

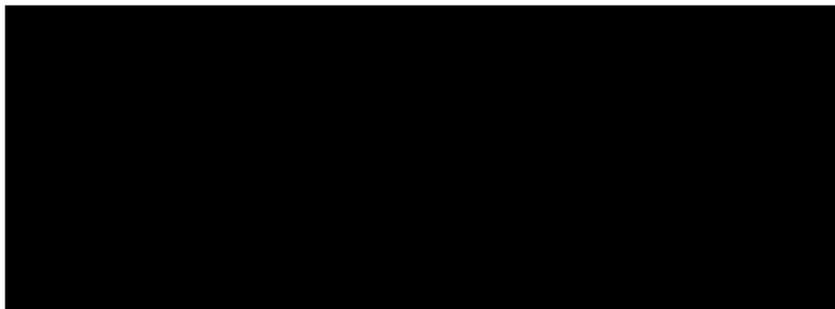
identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

PUBLIC COPY



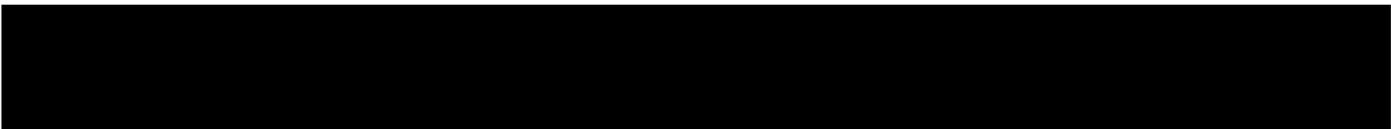
B6

FILE:

Office: TEXAS SERVICE CENTER

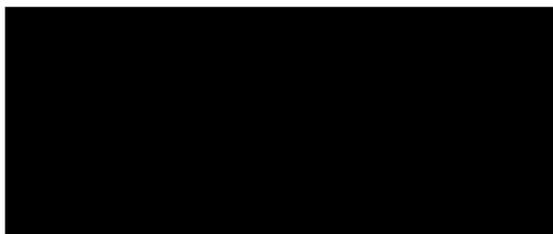
Date: NOV 24 2010

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:



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 \$630. 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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 is the successor-in-interest to the company that filed the labor certification, so that no approved labor certification supported the petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

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 As set forth in the director's May 17, 2007 denial, the issue in this case is whether or not the petitioner is a valid successor-in-interest to the company that filed the labor certification.

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.

Form ETA 750, filed on April 25, 2001 states the labor certification applicant as [REDACTED] with an address of [REDACTED]. The petitioner filed Form I- [REDACTED] with an address of [REDACTED]. Form I-140 does not state the petitioner's Federal Employee Identification Number. In a prior I-140 filing, the owners of the initial labor certification applicant submitted a letter which stated that Le Peep and Egglettes were the same company, that Egglettes was the corporate name for [REDACTED], d/b/a Black Stallion asserts that it is the successor-in-interest to the original Egglettes and Le Peep in order to continue processing under the same labor certification.

Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986), is an AAO decision designated as precedent by the Commissioner, which applies to successor-in-interest cases. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS

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).

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] (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto 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 Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body 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 Elvira Auto Body's 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).² This is why the Commissioner said "[i]f the petitioner's claim is found to be true,

² The 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

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.

On December 8, 2009, the AAO issued a Notice of Intent to Deny ("NOID") regarding the relationship between the petitioner and [REDACTED] the company that filed the labor certification. In this NOID, the AAO specifically requested "corporate or state filings to reflect any name change or that [REDACTED] was an alternate or fictitious name for [REDACTED] . . . evidence that [REDACTED] share the same federal tax identification number" to resolve the issue of the petitioner's and the other entities' relationship. In response to this NOID, the petitioner submitted no evidence regarding the petitioner's relationship with [REDACTED] or any of the other aforementioned entities. Instead, the petitioner responded only to that part of the NOID requesting financial documents concerning its ability to pay the proffered wage. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As stated in the NOID, the evidence in the record demonstrates a relationship between [REDACTED] but contains discrepant information on the relationship between [REDACTED] and [REDACTED]. A February 2005 letter from [REDACTED] stating that [REDACTED] changed its name to [REDACTED] in January 2003 is in conflict with a November 9, 2004 letter from [REDACTED]

shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

identifying himself as general manager of Le Peep and the beneficiary's Form G-325 stating that he was employed with [REDACTED] until June 2005 when he began working for [REDACTED].³ "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Despite being specifically notified about this discrepancy in the NOID, the petitioner submitted no evidence to resolve the discrepancy.

