001 through 2004 and 2006, the petitioner did not have sufficient net income to pay the proffered wage of \$39,000. In 2005, the petitioner did have sufficient net income to pay the proffered wage of \$39,000. Therefore, the petitioner has established its ability to pay the proffered wage of \$39,000 in 2005 out of its net income, but not in 2001 through 2004 and 2006.

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.⁷ 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

a principle address of [REDACTED] This entity was incorporated on February 26, 1992 and is still active. Further pursuit of this visa petition must explain the difference in the two FEIN's and must provide documentation to corroborate any assertions made in support of this difference.

⁶ 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 January 20, 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 did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2005, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S. Because the petitioner did have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its 2006 tax returns.

⁷According 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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2004 and 2006,⁸ as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$12,493.
- In 2002, the Form 1120S stated net current assets of \$1,079.
- In 2003, the Form 1120S stated net current assets of \$8,891.
- In 2004, the Form 1120S stated net current assets of \$24,966.
- In 2006, the Form 1120S stated net current assets of \$52,526.

Therefore, for the years 2001 through 2004, the petitioner did not have sufficient net current assets to pay the proffered wage of \$39,000. In 2006, the petitioner did have sufficient net current assets to pay the proffered wage of \$39,000. Therefore, the petitioner has established its ability to pay the proffered wage in 2005 from its net income and in 2006 from its net current assets. The petitioner has not established its ability to pay the proffered wage in 2001 through 2004.

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, the petitioner asserts that it has established its ability to pay the proffered wage of \$39,000 based on its gross income and on the wages it has paid to its employees in the past.

The petitioner'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.

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 the Service should have considered income before expenses were paid rather than net income. Therefore, the AAO will not consider the petitioner's gross income without also considering its total deductions.

In addition, 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. There is no evidence that the beneficiary will replace another worker and there is no evidence that the position of any other employee involves the same duties as those set forth in the uncertified Form ETA 750. The petitioner has not documented any position, duty, or termination of a worker who performed the duties

⁸ The petitioner has already established its ability to pay the proffered wage in 2005 based on its net income.

of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 Form I-140 indicates the petitioner was incorporated in 1994. The petitioner has provided tax returns with a different EIN than the one on Form I-140 for 2001 through 2006 with only the 2005 and 2006 tax return establishing the petitioner's ability to pay the proffered wage of \$39,000. 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. In addition, 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, the letters submitted to document the beneficiary's experience are insufficient. 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 uncertified ETA Form 750 requires that the beneficiary possess two years of experience as a dry cleaning supervisor.

In this case, the beneficiary listed his work experience on the uncertified ETA Form 750 as having been employed by [REDACTED] as an area supervisor at [REDACTED] from October 1997 to November 2000. The beneficiary listed his job duties with [REDACTED] as:

Supervises and coordinates activities of workers engaged in receiving, marking, washing, and ironing clothes or linen in laundry. Determine sequence in which flat-work, one day service, white and colored work are to be scheduled through laundry to provide quick; and efficient service to customers and regulate work loads. Inspect articles to determine methods of specific cleaning requirements. Inspect finished laundered articles to ensure conformance to standards. Observes operation of machines and equipment to detect possible malfunctions. Investigates and resolves customer complaints of unsatisfactory work or bundle shortage. Study literature of launderers' and dry cleaners' associations, and confers with salespersons to obtain information on new or improved work methods and equipment.

The beneficiary further listed his work experience on the uncertified ETA Form 750 as having been employed by [REDACTED] as a spotter/presser at [REDACTED] from March 1994 to September 1997. The beneficiary listed his job duties with [REDACTED] as:

Spotter: Identify stains in wool, synthetic and silk garments and household fabrics and applies chemical solutions to remove stains, determining spotting procedures on basis of type of fabric and nature of stain. Spread article on work table and position stain over vacuum head or on marble slab. Sprinkle chemical solvents over stains and pat areas with brush or sponges until stain is removed. Apply chemicals to neutralize effect of solvents. Spray steam, water or air over spot to flush out chemicals and dry garment. Apply bleaching powder to spot and spray with steam to remove stains from certain fabrics which do not respond to other cleaning solvents.

Presser: Operate steam pressing machine and/or use hand iron to press garments, such as trousers, sweaters, and dresses, including silk and wool garments.

