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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B7c



FILE:



Office:



Date:

APR 05 2011

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker, Other, pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 employment-based immigrant visa petition was denied by the Director, [REDACTED] Service Center (director). The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a [REDACTED] restaurant. It seeks to permanently employ the beneficiary in the United States as a [REDACTED] food cook. The petitioner requests classification of the beneficiary as an other, unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 26, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's denial of the petition, at issue in this case is whether the petitioner has established the ability to pay the proffered wage. The AAO will also consider whether the petitioner is a successor-in-interest to the entity that filed the labor certification, and thus whether the petition is accompanied by a labor certification valid for the job offered.²

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

Procedural History

On April 26, 2001, another [REDACTED] restaurant, also named [REDACTED] hereinafter "predecessor restaurant"), filed a labor certification on behalf of the above-named beneficiary. The offered position is for a [REDACTED] food cook, and the proffered wage is [REDACTED] per hour [REDACTED]. According to the job offer portion of the labor certification, the offered position does not have any education, training, experience or other special requirements.

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

² 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).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

The predecessor restaurant was a sole proprietorship owned by [REDACTED] and [REDACTED] husband and wife. The business address of the sole proprietorship listed on the labor certification is [REDACTED]. The predecessor restaurant claimed to have been in business since 1991. The DOL certified the labor certification on January 22, 2004.

On June 1, 2004, the predecessor restaurant filed an I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary [REDACTED]. On or about October 1, 2004, the [REDACTED] Department of Transportation condemned the predecessor restaurant's building for a highway expansion project. According to a July 8, 2005 letter from [REDACTED] and [REDACTED] the predecessor restaurant resumed its operations at [REDACTED] on or about March 2005, after approximately five months of inactivity.

On May 11, 2005, the director issued a Request for Evidence (RFE), instructing the sole proprietor to submit its 2003 and 2004 tax returns, a list of monthly recurring household expenses, and copies of personal bank account statements. On August 16, 2005, the director issued a second RFE, instructing the sole proprietor to submit copies of pay vouchers issued to the beneficiary in 2005, documentation establishing the beneficiary's Social Security Number, and additional documentary evidence of the beneficiary's forced relocation due to the highway construction project.

The director denied the predecessor restaurant's petition on February 16, 2006. The decision concludes that the predecessor restaurant failed to establish its ability to pay the proffered wage for 2003 and 2004. The predecessor restaurant appealed the decision to the AAO, and the AAO dismissed the appeal on October 2, 2006. The AAO decision concludes that the predecessor restaurant failed to establish its ability to pay the proffered wage for 2001, 2002, 2003 and 2004.

On August 15, 2007, the petitioner filed the instant petition with United States Citizenship and Immigration Services (USCIS). The instant petition contains the same labor certification submitted with the prior petition filed by the predecessor restaurant. The petitioner claims to be a successor-in-interest to the predecessor restaurant.⁴ The petitioner, also named [REDACTED] is located in [REDACTED] (hereinafter "petitioner" or "successor restaurant"). The petitioner claims to have been established in 1991. The petitioner was

⁴ The cover letter submitted with the petition states that the petition is a re-filing of the predecessor restaurant's prior petition and a motion to reconsider the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal. The director did not address the motion to reconsider requested on the cover letter. Even if the predecessor submitted a motion to reconsider in the correct format and with the appropriate filing fee, the motion would have been untimely. The regulation at 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. The instant petition was filed on August 15, 2007, over ten months after the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal. Accordingly, the predecessor restaurant failed to properly file a motion to reconsider the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal, and the AAO will not accept counsel's request on the cover letter to consider this new petition filing as a motion to reconsider.

originally formed as a sole proprietorship and then was restructured as a single member limited liability company (LLC). The petitioner's Operating Agreement states that the LLC commenced on August 14, 2007.

The evidence submitted to establish that the petitioner is a successor-in-interest to the predecessor restaurant is a one-page asset purchase agreement for restaurant equipment, inventory and signage dated December 27, 2006.

On November 19, 2008, the director issued a Notice of Intent to Deny (NOID) the instant petition. The NOID states that the evidence in the record did not establish that the predecessor restaurant possessed the ability to pay the proffered wage from the priority date until the date of the acquisition of the predecessor restaurant's assets. The NOID also states that the evidence in the record did not establish that the petitioner was a successor-in-interest to the predecessor restaurant.

On January 14, 2009, the director denied the petition. The decision concludes that the petitioner is a successor-in-interest to the predecessor restaurant, but that the petitioner did not establish its ability to pay the proffered wage. The decision notes that the AAO had previously concluded that the predecessor restaurant had not established its ability to pay the proffered wage for 2001 and 2002. However, the decision concluded that the predecessor restaurant had successfully established its ability to pay the proffered wage in 2001 and 2002. The decision also states that the predecessor restaurant had not established its ability to pay the proffered wage in 2004, 2005 and 2006.⁵ The director then examined the petitioner's ability to pay the proffered wage as of the 2001 priority date,⁶ and concluded that successor restaurant had only established its ability to pay the proffered wage in 2001, 2002, 2006 and 2007.

The petitioner appealed the director's decision to the AAO on February 17, 2009. On January 3, 2011, the AAO incorrectly rejected the appeal as untimely filed, and remanded the matter to the director for reconsideration as a motion to reopen and reconsider. On January 7, 2011, the AAO reopened the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) to correct its error and enter a new decision, and gave notice to the petitioner of deficiencies in the record permitting the submission of additional evidence that it is a successor-in-interest to the predecessor restaurant.

