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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

PUBLIC COPY

[REDACTED]

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FILE: [REDACTED]

Office: TEXAS SERVICE CENTER

Date: JAN 26 2011

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

[REDACTED]

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 Director, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaners. It seeks to employ the beneficiary permanently in the United States as a dry cleaner helper (machine operator) pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and denied the petition accordingly.

Section 203(b)(3)(A)(iii) of 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 not available in the United States.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹ and discusses all relevant issues including those the director did not identify in his decision. The AAO has identified an additional ground of ineligibility in this case, namely whether or not the petitioner is a successor-in-interest to the business entity listed on the labor certification.

No regulations govern 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. 1981) ("*Matter of Dial Auto*"), a binding legacy Immigration and Naturalization Service ("INS") precedent that was decided by the Administrative Appeals Unit and designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

¹ 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).

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

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

The legacy INS and USCIS has, 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 government could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason 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." *Id.* (emphasis added.)

Accordingly, the Commissioner clearly considered the petitioner's claim that it 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 of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims.

In view of the above, *Matter of Dial Auto* did not stand for the proposition that a valid successor relationship could 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 more broad: “One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.” Black’s Law Dictionary at 1473 (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 interest.² *Id.* (defining “successor”). When considering other business organizations, such as partnership or sole proprietorship, 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.³

A mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *Id.* 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 obligation 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

² Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group comprehends “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is, either in law or in point of fact, the reincarnation or reorganization of one previously existing. To the fourth group belong those transactions in which a corporation, although continuing to exist as a legal entity, is in fact merged in another which, by acquiring its assets and business, has left the first with only its corporate shell. 19 Am. Jur. 2d Corporations § 2165 (2010).

³ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. See *Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

manner with regard to the assets sold.⁴ 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 success relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner 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.

In the instant case, the Form ETA 750 was filed on April 30, 2001 by and certified on July 25, 2007 to The [REDACTED] (employer identification number: [REDACTED]) under the name of [REDACTED]. On January 18, 2008, the petitioner, [REDACTED] dba [REDACTED] filed the instant petition based on the underlying labor certification for The [REDACTED]. With the initial filing of the petition, counsel submitted a letter which the owner of the petitioner addressed to DOL on January 9, 2006 regarding the successor-in-interest (the petitioner's January 9, 2006 letter). This letter states in pertinent part that:

Please be advised that I am an owner of [REDACTED] formerly [REDACTED] located at [REDACTED]

In April 2001, [REDACTED] filed an application for alien labor certification as a Machine Operator (Dry Cleaning) on behalf of [the beneficiary].

In August 2003, maintaining the same address and telephone number, the business operating at this location known as [REDACTED] dba [REDACTED] Cleaners was dissolved and re-opened as [REDACTED] Services

⁴ The mere assumption of immigration obligations, or the transfer of immigration benefits, derived from approved or pending immigration petitions or applications will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

Inc. dba [REDACTED] Cleaners with the same telephone, fax, and street address. However, our new tax identification number is: [REDACTED].

The record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence 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 record does not contain any certificate of merger and agreement and plan of merger filed with the State of New Jersey showing that [REDACTED] (the LLC) was merged into the petitioner. As discussed previously, the only evidence counsel submitted for the petitioner's successor-in-interest status is the petitioner's January 9, 2006 letter. This letter is not sufficient to document that the petitioner not only purchased assets from the predecessor, but also assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner did not submit any documentary evidence showing why the LLC was dissolved, and whether there was any sale and purchase agreement by which the petitioner purchased the business from the LLC before it was dissolved. Without an ownership transfer, opening the same type of business at the same location itself cannot establish the petitioner's successor-in-interest status to the LLC. The record contains no other documentary evidence that the petitioner qualifies as a successor-in-interest to the LLC for the purposes of this petition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Therefore, the petitioner cannot use the underlying labor certification to file an immigrant petition.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which 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.

