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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

PUBLIC COPY



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



B6

JAN 03 2011

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

SELF-REPRESENTED

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,

Elizabeth McCormack

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 custom tailoring and alteration business. It seeks to employ the beneficiary permanently in the United States as a garment fitter/alterations tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

As a threshold issue, the AAO notes that the Form I-140 petition was filed by [REDACTED] represented by [REDACTED], with a Hermosa Beach, California address, and that there is no approved labor certification application in the name of the petitioner. The approved labor certification of record is in the name of [REDACTED], represented by [REDACTED] with a Redondo Beach, California address. There is no evidence indicating that [REDACTED] is the successor-in-interest to [REDACTED]. As there is no approved labor certification accompanying the petition, the appeal must be rejected. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). For this reason, the petition may not be approved. As the issue was not raised by the director, however, the AAO will adjudicate the appeal on the issues of the petitioner's ability to pay the proffered wage and the beneficiary's qualifications discussed by the director and briefed by the petitioner on appeal.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the issues in this case are whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary is qualified to perform the duties of the position.

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

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

¹ The petitioner's tax returns refer to the petitioner as [REDACTED]. In this decision we will refer to [REDACTED] with [REDACTED].

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 3, 2002.² The proffered wage as stated on the Form ETA 750 is \$14.35 per hour (\$29,848.00 per year). The Form ETA 750 states that the position requires 2 years of experience in the job offered or 2 years experience as a garment fitter.

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

The evidence in the record of proceeding shows that the petitioner is a sole proprietorship. On the petition, the petitioner indicates that it was established on October 1, 1993, and that it currently employs 7 workers. On the Form ETA 750B, signed by the beneficiary on March 3, 2001, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition

² The record of proceeding shows that [REDACTED] initially filed the ETA 750 using the company name [REDACTED] and that the ETA 750 was initially received on March 8, 2001. The filing date was amended to read that June 3, 2002 was the initial date of filing the Form ETA 750. [REDACTED] is listed on the California State Corporations website <http://kepler.ss.ca.gov/> as a corporate entity that was established on November 28, 1995, and is currently dissolved. The record of proceeding also shows that the ETA 750 was amended to read [REDACTED] as the employer applicant rather than [REDACTED]

³ 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).

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The proffered wage is \$29,848.00 per year. The petitioner submitted copies of the beneficiary's IRS Forms W-2 that demonstrate the beneficiary's wages as shown in the table below.

- In 2002, the Form W-2 stated wages of \$8,840.00.⁴
- In 2003, the Form W-2 stated wages of \$8,840.00.
- In 2004, the Form W-2 stated wages of \$9,010.00.
- In 2005, the petitioner did not provide any evidence of wages paid to the beneficiary.
- In 2006, the Form W-2 stated wages in the amount of \$4,930.00.
- In 2007, the Form W-2 stated wages in the amount of \$23,484.00.⁵

As there has been no relationship established between [REDACTED] and the petitioner, [REDACTED] the AAO will not consider the wages paid by [REDACTED] in its determination 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 from the priority date onwards.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay

⁴ The employer's name on the beneficiary's Forms W-2 for the years 2002 through 2006 is [REDACTED] and the business entity's employer identification number is EIN [REDACTED]

⁵ The employer name used on the Form W-2 for the year 2007 was [REDACTED] and the employer identification number used was EIN [REDACTED]

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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

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

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

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

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on July 31, 2007, with the receipt by the director of the petitioner’s Form I-140 petition. As of that date, the petitioner’s 2007 federal income tax return was not yet due. On appeal, the petitioner submitted its income tax returns for 2002 through 2007 for consideration on appeal.

The petitioner claims to be 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). The petitioner filed the

instant petition as a sole proprietor on June 8, 2007, listing the name of the sole proprietorship and the social security number of the sole proprietor. 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. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, 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 out of their adjusted gross income or other available funds. In addition, sole proprietors 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 highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The record of proceeding shows that the business entity listed on Schedule C of the Forms 1040 for 2002 through 2007 is [REDACTED] EIN number (EIN [REDACTED]) differs from the employer EIN number (EIN [REDACTED]) that appears on the Forms W-2 issued to the beneficiary by [REDACTED] from 2002 through 2006. It is further noted that the business addresses for the two entities are different and that the proprietor's names are different; [REDACTED] is the representative for [REDACTED] aka [REDACTED] and [REDACTED] is the proprietor for [REDACTED]. Thus, the amounts paid to the beneficiary by [REDACTED] will not be counted in the determination of whether [REDACTED] has the ability to pay the proffered wage.