The AAO notice requests that the petitioner submit additional evidence of the predecessor restaurant's ability to pay the proffered wage beginning on the priority date and continuing until the date the claimed transfer of ownership to the petitioner was completed. Second, the AAO notice requests that the petitioner submit additional evidence of its continuing ability to pay the proffered wage from the transaction date forward. Third, the AAO notice requests that the petitioner fully

⁵ The director made no reference to whether the predecessor restaurant had established its ability to pay the proffered wage in tax year 2003.

⁶ As is explained below, the director should have examined the predecessor restaurant's ability to pay from the priority date until the date of the claimed acquisition, and the successor restaurant's ability to pay the proffered wage from the date of the claimed acquisition onwards. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

describe and document its claimed assumption of the ownership of the predecessor restaurant. Counsel filed a response to the AAO notice on February 7, 2011.

Therefore, at issue in this case is (1) whether the petitioner is a successor-in-interest to the predecessor restaurant, and, if so, (2) whether the predecessor restaurant, a sole proprietorship, possessed the ability to pay the proffered wage from the April 26, 2001 priority date until the December 27, 2006 date of the purchase agreement, and (3) whether the petitioner, a sole proprietorship until August 14, 2007 and a single-member LLC thereafter, possessed the ability to pay the proffered wage from the December 27, 2006 date of the purchase agreement until the present.

Successor-in-Interest

In order for the petition to be approved, the petitioner must establish that it is a successor-in-interest to the predecessor restaurant that filed the labor certification on behalf of the beneficiary. Otherwise, it cannot be concluded that the petition is accompanied by a labor certification valid for the proffered position. See 8 C.F.R. § 204.5(1)(3)(i); 20 C.F.R. § 656.30(c)(2). In the decision denying the instant petition, the director concluded that the petitioner demonstrated that it is a successor-in-interest to the predecessor restaurant. For the reasons set forth below, the AAO concludes that the evidence in the record of proceeding does not establish that the petitioner is a successor-in-interest to the predecessor restaurant, and the appeal must be dismissed for this reason. As is stated at the outset of this decision, the AAO reviews appeals *de novo*, and any 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 at 1043; see also *Soltane v. DOJ*, 381 F.3d at 145.

The basis of the petitioner's successor-in-interest claim is a one-page asset purchase agreement between the petitioner and the predecessor restaurant. The agreement states:

[REDACTED] and [REDACTED] owners of [REDACTED] [REDACTED] Restaurant located in [REDACTED] at [REDACTED] selling this business with all the equipment and fixtures to [REDACTED] and [REDACTED] owners of [REDACTED] Restaurant in [REDACTED] [f]or the sum of \$16,000,00.

The equipment listed in the agreement is as follows: six-burner Imperial stove; two-burner Imperial stove; stainless steel Victory double door refrigerator; stainless steel Victory double door freezer; Star 24"x 24" grill; Duke four-compartment steam table; True double door sandwich bar; Manitowoc ice machine; Thunderbird 20 quart dough mixer; dough roller; Hobart under-counter dishwasher; 10' hood with all Ansul fire equipment; all stainless steel sinks; grease trap; all cooking utensils; all tables, chairs and booths; cash register; inventory; Imperial deep fryer; all outside signage; stainless steel tables; and stainless racks and shelving.

Attached to the agreement is a notarized individual acknowledgement dated December 27, 2006, signed by [REDACTED]. The note states that [REDACTED] are selling their "restaurant business with all the equipment and fixtures to [REDACTED] for \$16,000.00. The notarized individual acknowledgement states that the agreement is an "Equipment Sale."

In the response to the AAO notice, counsel submits a letter from [REDACTED] dated February 2, 2011. The letter states that, on December 27, 2007, he and his wife sold "the restaurant business together with all equipment and other asset[s]." The letter states that "[w]hen we sold the restaurant business, [REDACTED] assumed all of our rights, duties, obligations and assets. This included our employee [REDACTED] who was our cook and had worked for us since 1995. She was the only cook for the business and without her [REDACTED] would not have been able to operate." The letter further states:

Please note that our restaurant was forcibly relocated by the [REDACTED] from its original location about October 2004, but that the restaurant business never ceased operating although we moved to a new location in January 2005 where the restaurant continued to operate until it was sold to [REDACTED] in December of 2006.

This letter contradicts the earlier letter of [REDACTED] dated July 8, 2005, submitted with the response to the director's May 11, 2005 RFE for the petition filed by the predecessor restaurant. That letter states:

We reopened [REDACTED] in March of 2005 in a different location on [REDACTED]. We are in a more obscure location[] and it will take time for our clientele to find us. But business is picking up and we are starting to do well. We have downsized our business considerabl[y] and have made it more efficient. . . . We expect to do well in the future and we will be able to give [the beneficiary] 40 hours per week. But it takes time to get a business off the ground again. . . . We have streamlined out personal finances also and I, [REDACTED] will be working for the [REDACTED] on a part time basis. This is a Government job and we will be getting Government benefits such as health insurance.

The record also contains a notarized letter dated September 7, 2005 by [REDACTED]. The letter describes the relocation of the predecessor restaurant. The letter states:

We did manage to relocate the business in March, 2005 as a substantially down sized restaurant. From October, 2004 until March, 2005 we had no business at all, and we suffered great losses during that time period.

Therefore, the statements in the February 2, 2011 letter that the predecessor never ceased operating and moved to a new location in January 2005 directly contradict the July 8, 2005 and September 7,

2005 letters.⁷ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591. Accordingly, the statement by [REDACTED] in the February 2, 2011 letter that "[REDACTED] assumed all of [the predecessor restaurant's] rights, duties, obligations and assets" must be substantiated by competent objective evidence.

