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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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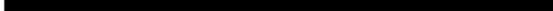


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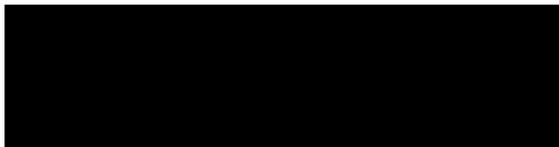
Office: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

*Perry Rhew*

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> The director determined that the petitioner had not established that the beneficiary had the required education as of the priority date. The director denied the petition accordingly.

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<sup>1</sup> The labor certification was initially filed by [REDACTED]. The DOL changed the employer to [REDACTED]. on September 12, 2006, the date the labor certification was certified. In response to the director's Request for Evidence (RFE) dated February 6, 2008, the petitioner submitted documentation regarding its status as a successor-in-interest to [REDACTED]. United States Citizenship and Immigration Services (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 1981) (*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(e) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

*Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. 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, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

The Commissioner's decision, 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* 1570 (9th ed. 2009) (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. *Id.* at 1569 (defining "successor"). When considering other business 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.

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. *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

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 April 28, 2008 denial, the primary issue in this case is whether or not the petitioner submitted sufficient evidence of the beneficiary's education as of the priority date. On appeal, the AAO has identified an additional ground of ineligibility: whether the petitioner and its predecessor had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The AAO conducts appellate review on a *de novo* basis. *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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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.

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. 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.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish its ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. Here, the petitioner submitted a copy of its Business Transfer Agreement which fully documents the transaction transferring assets, essential rights and obligations of [REDACTED] to the petitioner. The agreement specifically stated that the beneficiary would be transferred to the petitioner and that the beneficiary would continue to work in the same capacity at the same rate of pay or higher. The ability of the petitioner and its predecessor to pay this proffered wage will be discussed herein.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Acting Reg'l Comm'r 1977). Here, the Form ETA 750 was accepted for processing on June 9, 2004. The Immigrant Petition for Alien Worker (Form I-140) was filed on February 14, 2007.

The job qualifications for the certified position of construction carpenter are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

**GENERALLY:** Read blueprints, sketches and plans to ascertain the required materials and project dimensions. Select appropriate materials and prepare the property for the task using measuring implements. Build, install and repair frameworks made of wood, plywood and wall board using hand tools and power tools. Verify accurate fit of construction by using plumb bob and level. As needed, erect scaffolding and ladders for building above ground level. In remodeling, remove certain structures in preparation for replacement with new construction.

**ROUGH FRAMING:** Measure and mark cutting materials to specifications using ruler and pencil. Cut building materials using hand tools and power tools such as saws, chisels and planes. Fit prepared building materials together per the plans using various nail types and sizes and nail gun. Rough-frame wall, partitions, sub-floor, roof, stair systems, window and door casings with wood, plywood and wallboard using hand tools and power tools. Build concrete forms for foundations.

**FINISH CARPENTRY:** Measure and mark cutting materials to specifications using ruler and pencil. Cut building materials using hand tools and power tools such as saws, chisels and planes. Finish carpentry includes weather stripping and installing prefabricated doors, windows, cabinets and corresponding hardware; installing wood floors and paneled walls; selecting, cutting and installing base and crown moldings; building and affixing bookshelves, bookcases, closets, and fireplace mantelas [sic] using carpenter's hand tools and power tools.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4

College	0
College Degree Required	None
Major Field of Study	N/A

Experience:

Job Offered	4 years
(or)	
Related Occupation	[None]

Block 15:

Other Special Requirements: None

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires eight years of grade school education, four years of high school education, and four years of experience in the job offered as a construction carpenter.<sup>3</sup>

On the Form ETA 750B, signed by the beneficiary on May 24, 2004, the beneficiary represented that he attended grade school from 1980 to 1986 and earned a high school diploma after attending high school from August 1986 to June 1990. In support of the beneficiary's educational qualifications, the petitioner submitted a statement from the Mexican Secretary of Education stating that the beneficiary attended three years of secondary school. No further evidence of any education was submitted, including evidence that the beneficiary attended grade school.