The labor certification is not valid for the petitioner to file an immigrant petition with United States Citizenship and Immigration Services (USCIS), the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

As the labor certification is not valid for the petitioner to use, the petition is not accompanied by a valid labor certification. Therefore, the petition cannot be approved.

In the instant petition, the AAO notes that this petition can be denied for lack of a valid labor certification for the petitioner because the new petitioner failed to establish its successor-in-interest status to the original employer who filed the Form ETA 750. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). As noted by the director, the petition may also be denied because the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present even if assuming that the petitioner had established that it qualified as a successor-in-interest to the LLC with a required documentary evidence.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. Therefore, the successor-in-interest must not only establish its ability to pay the proffered wage from the time the successorship established to the present, but also establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner claimed in its January 9, 2006 letter that it qualified as a successor-in-interest to the LLC in August 2003. Therefore, the petitioner in this matter must establish that the LLC paid the beneficiary the full proffered wage or that the LLC had sufficient net income or net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage for 2001 through August 2003. The petitioner must also establish that it paid the beneficiary the full proffered wage from August 2003 to the present or that it had sufficient net income or net current assets to pay the full proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage for these years.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$450.00 per week (\$23,400 per year).

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 this matter, the petitioner submitted the beneficiary's W-2 forms for 2001 through 2007. The beneficiary's W-2 forms show that the predecessor enterprise [REDACTED] paid the beneficiary \$2,400 in 2001, \$14,400 in 2002, and \$11,700 in the first seven months of 2003; and the petitioner paid the beneficiary \$3,600 in the five months from August in 2003, \$11,100 in 2004, \$10,200 in 2005, \$13,800 in 2006, and \$15,300 in 2007. The petitioner failed to demonstrate that either the predecessor enterprise or the petitioner paid the beneficiary the full proffered wage for the relevant years respectively, and therefore, the petitioner must demonstrate that the predecessor enterprise had sufficient net income or net current assets to pay the beneficiary the differences of \$21,000 in 2001, \$9,000 in 2002 and \$1,950⁵ in 2003 between wages actually paid to the beneficiary and the proffered wage respectively; and that the petitioner had sufficient net income or net current assets to pay the beneficiary the differences of \$6,150⁶ in 2003, \$12,300 in 2004, \$13,200 in 2005, \$9,600 in 2006 and \$8,100 in 2007 between wages actually paid to the beneficiary and the proffered wage respectively.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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

⁵ The petitioner claims that the successorship occurred in August 2003 in this matter. Therefore, the AAO prorates the proffered wage of \$13,650 for the first seven months of 2003 for the predecessor enterprise.

⁶ Accordingly, the petitioner's prorated proffered wage for five months in 2003 would be \$9,750.

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service 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).

On appeal counsel requests USCIS reconsider its position on adding back the amount of depreciation that the petitioner took on its taxes. Counsel's reliance on depreciation deduction in determining the petitioner's ability to pay the proffered wage is misplaced. With respect to depreciation, the court in *River Street Donuts* noted:

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

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

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The evidence in the record of proceeding shows that the predecessor enterprise was structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income⁷ and the petitioner is structured as a C corporation and files its tax returns on

⁷ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the

the Form 1120, U.S. Corporation Income Tax Return. According to the tax returns in the record, the predecessor enterprise's fiscal year was based on a calendar year and the petitioner's fiscal year runs from August 1 to July 31. The record contains the predecessor enterprise's Form 1065 for 2001 and 2002 and the petitioner's Form 1120 for 2003 through 2007. These tax returns demonstrate their net income respectively as set forth below.

- In 2001, the predecessor's Form 1065 stated net income of \$15,819.⁸
- In 2002, the predecessor's Form 1065 stated net income of \$14,969.
- In 2003, the petitioner's Form 1120 stated net income of \$13,922.⁹
- In 2004, the petitioner's Form 1120 stated net income of (\$2,781).
- In 2005, the petitioner's Form 1120 stated net income of \$14,443.
- In 2006, the petitioner's Form 1120 stated net income of \$7,708.
- In 2007, the petitioner's Form 1120 stated net income of \$4,683.