To summarize the facts in this case, the petitioner is a [REDACTED] restaurant named [REDACTED] in [REDACTED]. Forty five miles to the north on the same highway, there was another [REDACTED] restaurant named [REDACTED] (the predecessor restaurant), with different owners. The predecessor restaurant had been struggling financially since it was forced to relocate to a new location due to a highway expansion project. Therefore, approximately 21 months after relocating, the owners of the predecessor restaurant decided to close the business and sell their equipment, signage and inventory to the petitioner on December 27, 2006. In addition, the predecessor restaurant's cook, the beneficiary of this petition, allegedly went to work for the petitioner. The petitioner did not continue to operate a restaurant on the predecessor restaurant's premises. Instead, the petitioner appears to have used the predecessor restaurant's equipment in its existing business. Counsel claims that these facts are sufficient to establish that the petitioner is a successor-in-interest to the predecessor restaurant.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986)(hereinafter "*Matter of Dial Auto*"), a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (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 Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body,

⁷ The record also contains a letter dated April 6, 2006 from [REDACTED] who claims to have been the predecessor restaurant's accountant since 1991. The letter states that the sole proprietor "finished remodeling the new restaurant location in April/May, 2005."

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.

19 I&N Dec. at 482-3 (emphasis added).

The Commissioner's decision in *Matter of Dial Auto*, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be 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" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* at 1570 (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.⁸ *Id.* at 1569 (defining "successor"). When considering other business

⁸ Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁹

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property - such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold.¹⁰ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

⁹ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

¹⁰ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Therefore, a successor-in-interest must not only show that it purchased assets from the predecessor, but assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the facts of the instant petition, the evidence submitted by the petitioner to document its purchase of the predecessor's restaurant is insufficient to establish that the petitioner is a successor-in-interest. Specifically, the evidence in the record reflects that the petitioner only purchased the predecessor restaurant's equipment, inventory and signage. The evidence in the record does not demonstrate the continuity required to establish a successor-in-interest. While the restaurants have the same name, are in the same Metropolitan Statistical Area, and offer the same type of position to the beneficiary, the fact remains that the predecessor restaurant simply terminated its business and sold its assets to the petitioner. There is no evidence in the record that the petitioner assumed any rights and obligations of the predecessor restaurant. The petitioner did not assume a lease, existing contracts or any other obligations. The mere statement from [REDACTED] dated February 2, 2011 that the petitioner "assumed all of our rights, duties, obligations and assets" is not sufficient to establish a successor-in-interest without documentary support, particularly given that some of the statements in that letter directly contradict two prior letters and other evidence in the record.

Further, the fact that the beneficiary now works for the petitioner does not mean that the petitioner has assumed the predecessor restaurant's obligations. The petitioner did not assume an employment contract. The beneficiary is not an asset to be sold. Instead, she appears to have been an at-will employee who was hired by the petitioner after the predecessor restaurant terminated its business. This does not constitute assuming the essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

In short, the predecessor restaurant was going out of business, and the petitioner, an existing restaurant with the same name, purchased its equipment, inventory and signage. In addition, the predecessor restaurant's cook, the beneficiary, now works for the petitioner as a cook. Based on these facts, the petitioner is not a successor-in-interest to the predecessor restaurant because the petitioner did not assume the essential rights and obligations of the predecessor. Instead, the evidence in the record does not establish that the purchase agreement was anything more than a mere transfer of assets. Therefore, beyond the decision of the director, the appeal is dismissed because the petitioner has not demonstrated that it is a successor-in-interest to the entity that filed the underlying labor certification. The petition is not accompanied by a labor certification valid for the job offered by the petitioner.

Ability to Pay the Proffered Wage

The petitioner has also not established its ability to pay the proffered wage. A petitioner claiming to be a successor-in-interest must establish that the predecessor entity possessed the ability to pay the

offered wage from the priority date until the claimed transfer of ownership to the successor, and the successor has possessed the ability to pay the offered wage from the date of the claimed transfer of ownership onwards. *Matter of Dial Auto*, 19 I&N Dec. at 481.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

As is stated above, the labor certification was filed on April 26, 2001, and the proffered wage is [REDACTED] an hour [REDACTED] per year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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 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.

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 (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 INS, 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 v. Napolitano*, 696 F. Supp. 2d 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 118. "[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).

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.¹¹

In contrast to a corporation's net current assets and net income, if the petitioner is a sole proprietorship,¹² the sole proprietor's adjusted gross income (AGI), assets, and personal liabilities are considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (IRS 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. Sole proprietors and individuals must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds. See *Ubeda v. Palmer*, 539 F. Supp. 647.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that the petitioner 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 court specifically stated:

In the instant case, the Attorney General determined that the petitioner cannot compensate the beneficiary at the wage rate stated. Petitioner has a total gross income of \$20,000 and a net taxable income of \$13,000 out of which he must support himself, his wife, and five children, one of whom is severely handicapped. Notwithstanding these financial burdens, petitioner stated that he would compensate the beneficiary at the rate of \$500 per month or \$6,000 per year. Like the INS, this court finds it highly unlikely that the petitioner can, in fact, compensate the beneficiary in an amount which totals such a high percentage of his income. Clearly, the petitioner is unable to afford this rate of compensation.