The director denied the petition on April 28, 2008. He determined that the beneficiary did not meet the terms of the labor certification which required eight years of grade school education, four years of high school education and four years of experience as a construction carpenter.

DOL assigned the code of 47-2031.01, construction carpenter, to the proffered position. According to DOL's public online database at <http://www.onetonline.org/link/summary/47-2031.01> (accessed November 23, 2011) and its description of the position and requirements for the position most

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<sup>3</sup> The petitioner established that the beneficiary had the required four years of work experience in the job offered.

analogous to the petitioner's proffered position, the position falls within Job Zone Two requiring "some preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 4.0-<6.0 to the occupation, which means that "These occupations usually require a high school diploma." Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Some previous work-related skill, knowledge, or experience is usually needed. For example, a teller would benefit from experience working directly with the public.

Employees in these occupations need anywhere from a few months to one year of working with experienced employees. A recognized apprenticeship program may be associated with these occupations.

*See id.* Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a skilled worker.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The above regulation requires that the alien meet the requirements of the labor certification.

Initially, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.<sup>5</sup>

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<sup>5</sup> On appeal, counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7<sup>th</sup> Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes “relevant” post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case. Counsel also cited *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which held that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” *Id.* at 1179. Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 \*5 (D. Or. Nov. 30, 2006). The court in *Snapnames.com, Inc.* concluded that where the plain language of the labor certification does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.*

On appeal, counsel states that a high school education is not required for the beneficiary to perform the job duties and that, since the beneficiary has the required experience, the petition should be approved. In support of this proposition, counsel cites *Denver Tofu Company v. District Director*, 525 F.Supp. 254 (D. Colo. 1981). In the *Denver Tofu* case, the court held that the director acted arbitrarily and capriciously in focusing on a technical requirement of "management training" for the position of product development manager where the labor certification application required two years of "on-the-job training" and the job involved the supervision of only three employees. *Id.* However, unlike the *Denver Tofu* case, there is no basis to question the plain meaning of the terms of the labor certification in the instant case.<sup>6</sup> The labor certification application requires eight years of grade school education, four years of high school education and four years of experience as a construction carpenter.

In response to the director's RFE, counsel cited a Board of Alien Labor Certification Appeals (BALCA) case, *Innova Solutions*, 2203-INA-94 (BALCA 2004), for the proposition that no U.S. worker could have known of the error of the excessive degree requirement and, therefore, could not have been discouraged from applying for the proffered job because the advertisement did not list educational requirements. However, counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also cited to the Technical Assistance Guide (TAG) and General Administration Letter (GAL) No. 1-97. However, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). The AAO is not bound by the TAG and GAL No. 1-97.

Counsel argues that the AAO should discard the high school education requirement as it "exists on paper only and in and of itself is insignificant." To this end, counsel urges the AAO to examine the advertisements placed for the position that do not mention that any education is required. Neither the job advertisements on California Jobs or in *The Sun – San Bernardino County* require education; the California Jobs advertisement seeks those with four years experience, the newspaper advertisements do not contain any education or experience requirement. Similarly, the notice sent to the local union did not contain any education requirement, but only required four years of experience

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<sup>6</sup> Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. at 719.

in the position offered. Counsel explains that the lack of an education requirement allowed for a greater pool of U.S. workers.<sup>7</sup> Counsel also notes that the Prevailing Wage Request Form submitted to the Employment Development Department with the State of California did not require any education. However, as stated above, DOL's role is to determine that there are not sufficient U.S. workers for the position and to certify a position's requirements and prevailing wage rate. See *Madany*, 696 F.2d at 1012; *K.R.K. Irvine*, 699 F.2d at 1009; *Tongatapu Woodcraft Hawaii*, 736 F.2d at 1309. USCIS may not ignore a term of the labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406. See also, *Madany*, 696 F.2d 1008; *K.R.K. Irvine, Inc.*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc.*, 661 F.2d 1.