The evidence in the record, previously submitted by the petitioner and noted in the AAO's NOID, includes a letter dated February 14, 2005 from [REDACTED] stating that the restaurant changed its name from [REDACTED] in January 2003; a bill of sale transferring the rights and responsibilities of [REDACTED] restaurant from [REDACTED] to [REDACTED] January 31, 2007 letter from [REDACTED] assuming the rights and responsibilities of [REDACTED]; and Form W-2s demonstrating that the beneficiary was paid by [REDACTED] in 2001 to 2004 and [REDACTED] in 2005. The Bill of Sale between [REDACTED] to [REDACTED] states that [REDACTED]; "sells, transfers, sets over and assigns unto Buyer [REDACTED] the business:

now located in leased premises at [REDACTED] including the stock in trade, food and beverages, fixtures, equipment, good-will, trade name [REDACTED] licenses, lease and all rights under any contracts for vending machines, public telephones or any other rental or use of equipment at the said premises, more particularly described and mentioned in the Inventory attached hereto.

In addition, the Bill of Sale specifies that the purchaser will

assume and use the name [REDACTED] from and after June 13, 2005 and . . . the existing [REDACTED] will either change its name or dissolve itself. The existing [REDACTED] shall retain its federal and state ID numbers and pay its own sales and income taxes. The newly formed limited liability company . . . which will assume the name [REDACTED] shall obtain its own federal and state ID numbers and shall file its own income tax and sales tax returns."

The Bill of Sale is signed by representatives of the seller, [REDACTED] but not by representatives of the buyer, which is identified as [REDACTED]. While the document is unsigned by [REDACTED] subsequent tax returns show that [REDACTED] did business under a different tax identification number and that [REDACTED] was a partner in this business. The 2007 Form W-2 submitted for the beneficiary shows that [REDACTED] has a [REDACTED] which is the same FEIN as the one used by

³ In contrast, the record does contain a bank statement dated December 31, 2001, which is addressed to [REDACTED] which lends support that the two companies were at least originally related.

██████████ on its 2006 Form 1065 Partnership Return. In addition, the bank statements from Commerce Bank stated June 30, 2005 list the account holder as ██████████. Therefore, it appears that ██████████ assumed the rights, duties, obligations, and assets of ██████████ would be the successor-in-interest to ██████████. However, no evidence was submitted to show that the ██████████ does business as or is related to ██████████ or ██████████. The AAO's NOID requested that the petitioner submit evidence that ██████████ and the ██████████ share the same tax identification number. Counsel did not submit any evidence or address this point. Therefore, the evidence is insufficient to establish that ██████████ does business as the ██████████ in order to continue processing under the same labor certification. The heading on a letter from ██████████, owner of ██████████ states the business as ██████████ formerly ██████████." This letter does not indicate that the business operated under both names but instead that the companies were separate. The petitioner submitted no evidence to show that ██████████ are the same entity.

Several internet searches reveal that ██████████ is still operational at the address shown on the original labor certification.⁴ These internet searches reveal that ██████████ is a separate restaurant, which also appears to be currently operating, or recently and simultaneously operating.⁵ If both entities were operating simultaneously, this calls into question whether ██████████ is the successor to the original ██████████. In addition, the New Jersey State Business Gateway Service shows that ██████████ are both operational. See <http://accessnet.state.nj.us/GatewayWatchNameSearch.asp> (accessed November 22, 2010.) To the extent that the petitioner asserts that the beneficiary will be employed by ██████████ this appears to be incorrect as nothing shows that ██████████ is connected to ██████████. The I-140 cannot be approved for ██████████. The petitioner was afforded an opportunity to resolve the successorship issue and inconsistencies in the record. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner failed to address and submit evidence to establish the chain of successorship in its entirety from ██████████. Therefore, the

██████████ (accessed November 22, 2010).

⁶ Additionally, an internet search of the ██████████ shows a telephone number of ██████████. A call to this number on November 22, 2010 revealed that the number was not in service. ██████████ phone number is listed online as ██████████. A call to this number shows ██████████ is still operational.

evidence in the record is insufficient to establish that [REDACTED] is the successor-in-interest to the initial labor certification applicant, [REDACTED]

In addition to the issue regarding successor-in-interest, the NOID advised the petitioner that it failed to provide evidence of its ability to pay the proffered wage. 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*, 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).

The regulation 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 (with the sponsoring organization as [REDACTED] was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$12.59 per hour (\$26,187.20 per year). The Form ETA 750 states that the position requires two years of experience as a cook.

The record indicates that [REDACTED] is structured as a limited liability company and filed its tax returns on IRS Form 1065.⁷ On the petition, the petitioner claimed to have been formed on March

⁷ The company that submitted tax returns for the years 2005 and 2006 with a Federal Employer Identification Number of [REDACTED]. The tax returns state [REDACTED] as the business name. The tax return does not state any alternate business name or that it "does business as" [REDACTED].

⁸ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the

30, 2000 and to currently employ 16 workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary claimed to work for [REDACTED] since March 2000.