The *Ubeda* court implies that expenses are balanced against income. Therefore, like the court in *Ubeda*, the AAO balances AGI against the petitioner's household expenses (into which the AAO collapses any recurring personal debt obligations, short-term or long-term) and, if that fails, the AAO reviews the sole proprietor's unencumbered, liquid assets. Household expenses are applied to AGI only and not again to the sole proprietor's personal assets. This approach has been supported by the courts in *Rahman v. Chertoff*, 641 F. Supp. 2d 349 (D. Del. 2009) (stating that the AAO did not

¹¹According 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.

¹² A sole proprietorship 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 does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. at 250.

disregard the appropriate protocol for reviewing I-140 petitions submitted by sole proprietors) and *O'Conner v. Atty. Gen.*, 1987 WL 18243 (D. Mass. Sept. 29, 1987) (noting that the personal assets and income of the sole proprietors are relevant to a determination of the ability of the sole proprietorship to pay the proffered wage).

Finally, for both LLCs and sole proprietors, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

With the analytical framework established, we next examine whether the evidence in the record establishes the petitioner's ability to pay the proffered wage.

The Predecessor Restaurant's Ability to Pay the Proffered Wage¹³

The first part of the ability to pay analysis is whether the predecessor restaurant, a sole proprietorship, possessed the ability to pay the proffered wage from the April 26, 2001 priority date until the December 27, 2006 date of the purchase agreement. See *Matter of Dial Auto*, 19 I&N Dec. 481.

¹³ As noted in detail above, the record fails to demonstrate that the alleged predecessor is a predecessor-in-interest to the petitioner according to the requirements of precedent on point. The AAO is examining the alleged predecessor's ability to pay despite that failure for the sake of argument.

1. Employment of the Beneficiary.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary claimed to have worked full-time for the predecessor restaurant as a specialty cook since January 1998. As explained above, in determining the petitioner's ability to pay the proffered wage, we will first examine whether the petitioner employed and paid the beneficiary at any time since the priority date. If the predecessor restaurant 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 for that period of employment.

Evidence of the wage paid to the beneficiary is generally established with Forms W-2, Wage and Tax Statement; Forms 1099-MISC, Miscellaneous Income; Forms 941, Employer's Quarterly Federal Tax Return; and/or state wage and withholding reports. Paystubs issued by the petitioner to the beneficiary are also accepted if the petitioner submits evidence that the attached paychecks were cashed, such as a copy of the front and back of the canceled paycheck. Further, paystubs and paychecks only establish the wage paid to the beneficiary for the indicated time period. Conversely, internally generated payroll statements or payroll reports are not, by themselves, sufficiently reliable evidence to establish the actual wage paid to the beneficiary.

The evidence in the record of the predecessor restaurant's employment of the beneficiary from the priority date until the date of the purchase agreement is as follows:

- Notarized internally generated payroll history for the beneficiary from May 6, 2005 to August 23, 2005.
- Copies of paystubs (without the accompanying canceled paychecks) issued to the beneficiary for May 6, 2005 to October 24, 2005, December 31, 2005, February 10, 2006, March 23, 2006 and March 31, 2006. The paystubs indicate that the beneficiary received an hourly wage of [REDACTED] per hour from March 2005 to June 2005, and [REDACTED] from July 2005.
- Copy of a check register indicating that the beneficiary was issued a paycheck on June 6, 2005 for [REDACTED] based on gross earnings of [REDACTED].
- Letter dated April 6, 2006, from [REDACTED] [REDACTED] claims to have been the predecessor restaurant's accountant since 1991. The letter states that, following the relocation of the restaurant, the sole proprietor employed the beneficiary 32 hours per week at [REDACTED] per hour, and later increased her hours to 40 hours per week. The letter also states that the relocation negatively impacted the restaurant's "2005 financial numbers," but that their business appeared to be improving.

As is explained above, this evidence is not sufficient to establish that the beneficiary was employed by the predecessor restaurant from the priority date until the date of the purchase agreement. Even if the submitted evidence was sufficient to establish the actual wage paid to the beneficiary, the evidence would only establish that the predecessor restaurant employed the beneficiary for a few months in 2005 and a fraction of 2006.

Despite being provided with several opportunities to do so, neither the predecessor restaurant nor the petitioner has provided sufficient evidence of wages paid to the beneficiary as of the 2001 priority date. The record does not contain any Forms W-2, Wage and Tax Statement; Forms 1099-MISC, Miscellaneous Income; Forms 941, Employer's Quarterly Federal Tax Return; state wage and withholding reports; or paystubs with the corresponding canceled checks.

It is noted that the AAO notice instructed the petitioner to provide:

Any additional evidence of [the predecessor restaurant's] and [the petitioner's] respective abilities to pay the proffered wage not already submitted into the record of proceeding for consideration including updated evidence from [the petitioner] for 2007, 2008, and 2009 consistent with 8 C.F.R. § 204.5(g)(2).

In response to the notice, the petitioner did not provide additional evidence of the predecessor restaurant's employment of the beneficiary. 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). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry.

Therefore the evidence in the record does not establish that the predecessor restaurant paid the beneficiary any salary from the priority date.

2. The Predecessor Restaurant's AGI, Assets, and Liabilities.

Since the evidence in the record does not establish that the predecessor restaurant paid the beneficiary wages, the petitioner must establish that the predecessor restaurant, a sole proprietorship, possessed the ability to pay the entire [redacted] proffered wage from the April 26, 2001 priority date until the December 27, 2006 date of the purchase agreement. As is explained above, when assessing a sole proprietorship's ability to pay the proffered wage, the AAO will consider the sole proprietor's AGI minus monthly household expenses. If this figure is not equal to or greater than the proffered wage, the AAO will also consider the sole proprietor's liquefiable assets.