For 2001, the predecessor enterprise did not have sufficient net income to pay the beneficiary the difference of \$21,000 between wages actually paid to the beneficiary and the proffered wage while the predecessor enterprise had sufficient net income to pay the beneficiary the difference of \$9,000 between wages actually paid to the beneficiary and the proffered wage in 2002. However, the petitioner did not submit the predecessor's annual report, tax return or audited financial statements for 2003, and therefore, the AAO cannot determine whether the predecessor had sufficient net income to pay the difference of \$1,950 in 2003 between wages actually paid to the beneficiary and the proffered wage.

The petitioner's tax return shows that the petitioner had net income of \$13,922 during the fiscal year 2003 (8/1/03-7/31/04). However, its prorated net income for five months from August to December in 2003 would be approximately \$5,800.93 which was not sufficient to pay the difference of \$6,150 between wages actually paid to the beneficiary and the proffered wage for the petitioner was responsible to pay during the five months in 2003. Therefore, the petitioner failed to demonstrate that it had sufficient net income to pay the beneficiary the difference between wages actually paid to the beneficiary and the proffered wage during the five months from August to December in 2003.

petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

⁸ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K.

⁹ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

The petitioner's net income for 2005 was sufficient to pay the difference of \$13,200 between wages actually paid to the beneficiary and the proffered wage in 2005. However, the petitioner did not have sufficient net income to pay the differences of \$12,300 in 2004, \$9,600 in 2006 and \$8,100 in 2007 between wages paid to the beneficiary and the full proffered wage respectively.

Therefore, the petitioner failed to demonstrate that the predecessor had sufficient net income to pay the beneficiary the differences between wages actually paid to the beneficiary and the proffered wage for 2001 and 2003. The petitioner also failed to demonstrate that it had sufficient net income to pay the beneficiary the differences between wages actually paid to the beneficiary and the proffered wage for 2003, 2004, 2006 and 2007.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ An LLC's or a corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. An LLC's year-end current liabilities are shown on lines 15(d) through 17(d) while a corporation's year-end current liabilities are shown on lines 16(d) through 18(d). If the total of an LLC's or 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 predecessor's Form 1065 for 2001 and the petitioner's Form 1120 for 2003, 2004, 2006 and 2007 demonstrate their net current assets respectively as set forth below.

- In 2001, the predecessor's Form 1065 does not provide any information about its assets and liabilities in Schedule L.
- In 2003, the petitioner's Form 1120 stated net current assets of (174,489).
- In 2004, the petitioner's Form 1120 stated net income of (\$190,011).
- In 2006, the petitioner's Form 1120 stated net income of (22,995).
- In 2007, the petitioner did not submit Schedule L.

The petitioner did not provide the predecessor's figures in Schedule L of Form 1065 for 2001 and did not submit the annual report, tax return or audited financial statements for 2003, and therefore, the AAO cannot determine whether the predecessor had sufficient net current assets to pay the differences between wages actually paid to the beneficiary and the proffered wage in 2001 and 2003 respectively.

¹⁰ 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.

The petitioner's tax return shows that the petitioner had negative net current assets in its fiscal years 2003, 2004 and 2006. Therefore, the petitioner failed to demonstrate that it had sufficient net current assets to pay the beneficiary the difference between wages actually paid the beneficiary and the proffered wage in these years respectively.

The petitioner did not submit its Schedule L of Form 1120 for 2007 or other regulatory-prescribed evidence, such as annual reports or audited financial statements, and therefore, the AAO cannot determine whether the petitioner had sufficient net current assets to pay the differences between wages actually paid to the beneficiary and the proffered wage in 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner failed to establish the predecessor's and its continuing ability to pay the proffered wage except for years 2002 and 2005.

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 (BIA 1967). 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 [REDACTED] 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 the instant case, the petitioner failed to establish the predecessor's and its ability to pay the proffered wage five out of seven relevant years. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these five years were uncharacteristically unprofitable years for the petitioner. 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.

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.