As the beneficiary does not meet the terms of the labor certification, the petition must be denied. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). Specifically, the labor certification requires eight years of grade school education and four years of high school education. The petitioner has provided no evidence to establish that the beneficiary completed eight years of grade school and four years of high school as required by the labor certification.<sup>8</sup> Therefore, the petitioner has failed to demonstrate that the beneficiary has the education required for the position offered.

Additionally, beyond the decision of the director, the petitioner failed to establish that it or its predecessor had the continuing ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The regulation 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

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<sup>7</sup> The recruitment report stated that [REDACTED] received six resumes in response to its recruitment efforts. Of the six applicants, four were not qualified because they did not have the specific skills such as finish carpentry experience, concrete forming, or rough framing. The two qualified applicants declined the position. No mention was made in the recruitment report as to any education of the applicants, nor were their resumes attached for our review.

<sup>8</sup> The labor certification application does not state that any type of equivalency would be accepted. The beneficiary's three years of secondary school education do not meet the terms of the labor certification.

form of copies of annual reports, federal tax returns, or audited financial statements.

Generally, 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). In the instant case, the petitioner must establish the ability of its predecessor, [REDACTED], to pay the proffered wage from the priority date to the date of transfer, June 18, 2005, and the petitioner must establish its ability to pay the proffered wage from the date of transfer onward.<sup>9</sup>

Here, the Form ETA 750 was accepted on June 9, 2004. The proffered wage as stated on the Form ETA 750 is \$18.79 per hour (\$39,083.20 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner's predecessor was structured as a sole proprietorship. On the petition, the petitioner indicated that it was established in 2005 and currently employs five workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on May 24, 2004, the beneficiary did not claim to have worked for the petitioner or its predecessor.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner and/or its predecessor employed and paid the beneficiary during that period. If the petitioner and/or its predecessor establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner provided the following Forms W-2:

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<sup>9</sup> Thus, for 2005, [REDACTED] must establish its ability to pay \$18,096.06 from January 1, 2005 to June 18, 2005, and the petitioner must establish its ability to pay \$20,987.14 from June 19, 2005 to December 31, 2005.

- The 2004 W-2 indicates that [REDACTED]<sup>10</sup> paid the beneficiary \$37,907.<sup>11</sup>
- The 2005 W-2 indicates that [REDACTED] paid the beneficiary \$15,594 and the 2005 W-2 issued by the petitioner states that it paid the beneficiary \$19,987.50.
- The 2006 W-2 indicates that the petitioner paid the beneficiary \$47,226.
- The 2007 W-2 indicates that the petitioner paid the beneficiary \$52,934.

As the amounts paid by the predecessor to the beneficiary in 2004 and from January 1, 2005 through June 18, 2005 are less than the proffered wage, the petitioner must establish its predecessor's ability to pay the difference between the actual wage paid and the proffered wage in those periods; in 2004, the difference is \$1,176.20 and in 2005, the difference is \$2,502.06. Further, as the amount paid by the petitioner from June 19, 2005 through December 31, 2005 is less than the proffered wage for that period, the petitioner must establish its ability to pay the \$999.64 difference between the actual wage paid and the proffered wage. The Forms W-2 demonstrate that the petitioner had the ability to pay the proffered wage in 2006 and 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d

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<sup>10</sup> As stated above, the petitioner is a successor-in-interest to [REDACTED]. The petitioner submitted tax return transcripts for [REDACTED] for 2004 and 2005. While the Forms W-2 issued by [REDACTED] show a federal employer identification number (EIN) for the business and show wages paid by the business to the beneficiary in 2004 and 2005, the tax return transcripts for the business do not indicate that the business had a separate EIN or paid wages in either year. The tax transcripts do not indicate if the beneficiary's wages were included as costs of goods sold in either year. Further, the beneficiary indicated on Form ETA 750B that he had not worked for [REDACTED] as of May 24, 2004. The record does not indicate whether all of the wages paid by [REDACTED] to the beneficiary in 2004 were paid after May 24 of that year. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

<sup>11</sup> The AAO will not prorate the wage for 2004. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly audited income statements or pay stubs, the petitioner has not submitted such evidence. Thus, the petitioner must establish its predecessor's ability to pay the full proffered wage in 2004.