The record contains copies of the sole proprietor's Form 1040 individual tax returns for 2001, 2002, 2003 and 2004. The AGI reflected on these returns is as follows:

Year	AGI (\$)
2001	[redacted]
2002	[redacted]
2003	[redacted]
2004	[redacted]
2005	Not provided ¹⁴

¹⁴ As is noted above, the AAO instructed the petitioner to provide:

2006	Not provided
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The petitioner must establish that the predecessor restaurant, a sole proprietorship, had sufficient funds to both pay the proffered wage and cover monthly household expenses. The only years that the predecessor restaurant established that its AGI exceeded the proffered wage was in 2001 and 2002. If the proffered wage is subtracted from AGI, the sole proprietor would have had only [REDACTED] remaining to pay monthly household expenses in 2001, and only [REDACTED] for monthly household expenses in 2002.

The RFE issued by the director during the adjudication of the petition filed by the predecessor restaurant requested a list of the sole proprietor's monthly expenses. Instead of a list, the sole proprietor provided the following evidence of monthly expenses:

- [REDACTED] mortgage statement dated May 20, 2005 with a payment due of [REDACTED]
- [REDACTED] car payment statement dated December 18, 2004 with a payment due of [REDACTED]
- [REDACTED] car insurance premium statement of [REDACTED]
- [REDACTED] homeowners insurance statement dated June 9, 2005 with a payment due of [REDACTED]
- [REDACTED] electricity bill dated June 24, 2005 with a payment due of [REDACTED]
- [REDACTED] sewage and water bill dated March 18, 2005 with a payment due of [REDACTED] and [REDACTED]
- [REDACTED] fuel bill dated December 21, 2004 with a payment due of [REDACTED]

Any additional evidence of [the predecessor restaurant's] and [the petitioner's] respective abilities to pay the proffered wage not already submitted into the record of proceeding for consideration including updated evidence from [the petitioner] for 2007, 2008, and 2009 consistent with 8 C.F.R. § 204.5(g)(2).

In response, the petitioner did not provide the predecessor restaurant's 2005 and 2006 tax returns. The regulation 8 C.F.R. § 204.5(g)(2) states that ability to pay the proffered wage must be demonstrated as of "the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

Even if this limited evidence in the record was considered the full extent of the sole proprietor's monthly expenses, the evidence in the record does not establish that the predecessor restaurant had sufficient AGI to pay the proffered wage and pay monthly household expenses for 2001, 2002, 2003, 2004, 2005 or 2006.

As is stated above, the sole proprietor may also use personal liquefiable assets to pay the proffered wage. The record contains the following evidence of the sole proprietor's resources:

- [REDACTED] bank account statements in the sole proprietor's name for February, April, and May 2005, indicating balances of [REDACTED]¹⁵;
- [REDACTED] bank account statement in the sole proprietor's name for February 2006 indicating a balance of [REDACTED]
- [REDACTED] wire transfer to the sole proprietor in the amount of [REDACTED] on June 24, 2005;
- Mortgage statement for the sole proprietor's personal residence dated February 16, 2006 indicating a balance of [REDACTED]
- [REDACTED] statement in the sole proprietor's name indicating a line of credit of [REDACTED]
- Letter from an unidentified credit card provider sent to [REDACTED] with regard to available credit of [REDACTED] and cash of [REDACTED]
- March 23, 2006 letter from a realtor estimating a [REDACTED] market value for the sole proprietor's home;
- Warranty deed for the sole proprietor's residence;
- 2005 Form W-2 issued by the [REDACTED] to [REDACTED], stating earnings of [REDACTED]
- [REDACTED] Pension Fund letter dated July 1, 1998, regarding [REDACTED] pension payments.

It is noted that these financial documents primarily relate to 2005 and 2006. However, the predecessor restaurant must have possessed the ability to pay the proffered wage from the April 26, 2001 priority date until the date of the purchase agreement. A petition may not be approved if the eligibility is not established at the priority date, with an expectation of eligibility at a subsequent time. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Coram. 1971).

With regard to the sole proprietor's line of credit, the AAO will not augment the sole proprietor's AGI by adding in the sole proprietor's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal

¹⁵ These statements appear to represent funds in the sole proprietorship's business account. Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase liabilities of a firm or individual. The AAO will evaluate the overall financial position of a sole proprietor to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

With regard to the [REDACTED] bank statements, in order for a sole proprietor to establish ability to pay using personal bank account statements, the record must contain all monthly or year-end statements to permit an assessment of the average annual account balance for each year in question. A small number of monthly statements with marginal balances do not establish ability to pay the proffered wage. The bank account statements in the record do not permit a calculation of the average annual balances for any year. Thus, the sole proprietor has not established that the bank account contained cash assets sufficient to pay the proffered wage.

[REDACTED] Pension Fund letter dated July 1, 1998, states that [REDACTED] "appears" to be eligible for a monthly [REDACTED] benefit at age 62, although he could elect to take benefits as early as age 55 for a reduced monthly benefit of [REDACTED] per month. This letter does not constitute a liquefiable asset possessed by [REDACTED] as of the priority date. First, the letter states that [REDACTED] only "appears" to be eligible for pension payments. Second, [REDACTED] has not elected to take his benefits prior to age 62, nor has he stated that he would be willing to do so and accept lower monthly pension payments in order to pay the beneficiary's proffered wage. Third, even if the AAO accepted the pension as assets available to [REDACTED] since the priority date, the amount of the monthly payments would not be sufficient to pay the proffered wage. The sole proprietor must establish its ability to pay the proffered wage from the priority date. The AAO will not consider potential funds available at some point in the future. Once again, a petition may not be approved if the eligibility is not established at the priority date, with an expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. at 49.