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. The petitioner supplied the following Form W-2s:

- The 2001 Form W-2 states that [REDACTED] with a [REDACTED] paid the beneficiary \$16,942.63.
- The 2002 Form W-2 states that [REDACTED] paid the beneficiary \$18,360.
- The 2003 Form W-2 states that [REDACTED] paid the beneficiary \$17,595.
- The 2004 Form W-2 states that [REDACTED] paid the beneficiary \$17,609.88.
- The 2005 Forms W-2 states that [REDACTED] with a [REDACTED]⁹ paid the beneficiary \$11,293.63 and that [REDACTED] paid the beneficiary \$7,820.
- The 2006 Form W-2 states that [REDACTED] paid the beneficiary \$25,182.48.
- The 2007 Form W-2 states that [REDACTED] paid the beneficiary \$20,874.
- The 2008 Form W-2 states that [REDACTED] paid the beneficiary \$9,860.

LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, submitted no such election form and will be considered to be a partnership for federal tax purposes.

⁹ This tax identification number matches the tax identification number on the 2005 and 2006 tax returns for [REDACTED] so that we accept that [REDACTED] are the same company. However, nothing establishes the connection to the [REDACTED]

As stated above, while it appears that [REDACTED] is the successor-in-interest to [REDACTED] nothing shows that [REDACTED] does business as [REDACTED] so that it is unclear that the wages paid by [REDACTED] may be used to show the petitioner [REDACTED] ability to pay the proffered wage. None of the Form W-2s demonstrate that the petitioner paid the beneficiary the proffered wage for any of the years in question. The petitioner must then demonstrate its ability to pay the difference between the actual wage paid and the proffered wage for all of these years. In 2001, the difference is \$9,245; in 2002, the difference is \$7,827; in 2003, the difference is \$8,592; in 2004, the difference is \$8,578. If the [REDACTED] W-2s could be accepted for [REDACTED] which the petitioner has not definitively established, in 2005, the difference would be \$7,073.57; in 2006, the difference would be \$1,004.72; in 2007, the difference would be \$5,313.20; and in 2008, the difference would be \$16,327.20.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). 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. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 January 31, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. The record before the AAO closed on January 5, 2010 with the AAO’s receipt of the petitioner’s response to the NOID. The petitioner’s tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner’s, FEIN [REDACTED] Form 1065 stated net income of -\$9,948.¹⁰
- In 2002, the petitioner’s Form 1065 stated net income of -\$8,191.
- In 2003, the petitioner’s Form 1065 stated net income of -\$4,807.
- No tax return was submitted for 2004.¹¹
- In 2005, the petitioner’s, FEIN [REDACTED] Form 1065 stated net income of -\$101,872.
- In 2006, the petitioner’s Form 1065 stated net income of -\$101,689.

Therefore, the petitioner did not establish that it had sufficient net income to pay the difference between the actual wage paid and the proffered wage in any of the years in question.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. Net current assets are the difference

¹⁰ For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s Schedules Ks have no relevant entries.

¹¹ On appeal, the petitioner stated that it could not obtain the 2004 tax return from the former owners as the former employer “no longer has a relationship with the beneficiary.” *See Matter of Dial*, 19 I&N 481, successorship requires evidence of the predecessor’s ability to pay the proffered wage.

between the petitioner's current assets and current liabilities.¹² A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 stated its net current assets as detailed in the table below.

- In 2001, the petitioner's Form 1065 stated net current assets of \$18,282.
- In 2002, the petitioner's Form 1065 stated net current assets of \$11,340.
- In 2003, the petitioner's Form 1065 stated net current assets of \$4,136.
- No tax return was submitted for 2004.
- In 2005, the petitioner's¹³ Form 1065 stated net current assets of \$19,532.
- In 2006, the petitioner's Form 1065 stated net current assets of \$10,820.

In the years 2001, 2002, and 2003, the petitioner established sufficient net current assets to pay the difference between the actual wage paid and the proffered wage. In 2005 and 2006, while the tax returns of [REDACTED] would show the ability to pay the difference in wages between the actual wage paid and the proffered wage, it is unclear that the tax returns can be accepted to pay for the stated petitioner [REDACTED]. No tax return was submitted for 2004, and, therefore, the net current assets were insufficient to establish the petitioner's ability to pay the proffered wage in 2004.

Thus, 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.

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

¹² 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 one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹³ We note that "the petitioner" refers to the tax returns submitted for [REDACTED] only, and not [REDACTED]. As noted above, that relationship has not been established, and the tax returns do not refer to both entities.

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 initial labor certification applicant presented no evidence as to its financial condition in 2004 and the tax returns for both the initial labor certification applicant and subsequent I-140 alleged successor-in-interest otherwise demonstrated consistent negative net income. The petitioner presented no evidence to show that any one year contained one time or unique expenses and presented no evidence of its reputation or standing within the community. 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. Additionally, as noted above, the petitioner has failed to establish the entire chain of successorship from [REDACTED] to [REDACTED] to continue processing under the labor certification.

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