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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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Office: NEBRASKA SERVICE CENTER

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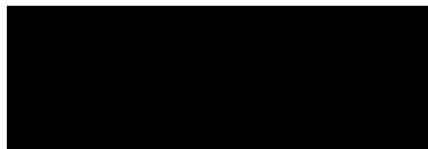
Petitioner:



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 \$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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general contracting business. It seeks to employ the beneficiary permanently in the United States as a construction coordinator. 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.

As set forth in the director's February 28, 2008 denial, the 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 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 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 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 \$49,982.00 per year. The Form ETA 750 states that the position requires 2 years of college and 1 year of experience in the job offered or in a related occupation.

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

The evidence in the record of proceeding shows that the petitioner was a sole proprietor from 2001 to December 2003, and incorporated on December 17, 2003; with an effective date of S corporation election of January 1, 2005. The petitioner indicates on its petition that it was established in 1999, and that it currently employs 7 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, the beneficiary does not indicate that she has been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2001 and through December 2003.² The petitioner has failed to establish by

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner does not clearly state when it began operating under its corporate structure. The sole proprietor filed quarterly tax returns with the Internal Revenue Service (IRS) in his individual name, [REDACTED] DBA [REDACTED], federal employer identification number (FEIN) [REDACTED], through December 2004. In January 2005 and thereafter the petitioner filed quarterly taxes under [REDACTED]. As it appears from this evidence that the business was operated as a sole proprietorship through December 2004, the AAO will accept the sole proprietor's individual tax returns as evidence of ability to pay in 2003 and 2004.

documentary evidence that it employed the beneficiary during that period at a salary equal to or greater than the proffered wage. United States Citizenship and Immigration Services (USCIS) will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation, to determine its ability to pay the beneficiary the proffered wage with sufficient funds remaining to support the proprietor's family.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 33 and 35, respectively. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The record shows that the sole proprietor filed his personal tax returns as married filing jointly, with 1 dependent in 2001 and 2002, and two dependents in 2003 and 2004. The proffered wage is \$49,982.00. In response to the director's request for evidence listing the petitioner's monthly recurring household expenses, the petitioner submitted copies of his American Express Account Summaries³ as shown in the table below.⁴

- In 2001, the petitioner's total reported expenses were \$86,099.13.
- In 2002, the petitioner's total reported expenses were \$122,205.54.
- In 2003, the petitioner's total reported expenses were \$118,021.45.
- In 2004, the petitioner's total reported expenses were \$127,580.41.

³ The American Express Summaries do not list living expenses such as mortgage payments, insurance payments, food, utilities, loan payments, other credit card payments, or other living expenses which, in all likelihood, would have added to the amounts listed in the summaries.

⁴ The director found that the petitioner had established its ability to pay the proffered wage in 2001 and 2002, based upon the net profit figures taken from the petitioner's IRS Forms 1040 at Schedule C for 2001 and 2002. The AAO relies upon the adjusted gross income (AGI) figures to determine the petitioner's ability to pay the proffered wage. In the instant case, the petitioner's AGI figures for 2001 and 2002 are insufficient to demonstrate the petitioner's ability to pay the proffered wage in those years; therefore, the director's decision with respect to this issue will be withdrawn.

The sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) as shown in the table below.

- In 2001, the proprietor's IRS Form 1040 stated AGI of \$57,982.00.
- In 2002, the proprietor's IRS Form 1040 stated AGI of \$61,372.00.
- In 2003, the proprietor's IRS Form 1040 stated AGI of \$25,284.00.
- In 2004, the proprietor's IRS Form 1040 stated AGI of \$70,450.00.

The sole proprietor's adjusted gross income minus his annual individual expenses for 2001, 2002, 2003, and 2004, is less than the proffered wage. Furthermore, it is improbable that the sole proprietor could support himself, his spouse, and one to two dependents on less per year than his monthly expenses require, which is what remains after reducing the adjusted gross income by the amount that is required to pay the proffered wage.

The evidence demonstrates that 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 the evidence submitted by the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will next examine whether the petitioner, as an S corporation beginning in 2005, 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. There is no evidence in the record of proceedings that demonstrates that the beneficiary has been employed by the petitioner.

If, as in this case, 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 December 3, 2007 with the receipt by the director of the petitioner’s submission of evidence in response to the request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The petitioner’s tax return demonstrates its net income as an S corporation as shown in the table below.

- In 2005, the Form 1120S stated net income⁵ of (\$3,667.00).

⁵ 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 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

- In 2006, the Form 1120S stated net income of (\$234.00).

Therefore, for the years 2005 and 2006 the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages actually paid to the beneficiary.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. However, any suggestion that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage is misplaced. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

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

- In 2005, the Form 1120S stated net current assets of \$1,247.00.
- In 2006, the Form 1120S stated net current assets of \$415.00.