With regard to the documents submitted to the record to demonstrate the sole proprietor's equity in his residence, the AAO does not view the sole proprietor's residence as a liquefiable asset that can easily be converted into available cash with which to pay the beneficiary's proffered wage. Further, a letter from a realtor is not considered reliable evidence of the market value of a home.

Regarding the [REDACTED] wire transfer of [REDACTED] it is noted that for 2005 and 2006, the record does not contain one of the three types of evidence required to establish ability to pay a proffered wage. 8 C.F.R. § 204.5(g)(2). While this regulation allows additional material "in appropriate cases," the petitioner 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 predecessor restaurant. A wire transfer, by itself, does not reflect a sustainable ability to pay a proffered wage because the funds may have been obligated for other purposes.

The earnings reflected on [REDACTED] 2005 Form W-2 Form would have been included in the AGI figure on his 2005 tax return. As is noted above, a tax return is one of the three types of documents required to establish ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). Accordingly, the sole proprietor's Form W-2 is not a substitute for one of the required documents. Also, [REDACTED] earnings of [REDACTED] are not sufficient to pay the proffered wage.

Thus, the sole proprietor has not established that it had financial resources available to pay the proffered wage and monthly expenses for 2001, 2002, 2003, 2004, 2005 or 2006. Therefore, the petitioner has not established that the alleged predecessor restaurant had the ability to pay the proffered wage from the priority date to the date of the purchase agreement in 2006.¹⁶

3. Totality of the Circumstances

In addition to the above analysis, 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.

In the instant case, the AAO has considered the predecessor restaurant's years in business, number of employees, the gross sales listed on its tax returns, its reputation in the industry as reflected in the two local newspaper articles in the record, the compensation paid by the [REDACTED] for the predecessor restaurant's forced relocation, the sole proprietor's statements about how the relocation impacted its business, the sole proprietor's bank account statements showing marginal balances and multiple overdraft charges, and the fact that the predecessor restaurant closed down its business and sold its equipment within two years of its relocation.

The sole proprietor's letter from July 8, 2005 summarizes the predecessor restaurant's financial issues due to the forced relocation:

[Due to the planned condemnation of our premises] we were placed into a position where we were not able to compete with our competition. We were not able to sell our business. We were not able to renovate our business and our employees [were] looking for other places to work as [they knew they would lose] their jobs. We reopened [REDACTED] in March of 2005 in a different location on [REDACTED]. We are in a more obscure location[] and it will take time for our clientele to find us. But business is picking up and we are starting to do well. We have down-sized our business considerabl[y] and have made it more efficient[, but] it takes time to get a business off the ground again. We have streamlined our

¹⁶ The director's decision concludes that the petitioner's adjusted gross income was sufficient in 2001 and 2002 to pay the proffered wage. However, in performing this analysis, the director did not take into consideration the sole proprietor's monthly expenses. Therefore the director's analysis of the petitioner's ability to pay the proffered wage in 2001 and 2002 is incomplete and is withdrawn for the reasons explained above.

personal finances also and I, [REDACTED] will be working for the [REDACTED] [REDACTED] on a part time basis.

In addition, the notarized letter dated September 7, 2005 by [REDACTED] provides further information about the financial impact of the relocation:

We did manage to relocate the business in March, 2005 as a substantially down sized restaurant. From October, 2004 until March, 2005 we had no business at all, and we suffered great losses during that time period.

As in *Sonegawa*, the AAO will consider uncharacteristic business expenditures or losses, such as, in the instant case, when a business is forced to relocate. However, the company must show a return to profitability. USCIS will not find that a company has the ability to pay the proffered wage if an uncharacteristic business expenditure or loss results in an inability to return to profitability or going out of business.

The AAO addressed the predecessor restaurant's ability to pay the proffered wage in the dismissal of the appeal of the denial of the predecessor restaurant's petition. Despite having multiple opportunities to address the deficiencies in the record, the petitioner has failed to overcome the stated grounds of the decision. The predecessor restaurant was a marginally profitable business until its forced relocation by the [REDACTED] Department of Transportation. This relocation resulted in a period of inactivity followed by an attempt to reestablish itself in a new location. From the evidence in the record, it appears that the predecessor restaurant was unable to return to profitability in its new location, it closed its doors within 21 months of its reopening, and it sold its inventory, equipment and signage to the petitioner.

Finally, as is discussed above, the regulation at 8 C.F.R. § 204.5(g)(2) states that the evidence establishing ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). There are no annual reports, federal tax returns, or audited financial statements in the record for the predecessor restaurant for 2005 and 2006. Therefore, the AAO cannot conclude that the evidence in the record establishes that the predecessor restaurant possessed the ability to pay the proffered wage for those years. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Therefore, after reviewing the evidence in the record and considering the totality of the circumstances, it is concluded that the petitioner has failed to establish that the predecessor restaurant possessed the ability to pay the proffered wage for any year from the April 26, 2001 priority date until the December 27, 2006 date of the purchase agreement.

The Petitioner's Ability to Pay the Proffered Wage

Also at issue is whether the petitioner, a sole proprietorship until August 14, 2007 and a single-member LLC thereafter, has possessed the ability to pay the proffered wage from the December 27,

2006 date of the purchase agreement.