571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

*River Street Donuts*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The petitioner must establish ability of its predecessor, [REDACTED] to pay the difference between the actual wage paid and the proffered wage of \$1,176.20 in 2004 and \$2,502.06 for the period from January 1, 2005 through June 18, 2005. The petitioner's predecessor was structured as a sole proprietorship.

Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's adjusted gross income (AGI), liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-

related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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

In 2004, the sole proprietor had an AGI of \$35,179 and in 2005, the sole proprietor's AGI was \$177,249. However, the petitioner submitted no statement of the sole proprietor's personal expenses to demonstrate that his AGI was sufficient to support himself, his wife, and three dependents as well as pay the difference between the actual wage paid and the proffered wage.<sup>12</sup> Therefore, the petitioner failed to demonstrate that its predecessor had the ability to pay the difference between the actual wage paid and the proffered wage in 2004 or the period from January 1, 2005 through June 18, 2005.<sup>13</sup>

The petitioner must establish its ability to pay the \$999.64 difference between the actual wage paid and the proffered wage from June 19, 2005 through December 31, 2005. The petitioner is structured as an S corporation. In 2005, the petitioner's Form 1120S stated net income<sup>14</sup> of -\$34,921.

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<sup>12</sup> The AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to determine a sole proprietor's personal living expenses. The poverty guidelines are used for administrative purposes - for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty guidelines are not adjusted for regional differences in the cost of living and, therefore, comparisons across regions of the country may be misleading. Thus, the poverty guidelines will not be considered when determining the petitioner's ability to pay the proffered wage.

<sup>13</sup> Regarding the sole proprietor's property values, real estate is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell such significant personal assets to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if 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 (5<sup>th</sup> 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).

<sup>14</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e of Schedule K for 2005. *See* Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 26, 2011) (indicating that Schedule K is a summary schedule of all

Therefore, the petitioner has not established that it had sufficient net income to pay the difference between the actual wage paid and the proffered wage from June 19, 2005 through December 31, 2005.

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.<sup>15</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2005 Form 1120S stated no net current assets.<sup>16</sup> The petitioner provided no other evidence required by 8 C.F.R. § 204.5(g)(2) to establish its net current assets for 2005. Therefore, the petitioner did not demonstrate sufficient net current assets to pay the difference between the actual wage paid and the proffered wage from June 19, 2005 through December 31, 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner and its predecessor have not established that they had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2006 and 2007.

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion

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shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional adjustments shown on its Schedule K, the petitioner's net income is found on line 21 of its tax returns for that year.

<sup>15</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>16</sup> Schedule L to IRS Form 1120S is not required to be completed if the corporation's total receipts for the tax year and its total assets at the end of the tax year are less than \$250,000. *See* <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 24, 2011).

design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's first year of operation was 2005, just two years prior to filing the Form I-140 petition. It is not clear from the record when the petitioner's predecessor, [REDACTED] was established. The petitioner submitted no evidence as to its reputation or the reputation of its predecessor, or any evidence showing that one year was off or otherwise not representative of the petitioner's or its predecessor's overall financial picture. The petitioner paid no salaries and wages in 2005 and it paid only \$70,995 in costs of labor in 2005.

In correspondence submitted with the petition, counsel stated that the petitioner paid officer compensation of \$22,500 to [REDACTED] in 2005 and that this amount may be used to demonstrate the petitioner's ability to pay the proffered wage in 2005. The petitioner's IRS Form 1120S for 2005 shows that the petitioner paid officer compensation of \$22,500 to [REDACTED] that year. However, the petitioner submitted no evidence to establish that [REDACTED] was willing or able to forgo his officer compensation in 2005.<sup>17</sup> Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it or its predecessor had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>17</sup> [REDACTED] 2005 IRS Form 1040, U.S. Individual Income Tax Return, shows total wages and salaries for him and his wife of \$26,551, and an adjusted gross income of \$17,684 that year. Therefore, it does not appear that [REDACTED] had the ability to forgo his officer compensation payment that year.