The evidence demonstrates that for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

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.

Because the petitioner had additional deductions and other adjustments shown on its Schedule K, the petitioner's net income is found on Schedule K of its tax return.

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel asserts that the director erred in determining that the petitioner had failed to establish its ability to pay the proffered wage since the priority date. Counsel further asserts that the petitioner has successfully operated his business for years; that the corporation is organized as an S corporation and that the sole proprietor's individual assets should be considered, including real property and automobiles; that depreciation should be added back into taxable income; and that the petitioner has always met payroll and is readily available to finance all of its enterprises, including paying the proffered wage to the beneficiary. The petitioner submits copies of its business checking account statements and argues that it has sufficient monthly cash assets to pay the beneficiary.

Contrary to counsel's claim, the sole proprietor's real property is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such a significant personal asset to pay the beneficiary's wage. Finally, it is speculative to claim that funds from the sale of real property would be available specifically to be used to pay the proffered wage. See *Matter of Soffici*, 22 I&N Dec. 158, 165. Similarly, although the evidence in the record demonstrates that the sole proprietor purchased vehicles in 2003 and 2007, copies of the vehicle titles are insufficient to demonstrate that the purchased vehicles are readily liquefiable or that the petitioner would realistically consider selling its vehicles in order to pay the beneficiary's salary. Moreover, in 2005 and 2006 the petitioner was organized as an S corporation and not as a sole proprietorship. Thus the assets of the sole proprietor that he acquired in 2005 and 2006 are not relevant to a determination of the petitioner's ability to pay the proffered wage. USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The petitioner submitted as evidence copies of its bank statements and a list of monthly bank balances relevant to the requisite time period. Contrary to counsel's claim with respect to the bank statements, the petitioner's reliance on the balances in the bank accounts, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, the bank statements, to the extent that they represent assets, have not been submitted in the context of audited financial statements which would also consider the sole proprietor's debts and other obligations. Accordingly, these bank statements are not probative to the petitioner's ability to pay the proffered wages.

The petitioner argues that depreciation should be added back in to the net current income of the petitioner. USCIS rejects the idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. The AAO notes that depreciation amounts on the petitioner's tax returns are non-cash deductions. The amounts cannot be added back to net cash as recommended, and the argument for such a procedure is without support. *See Elatos*, 632 F. Supp. at 1054.

The petitioner submitted a letter from the CPA firm of Russell & Associates, LTD in which [REDACTED] states that he has thoroughly reviewed the petitioner's financial records and bank statements of the past five years; and it is his professional opinion that there is nothing in the records that would preclude the petitioner from being able to pay the proffered wage to the beneficiary. The record in this matter does not contain audited financial statements, and [REDACTED] does not reference financial data to support his reasoning or conclusions. He does not state that he conducted an independent audit of the petitioner's financial records in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misrepresentations. Unaudited financial statements, to the extent [REDACTED] may have relied on them to reach his conclusions, are the representations of management. *See* 8 C.F.R. § 204.5(g)(2). The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the petitioner's ability to pay the proffered wage. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record 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.

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. 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

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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, and 2006. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner states that its net income was lowered after it incorporated in 2003, when it purchased small tools and equipment. The petitioner does not submit financial statements or other evidence indicating that the purchase of small tools and equipment were an uncharacteristic expense or that the business suffered unusual losses that would prevent it from paying the 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)).

The petitioner also states that its income has steadily increased and that it has always met payroll. The petitioner has not shown through professionally prepared financial documents that the increase in income has been significant enough to allow it to pay the beneficiary's wage. See *Sonegawa*. The bank statements, real property, and purchased vehicles are not probative of the petitioner's ability to pay the proffered wages. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750, or that it entails outsourced services. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability under the totality of circumstances to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also failed to establish that it is a successor-in-interest to the sole proprietor. The labor certification was filed with the DOL by the sole proprietorship on April 30, 2001. The evidence in the record of proceeding shows that the petitioner incorporated on December 17, 2003; with an effective date of S corporation election in the State of Indiana on January 1, 2005. A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the sole proprietor that filed the labor certification is a different entity than the petitioner, which did not exist at the time the labor certification was filed with the DOL.

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.

The record contains no evidence to establish a valid successor relationship. There is no evidence of 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, or that the duties of the proffered position will remain the same. 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 fact that the petitioner is owned by the former sole proprietor, and that the petitioner has the same address of the predecessor entity, is not sufficient to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the petitioner is a successor-in-interest to the sole proprietor that filed the labor certification. The petition is not accompanied by a proper labor certification. 8 C.F.R. § 204.5(1)(3)(i). 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. 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 Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO reviews appeals on a de novo basis).

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.