A. The Petitioner's Ability to Pay the Proffered Wage as a Sole Proprietorship

As is explained in detail above, the methodology for determining the ability to pay of a sole proprietorship and an LLC differ from each other. This subsection will assess whether the petitioner possessed the ability to pay the proffered wage to the beneficiary from the date of the December 27, 2006 purchase agreement until it was restructured as a single-member LLC on August 14, 2007.

1. Employment of the Beneficiary.

The petitioner claims that, as of the date of the purchase agreement, it has employed the beneficiary in the job offered. Specifically, a December 18, 2008 letter from [REDACTED] the petitioner's owner, states that the beneficiary worked for the petitioner following the purchase agreement, and continues to work for the petitioner as its only full-time cook with a wage of [REDACTED] paid twice monthly, plus a guaranteed annual bonus of [REDACTED]

As previously stated, 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 record does not contain any Forms W-2, Wage and Tax Statement; Forms 1099-MISC, Miscellaneous Income; Forms 941, Employer's Quarterly Federal Tax Return; or state wage and withholding reports.

The evidence in the record of the petitioner's employment of the beneficiary from the date of the December 27, 2006 purchase agreement until the petitioner was restructured as a single-member LLC on August 14, 2007 includes copies of eleven paystubs from February 2007 to July 2007. The paystubs indicate that the beneficiary was paid [REDACTED] during this period.

Again, for the reasons explained above, paystubs, by themselves, do not establish that the petitioner employed the beneficiary at the claimed wage. Even if the AAO accepted the paystubs, they would only establish the wage paid to the beneficiary for those five months.

Therefore, the petitioner has not established that it has paid the beneficiary from the December 27, 2006 purchase agreement until it was restructured as a single-member LLC on August 14, 2007.

Again, it is emphasized that the petitioner has been offered multiple opportunities to provide this evidence, including most recently, the AAO notice dated January 3, 2011.

2. The Petitioner's AGI, Assets, and Liabilities.

Since the petitioner has not established that it paid the beneficiary, it must establish that the sole proprietor's AGI minus monthly household expenses (and considering unencumbered liquid assets) exceed the proffered wage from the December 27, 2006 purchase agreement until the petitioner restructured as a single-member LLC on August 14, 2007. The record contains the petitioner's Forms 1040 for 2001, 2003, 2003, 2004, 2005 and 2006. The petitioner's tax returns for 2001, 2002, 2003, 2004 and 2005 are not relevant to this analysis as the date of the purchase agreement is December 27, 2006. However the prior tax returns will be considered when considering the totality of the circumstances (e.g., when assessing the petitioner's history of profitability).

Again, it is noted that the AAO instructed the petitioner to provide:

Any additional evidence of [the predecessor restaurant's] and [the petitioner's] respective abilities to pay the proffered wage not already submitted into the record of proceeding for consideration including updated evidence from [the petitioner] for 2007, 2008, and 2009 consistent with 8 C.F.R. § 204.5(g)(2).

The petitioner did not provide the requested documents for 2007, 2008, or 2009. The record does not contain the petitioner's tax returns for 2007, either as a sole proprietor or as an LLC. Therefore the AAO cannot examine the petitioner's ability to pay the proffered wage in 2007. The petitioner must establish its ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The AAO specifically requested this information. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage for 2007.¹⁷

Therefore, for the period covered by this section, the AAO is only able to examine the petitioner's ability to pay the proffered wage for the five-day period from the December 27, 2006 date of the purchase agreement to December 31, 2006.

The sole proprietor's 2006 tax return indicates that he had three dependents, and an AGI of [REDACTED]. The record does not contain documentation of the sole proprietor's household expenses. Nevertheless, Schedule A of the petitioner's Form 1040 indicates that the petitioner paid [REDACTED] in medical expenses, [REDACTED] in property taxes, presumably an annual expense, and a monthly mortgage payment of [REDACTED]. Adding the petitioner's real estate tax, twelve months of mortgage payments, and the petitioner's medical expenses, the yearly total of this partial list of expenses is [REDACTED]. The petitioner's actual household expenses for items such as food, clothing, car insurance, or similar expenses were not submitted. Without a list of the sole proprietor's monthly expenses, the AAO is unable to make a determination of the sole proprietor's ability to pay the proffered wage. Even if the AAO accepted the expenses listed on Schedule A of the petitioner's 2006 tax return, it would not be reasonable to conclude that the petitioner could pay the identified household expenses as well as the

¹⁷ 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). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in its notice.

proffered wage with an AGI of [REDACTED]. Thus, the petitioner has not established its ability to pay the proffered wage for the five-day period from the December 27, 2006 date of the purchase agreement to December 31, 2006.¹⁸

The record also contains evidence of the sole proprietor's ownership of a residence in [REDACTED] with a mortgage balance of [REDACTED] in 2008, and of what the petitioner claims is a storage building, also located in [REDACTED]. The record contains a real property tax statement for July 1, 2008 to June 30, 2009, which states that the storage building's real market value is [REDACTED]. The record also contains an unsigned Estimated Closing Statement dated August 24, 2005, which indicates that the purchase price of the storage building was [REDACTED] and that the purchasers, [REDACTED] were to pay the full purchase price at closing. However, there is no evidence in the record of whether the property has been encumbered by a mortgage. Regarding the sole proprietor's property values, real property is not readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell or encumber such a significant asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Therefore, the petitioner has not established that it had the ability to pay the proffered wage from December 27, 2006 until it restructured as a single-member LLC on August 14, 2007.

