

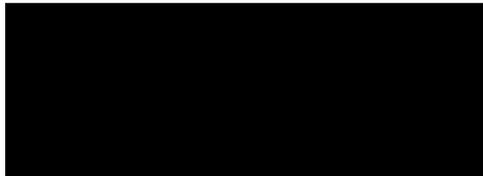
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

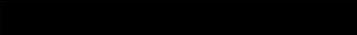
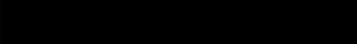


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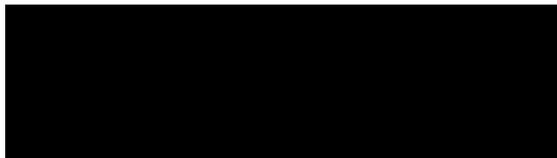
FILE: 
LIN 08 145 50167

APR 15 2011

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a care provider (i.e. operation of an adult care home). It seeks to employ the beneficiary permanently in the United States as a home health aide. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (the 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 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.

Beyond the decision of the director, an additional issue is whether Jaire Home, Inc. qualifies as a successor-in-interest to the petitioner. 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).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 ETA Form 9089 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 ETA Form 9089 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 ETA Form 9089 was accepted on October 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$8.06 per hour (\$16,764.80 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.¹

Accompanying the petition and the labor certification, counsel submitted two documents: a certification of employment dated January 23, 2006, for [REDACTED] and a copy of a college diploma.²

The director issue a request for evidence (RFE) dated January 27, 2009, to counsel. In response to the request, counsel submitted a letter dated March 5, 2009; a Wage and Tax (W-2) statement for 2008 from [REDACTED] to the beneficiary in the amount of \$5,300.00; a Wage and Tax Statement (W-2) issued in 2008 to another worker; and [REDACTED] federal income tax (Forms 1120S) returns for 2006⁴ and 2007.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 10, 2007, the beneficiary did claim to have worked for the petitioner.

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 labor certification in this matter requires a high school education and no job experience.

³ The petitioner is identified in the petition by the federal Employer Identification Number (EIN), #38-3714888. According to 20 C.F.R. § 656.17 (5)(i), "the term "Employer" means an entity with the same Federal Employer Identification Number (FEIN or EIN)." The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. *See* <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> accessed April 4, 2011.

The regulation at 20 C.F.R. § 656.3 states, in part, that an "employer," in this instance is one that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States and possesses a valid EIN.

⁴ Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's federal income tax return for 2006 generally. In 2006 the petitioner suffered a loss of \$33,231.00.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2007 or subsequently. The 2008 W-2 statement issued to the beneficiary in the record does not represent wages paid by the petitioner. Accordingly, this W-2 statement is not relevant to whether the petitioner has established its ability to pay the proffered wage. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Also, as explained *infra*, it has not been established that the issuer of this 2008 W-2 statement is a successor-in-interest to the petitioner. Finally, even if considered, the 2008 W-2 Statement shows a wage payment of \$5,300.00, which is \$11,464.80 less than 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 the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial 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:⁵

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.

[REDACTED] "[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 March 10, 2011 with the receipt by the AAO of the petitioner's submissions in response to the request for evidence. In 2007, the petitioner's Form 1120S stated net income⁶ of <\$35,060.00>.⁷ Therefore, for 2007, the petitioner did not have sufficient net income to pay the proffered wage.

⁵ Counsel recites on appeal that "Accounting principles of depreciation are not to be taken as evidence of the ability to pay a wage or hire employees." *Resser vs. Commissioner*, 74 F.3d 1538 (7th Cir. 1996). It is not clear what counsel intends by this statement than to agree with the decision in [REDACTED]

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown 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. In 2007, the petitioner's Form 1120S stated net current assets of <\$1,302.00>. Therefore, for 2007, 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 in 2007 or 2008, or its net income or net current assets for 2007. A tax return was not submitted for 2008.