IRS Forms 1040 from [REDACTED] reflect the adjusted gross income (AGI) as shown in the table below.

- In 2002, the sole proprietor's IRS Form 1040 stated AGI of \$215,652.00.
- In 2003, the sole proprietor's IRS Form 1040 stated AGI of \$133,893.00.
- In 2004, the sole proprietor's IRS Form 1040 stated AGI of \$124,267.00.
- In 2005, the sole proprietor's IRS Form 1040 stated AGI of \$183,982.00.
- In 2006, the sole proprietor's IRS Form 1040 stated AGI of \$959,898.00.
- In 2007, the sole proprietor's IRS Form 1040 stated AGI of \$124,745.00.

Although the AGI balances for the years noted above exceed the proffered wage amount, there is no evidence in the record of proceeding about the petitioner's household expenses. As noted above, sole proprietors must show that they can sustain themselves and their dependents, if any, in addition to paying the proffered wage. As the petitioner has not submitted evidence of household expenses, it cannot be determined that the petitioner's adjusted gross income is sufficient to pay the beneficiary's wage and his personal household expenses.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its income.

The director also found that the beneficiary was not qualified to perform the duties of the position. The AAO agrees. The petitioner has failed to establish that the beneficiary is qualified for the proffered position with two years of experience in the job offered. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as a garment fitter/alterations tailor. However, the petitioner has not submitted a letter of employment to demonstrate the beneficiary's qualifications at the time the labor certification was submitted. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The beneficiary, on the ETA 750B signed on March 3, 2001, did not indicate any employment besides that as a garment fitter for [REDACTED] since 1994. Accordingly, the petition will be denied for this additional reason. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 8, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

On appeal, the petitioner asserts that the petitioner has demonstrated its ability to pay the proffered wage with the evidence it has submitted. The petitioner further asserts that the director never requested evidence pertaining to the beneficiary's qualifications, that the beneficiary's employment with the petitioner would generate additional income, and that the petitioner/owner has sufficient assets to pay the proffered wage.

Contrary to the petitioner's claim, if all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition in the absence of issuing a request for evidence. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007).

The petitioner has not provided any evidence to substantiate the claim that the beneficiary's employment will generate additional income. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Although a sole proprietor's income, liquefiable assets, and personal liabilities are considered as part of the petitioner's ability to pay, the petitioner has failed to provide evidence of its assets during the requisite time period.

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.

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonogawa*. The record is devoid of evidence pertaining to the petitioner's business reputation or whether the beneficiary is replacing a former employee or outsourced service. There is no evidence in the record of proceeding that demonstrates any uncharacteristic business expenses or losses which made 2002, 2003, 2004, 2005, 2006, or 2007 unusually difficult or unprofitable years. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage.

Beyond the decision of the director, USCIS electronic records show that the petitioner filed an additional I-140 petition which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Since the record in the instant petition fails to establish the petitioner's ability to pay the

proffered wage to the single beneficiary of the instant petition, it is not necessary at this time to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on approved ETA 750 labor certifications.

Beyond the decision of the director, as noted above the record does not establish that the petition is accompanied by an individual labor certification from the DOL in the name of the petitioner. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). Accordingly, the petition may not be approved for this additional reason.

The original employer identified in the Form ETA 750 filed on March 8, 2001 was a corporation [REDACTED] which lists [REDACTED] as owner and operator. The labor certification application was approved in the name of [REDACTED] and a priority date of June 3, 2002. There is no evidence of record to demonstrate that the petitioner, [REDACTED] is the successor-in-interest to [REDACTED]

The only way for the petitioner to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). In this matter, the record is devoid of such evidence.

Matter of Dial Auto is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act.

By way of background, *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 successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy Immigration and Naturalization Service (INS) and USCIS have at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

As noted above, in this matter, the record is wholly devoid of evidence that the petitioning corporation is the successor-in-interest to the individual employer identified in the Form ETA 750. Accordingly, the petition could not be approved for this additional reason.

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).

When the AAO denies a petition on multiple alternative grounds, a petitioner can succeed on a challenge only if he or she shows 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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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