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.

In the instant case, the experience letters do not meet those requirements. The letter, dated April 7, 2001, from [REDACTED] of [REDACTED] does not give a description of the beneficiary's experience and does not state whether the employment was full-time or part-time. The experience letter merely states that the beneficiary was employed from March 1994 to September 1997 and that "[h]e was an excellent and efficient employee." Therefore, the letter is insufficient to demonstrate that the beneficiary has two years of full-time experience in the position offered.

The letter, dated March 3, 2001, from [REDACTED], does not give a description of the beneficiary's experience and does not state whether the employment was full-time or part-time. The experience letter merely states that the beneficiary "worked as a supervisor in the different areas of my company since October 1997 to November 2000". Therefore, the letter 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.

Furthermore, the AAO notes that the record of proceeding contains two Forms G-325A, Biographic Information, signed by the beneficiary under penalty of perjury. The first Form G-325A, signed by the beneficiary in 1999, does not list either [REDACTED] or [REDACTED] as a place of employment. Instead, the Form G-325A lists the beneficiary's places of employment as [REDACTED] as a presser from February 1995 to August 1996; [REDACTED] as a driver from March 1995 to November 1995; [REDACTED] as a driver from November 1995 to December 1996; [REDACTED] as a driver from December 1996 to January 1997; and [REDACTED] as a driver from January 1997 to the present (June 15, 1999). Therefore, while the uncertified ETA Form 750 and the experience letter indicates that the beneficiary was employed at [REDACTED] from March 1994 to September 1997 (40 hours per week according to the ETA Form 750), the beneficiary was also employed at [REDACTED] and [REDACTED]. In addition, while the uncertified ETA 750 and the experience letter indicate that the beneficiary was employed at [REDACTED] from October 1997 to November 2000 (40 hours per week according to the ETA Form 750), the beneficiary was also employed at [REDACTED].

The second Form G-325A (unsigned) also does not list either [REDACTED] or [REDACTED] as a place of employment. Instead, the Form G-325A claims that the beneficiary was self-employed as a manager from January 2001 to the present time.

The AAO further notes that the record does not contain any verifiable evidence as proof of the beneficiary's employment with [REDACTED] or [REDACTED], such as Forms W-2, Wage and Tax Statements, or Forms 1099-MISC, Miscellaneous Income. In fact, the record of proceeding contains copies of the beneficiary's 1996 through 1998 Forms 1040, U.S. Individual Income Tax Returns, along with copies of the beneficiary's 1996 through 1998 Forms W-2 or Forms 1099-MISC. None of the Forms W-2 or Forms 1099-MISC is from [REDACTED] or [REDACTED]. *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.

Another issue beyond the decision of the director is that the record in this case lacks an original certified ETA Form 750 labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

Initial evidence –(i) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. . .

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

Initial evidence. (1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. 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.

(Emphasis added.)

The regulation at 8 C.F.R. § 103.2(b)(4) states:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the CIS.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1(2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.). However, in this case, there is a labor certification in the record of proceeding, but it is a copy and an original is required.

The regulation at 20 C.F.R. § 656.30(e) states:

Duplicate labor certifications.

- 1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
- 2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Officer or DHS tracking number.

In the instant case, the record does not contain any information that indicates that the director requested the original labor certification or that the petitioner was unable to provide the original labor certification. Therefore, for this additional reason, the petition is not approvable.

Beyond the decision of the director, the petitioner has not established that the entity on the Form I-140, [REDACTED] with FEIN [REDACTED], and the entity listed on the tax returns, [REDACTED], with FEIN [REDACTED], are one and the same or that the petitioner is a successor-in-interest to [REDACTED]

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).⁹ 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. 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 record of proceeding does not contain a bill of sale showing that the petitioner purchased [REDACTED] or any other evidence explaining the relationship between the petitioner and [REDACTED].

The evidence in the record does not establish the organizational structure of the predecessor prior to

⁹The 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 transfer (if, in fact, there was a 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.

Therefore, the evidence in the record is not sufficient to establish that [REDACTED] is a successor-in-interest to [REDACTED], or that the two entities are one and the same. Thus, for this additional reason, the petition may not be approved.

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.