¹⁸ As is noted above, the AAO may also consider the liquefiable personal assets of a sole proprietor. On appeal, counsel states that the director did not address the Dec 18, 2008 letter of [REDACTED] a registered investment advisor. [REDACTED] states that he reviewed some documents related to the analysis of a petitioner's ability to pay the proffered wage and opines that the USCIS analysis of net profits does not reflect how such calculations are made in the business world. [REDACTED] states that the fact the petitioner did not need to access his available equity for lines of credit unequivocally demonstrates the petitioner's access to additional financial resources to pay the proffered wage or living expenses.

The AAO acknowledges that lines of credit and debt are an integral part of any business operation. However, USCIS must evaluate the overall financial position of a sole proprietor to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142. Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner did not establish that the unused funds from the line of credit were available at the time of filing the petition. Comparable to the limit on a credit card, a line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position.

B. The Petitioner's Ability to Pay the Proffered Wage as a Single Member LLC

The petitioner has operated as a single member LLC from August 14, 2007 until the present. As is explained above, the methodology for determining ability to pay the proffered wage differs between a sole proprietorship and an LLC.

1. Employment of the Beneficiary.

As with a sole proprietorship, to determine whether an LLC has the ability to pay the proffered wage, the AAO will first assess whether the petitioner has established by documentary evidence that it has paid the beneficiary a salary equal to or greater than the offered wage. If so, the evidence will be considered *prima facie* proof of the petitioner's ability to pay.

In the instant case, the evidence of the wage paid to the beneficiary for the period since the petitioner was restructured as a single member LLC is an internally generated payroll report for 2010. The report states that the petitioner paid the beneficiary a gross wage of [REDACTED]. The record also contains an internally generated payroll report which identifies the 2008 wages paid to the beneficiary to total [REDACTED].

The record does not contain any Forms W-2, Wage and Tax Statement; Forms 1099-MISC, Miscellaneous Income; Forms 941, Employer's Quarterly Federal Tax Return; or state wage and withholding reports. Again, for the reasons explained above, internally generated payroll reports do not establish that the petitioner employed the beneficiary. Even if the AAO accepted the reports, they would only apply to the wage paid to the beneficiary for 2008 and 2010. Therefore, the petitioner has not established that it has paid the beneficiary a salary from August 14, 2007.

2. The Petitioner's Net Income and Net Current Assets.

The record of proceeding does not contain any annual reports, audited financials statements or federal tax returns for the petitioner for 2007, 2008 and 2009. The AAO instructed the petitioner to provide:

Any additional evidence of [the predecessor restaurant's] and [the petitioner's] respective abilities to pay the proffered wage not already submitted into the record of proceeding for consideration including updated evidence from [the petitioner] for 2007, 2008, and 2009 consistent with 8 C.F.R. § 204.5(g)(2).

The petitioner did not provide the requested documents for 2007, 2008, or 2009. The petitioner must establish its ability to pay the proffered wage until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The AAO specifically requested this information. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage from August 14, 2007. Again, 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). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in its notice.

3. Totality of the Circumstances

In addition to the above analysis, 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. As with the predecessor restaurant, AAO has considered the petitioner's years in business, its claimed number of employees, its history of profitability and gross sales listed on the provided tax returns.

The AAO notes that the petition states that the petitioner initiated its business in 1991, while the sole proprietor's letter in response to the director's NOID states that the business started in 1995. The record does contain evidence of the petitioner's owner's real estate. However, the personal assets of an LLC's owner is not relevant to an ability to pay determination, and a sole proprietor's real estate assets are not considered liquefiable assets similar to money market funds, or savings accounts, that can be converted into cash.

In a 2008 letter, [REDACTED] claims that the petitioner has previously employed other part-time cooks, and submits Forms W-2 for these employees for tax years 2001 through 2005. The W-2 Forms submitted indicate that the petitioner paid one part-time cook \$3,549.01 in 2001; two part-time cooks a combined salary of [REDACTED] in 2002; two part-time cooks a combined salary of [REDACTED] in 2004; and one part-time cook a salary of [REDACTED] in 2005. [REDACTED] states that he worked as the cook in 2002 and in 2006 until the beneficiary began her employment with him. These wages provide a picture of the scale of previous wages paid to cooks. The petitioner's Schedule C for tax year 2006 reflects wages of [REDACTED]. This sum ostensibly represents the amount of wages paid to all of the petitioner's workers. This total amount is approximately [REDACTED] less than the proffered wage. The record is not clear that the petitioner can both pay its claimed seven employees and pay the beneficiary the proffered wage, even if the beneficiary replaced the petitioner's one part-time cook.

Finally, as is discussed above, the regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner for 2007, 2008 or 2009. Therefore, by regulation, the AAO cannot conclude that the record establishes that the petitioner possessed the ability to pay the proffered wage for those years. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the predecessor restaurant had the ability to pay the proffered wage from the April 26, 2001 priority date and continuing until the December 27, 2006 purchase agreement, or that the petitioner had the continuing ability to pay the proffered wage from the December 27, 2006 purchase agreement until the present.

Conclusion

The petitioner has failed to establish (1) that it is a successor-in-interest to the predecessor restaurant, (2) that the predecessor restaurant possessed the ability to pay the proffered wage from the priority date until the date of the purchase agreement; and (3) that it has possessed the ability to pay the proffered wage since the date of the purchase agreement.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. See Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d at 1043; see also Soltane v. DOJ, 381 F.3d at 145.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States, 229 F. Supp. 2d at 1043.*

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.