Beyond the decision of the director, an additional issue is whether Jaire Home, Inc. qualifies as a successor-in-interest to the petitioner and, thus, whether the instant petition and appeal are moot due to the dissolution of the petitioning corporation.

According to the record of proceeding, the petitioner had been informed that, according to the California Secretary of State, Business Entity Detail's official website, [REDACTED] is dissolved.⁹ According to counsel's letter dated March 7, 2011, the petitioner "was dissolved and restructured as [REDACTED] According to that same website accessed by counsel on March 9, 2011, and according to the record, Jaire Home, Inc. was incorporated on March 8, 2007.

There was no financial evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) submitted for Jaire Home, Inc., and no information showing the reputed restructuring of the petitioner into Jaire Home, Inc. except the reference in [REDACTED] letter dated March 7, 2011, a note in the

relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 16, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had other adjustments shown on its Schedule K for 2007, the petitioner's net income is found on Schedule K of its tax return.

⁷ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁸ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁹ See <http://kepler.sos.ca.gov/cbs.apx> accessed on March 17, 2011.

petitioner's 2007 California tax return, and a letter dated June 18, 2009 from the petitioner's tax preparer. The above website does not mention it. 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 record is devoid of evidence such as a bill of sale, sales agreement, or other evidence of a transfer of ownership.

A purported successor may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the entity must be the same as originally offered on the labor certification. Second, the claimed successor must submit evidence of the ability of both the predecessor entity and the purported successor to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2); the predecessor entity must be able to pay beginning on the priority date until the date the transfer of ownership to the successor is completed, while the purported successor must demonstrate its continuing ability to pay the proffered wage from the transaction date forward. Third, the successor must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also 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 essential business functions must remain substantially the same as before the ownership transfer. *See generally Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. Black's Law Dictionary 1473 (8th ed. 2004); *see also 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. While 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, 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. *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

The petitioner's tax preparer in his letter dated June 18, 2009, stated that in tax year 2007 there were seven business facilities "under the corporation- [REDACTED] some under [REDACTED] Inc. and some under sole proprietorship." As noted above, 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. This has not been proven in this case. There is insufficient evidence submitted that [REDACTED] is the successor-in-interest to the petitioner. There is no evidence of a merger or transfer of assets and liabilities from the petitioner to Jaire

Home, Inc. Accordingly, as the petitioner is dissolved, and has not been established to have been succeeded by a *bona fide* successor-in-interest, the appeal is also dismissed as moot.¹⁰

On appeal, counsel asserts that according to the petitioner's tax preparer's report and statement dated June 18, 2009, the petitioner suffered a loss in 2007 as "a result of carry overs from prior years, and taken against income in 2007 to reduce, legitimately, tax liability."

The petitioner's tax preparer in his letter dated June 18, 2009, provides an opinion for tax year 2007 (for which a tax return was submitted in this matter) to explain why in his opinion the petitioner had the ability to pay the proffered wage. Without providing audited financial statements, line references to the petitioner's tax returns or documentary evidence, the petitioner's accountant opines that in tax year 2007 there were seven business facilities "under the corporation- some under and some under sole proprietorship, [which] together had total cash inflow of \$750,875.00 and wage expense of \$290,719.00 in 2007." There is no attempt in the letter to distinguish the petitioner's finances.

Once again, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Further, the petitioner's accountant opines that serially for undetermined "prior" tax years, a "Net Operating Loss Carryover" from some undetermined entity(s) finances may be disregarded in the computation of adjusted gross income shown on a tax payer's undisclosed Forms 1040 to demonstrate the Subchapter S corporation's (i.e. the petitioner) ability to pay the proffered wage. Counsel has not referred to any statutes or regulations to support this erroneous opinion.

Without more information the AAO is unable to consider whether the carryovers should be considered in this matter. 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. 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

¹⁰ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

(Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

According to counsel, the petitioner reported total cash inflows of \$750,875.00,¹¹ and paid wages, including to the beneficiary, of \$290,719.00 which demonstrates the petitioner's ability to pay the proffered wage. Citing the case decision of *Construction & Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), counsel claims that a "subchapter S corporation can choose to have its corporate income pass through to [an] individual,"¹² "[i]f the entity has enough cash flow, it can afford a salary," and "[a] company's tax returns are not a reliable basis for determining whether a company can afford to hire another employee."¹³

¹¹ This figure does not appear on the petitioner's tax returns.

¹² No Form 1040 for the petitioner was submitted.

¹³ The court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612.

Further, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." *Id.* at 596. The court stated that if an employer has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure. *Id.* at 595.

Therefore, if the AAO were to follow the holding of the court in *Construction and Design* in the instant case, the petitioner would be required to establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by approximately 1.4. The multiplier is based on data provided by the Bureau of Labor Statistics, which is available at <http://www.bls.gov/news.release/ecec.t01.htm> (accessed February 3, 2011). Using the OMB-approved formula, the "fully burdened" wage rate in this case equates to \$23,470.72 per year. However, as the instant case does not arise in the seventh

Counsel has only submitted one relevant federal income tax return in this case. Reasonably, there were other tax returns, or other evidence, that the petitioner could have submitted to show its ability to pay the proffered wage. It appears that counsel is speaking hypothetically, that is to say, that the petitioner's income is passed through to its sole shareholder (in 2006, <\$33,231.00>, and in 2007, <\$35,060.00>), or that the petitioner "has enough cash flow" to pay the proffered wage. Both net income and cash flow have not been demonstrated.

Under generally accepted accounting principles (GAAP), in cash flow statements, the sources of cash are disclosed. The general categories are cash received from operations and investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with an audited balance sheet and income statement, present an analysis of the financial health of a business. Documentary evidence, such as a detailed business plan and audited cash flow statements can demonstrate the petitioner's overall financial position. See, e.g., <http://www.Planware.org/cashflowforecast.htm> accessed April 14, 2011. However audited financial statements and a business plan were not submitted. There was insufficient evidence submitted to demonstrate the cash flow of the petitioner, or that the petitioner has ever turned a profit.

Counsel also references *Elatos Restaurant Corp. v. Sava*, for the proposition that the government needs to look beyond the tax returns." Again, counsel has failed to submit sufficient evidence that USCIS or the AAO could review and analyze to reach, for the sake of argument, a favorable determination in this case. The burden of proof in these proceedings rests solely with the petitioner.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

circuit, the AAO will not require the petitioner to establish its continuing ability to pay the proffered wage at the higher "fully burdened" wage rate.

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

In the instant case, counsel states that the petitioner is in "the continual process of growth," and is able to pay all wages and outstanding liabilities, as the "entities" are consolidated for purposes of "ease of management," "and assets of the predecessor entity are taken over by the current existing consolidated entity." Counsel contends that the assets of "seven entities, now under one umbrella, are to be considered in assessing" the petitioner's ability to pay the proffered wage.

Counsel argues that the ability to pay the proffered wage should be shared by all seven facilities owned or controlled by one individual business, although no financial information according to the regulation at 8 C.F.R. § 204.5(g)(2) was submitted for other entities or for the alleged successor-in-interest. No evidence was submitted to establish that from the priority date onwards that any entity other than the petitioner would have been the beneficiary's actual employer, in control of the proffered position, had the beneficiary accepted the position. Consequently, only the petitioner is eligible to file a visa preference petition on its behalf.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)).

Counsel, here, has not provided any evidence to show any large one-time incident impacting the business' finances, or other factor which previously impacted its ability to pay the prevailing wage. Additionally, by reviewing the petitioner's net income, as well as the petitioner's net current assets, the petitioner's financial status has been fairly considered. Additionally, the petitioner here has failed to provide any evidence to demonstrate its reputation, or specific information regarding its employment roster. Again, 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)). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. In fact, the petitioner has been dissolved and it has not been established by sufficient evidence that the petitioner has been succeeded by a successor-in-interest.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

¹⁴ Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). See 8 C.F.R. § 204.5(c).

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.