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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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



B6

DATE: **JUL 05 2011** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
 Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a sprinkler technician in accordance with section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). Under this statutory provision preference classification may be granted to other 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.

On February 17, 2009, the Director denied the petition for lack of initial evidence, in accordance with 8 C.F.R. § 103.2(b)(8). In his decision the Director noted multiple grounds for denial. The company identified on the labor certification (Form ETA 750, certified by the Department of Labor (DOL) on August 28, 2007) did not match the company name on the immigrant visa petition (Form I-140, filed on February 19, 2008). No evidence had been submitted to verify that the two companies are one in the same – *i.e.*, that the petitioner is the successor-in-interest to Pacific Sundance Construction, Inc. (“Pacific Sundance”). The Director also noted that the petitioner had submitted no evidence of its ability to pay the proffered wage or the beneficiary’s qualifications for the subject position.

The petitioner filed a timely appeal with a cover letter from counsel and additional documentation addressing the grounds for denial. 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.¹

On the successor-in-interest issue, counsel stated that [REDACTED] was founded in 1989 by [REDACTED] and its corporate office was located [REDACTED] in Fremont, California. Corporate documents from 1997 show that [REDACTED] was the sole [REDACTED] of the company, and also its president and treasurer, while [REDACTED] was the [REDACTED] president and secretary. In 2004, counsel indicated, “the corporation decided to restructure.” [REDACTED] took over the company’s northern California operations, maintaining the same address in Fremont, while [REDACTED] took control of operations in southern California and set up an office at [REDACTED] in Santa Ana. [REDACTED] renamed his operation after himself, while [REDACTED] retained the name [REDACTED] (and the Federal Employer Identification Number of [REDACTED]). The labor certification application previously submitted to the DOL in the name of [REDACTED], counsel pointed out, specified that the beneficiary was to work at various locations in northern California.

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

On the ability to pay issue, counsel submitted copies of the petitioner's federal tax returns for the years 2004 to 2007, which identify [REDACTED] as the sole owner of the company, and its request to the Internal Revenue Service (IRS) for transcripts of the tax returns of [REDACTED] Inc. formerly [REDACTED] for the years 2002 and 2003. (In July 2009 the petitioner submitted copies of the 2002 and 2003 tax returns of [REDACTED]) As for the beneficiary's qualifications (the labor certification required six years of experience), counsel submitted a letter from [REDACTED] dated March 13, 2002, attesting to the beneficiary's employment as a [REDACTED] since October 1999, as well as Form W-2, Wage and Tax Statements, for the years 1999 to 2005 confirming that the beneficiary worked for [REDACTED] all of those years.

On April 14, 2011, the AAO issued the petitioner a Notice of Derogatory Information and Request for Evidence (NDI/RFE). The AAO noted continuing confusion in the record as to the petitioner's correct business identity, and requested that evidence be submitted documenting the petitioner's status as successor-in-interest to [REDACTED]. As evidence of the petitioner's ability to pay the proffered wage at all pertinent times, the AAO requested that copies be provided of its federal income tax returns, as well as the beneficiary's Form W-2s, for every year from 2002 up to the present (though some of this documentation was already in the record), in addition to the beneficiary's three most recent pay vouchers. Since the labor certification in the file – the original duplication and an incomplete revised copy – lacked signatures of the petitioner and the beneficiary, the AAO also requested that the original labor certification be submitted.

In response to the NDI/RFE the petitioner clarified that its corporate name is [REDACTED] with a Federal Employer Identification Number of [REDACTED]. The petitioner reiterated its previous narrative of the relationship between itself and [REDACTED], but submitted no additional documentation pertaining to the successor-in-interest issue. No further Form W-2s were submitted for the beneficiary, whom the petitioner indicates has not been employed by the petitioner up to now. While the petitioner resubmitted copies of the 2002 and 2003 federal tax returns for [REDACTED], it did not submit copies of its own federal tax returns for 2008, 2009, and 2010 (to supplement the tax returns already in the record for 2004-2007). Finally, the petitioner submitted a new copy of its certified Form ETA 750 with the requisite signatures of the employer ([REDACTED], then [REDACTED] of Pacific Sundance) and the beneficiary.

Issues

As the record now stands, there are two primary issues before the AAO on appeal:

- (1) Has the petitioner established that it is the successor-in-interest to [REDACTED] the employer that filed the Form ETA 750, Application for [REDACTED]?
- (2) Has the petitioner established its continuing ability to pay the proffered wage of the subject position from the priority date of the labor certification (April 5, 2002) up to the present?

There are two additional issues that will also be addressed:

- (3) May the petition request the “other, unskilled worker” classification in the Form I-140 for a position that requires at least six years of work experience?
- (4) Has the petitioner established that the beneficiary had six years of the requisite work experience before the priority date

Successor-in-interest

In the context of general corporate law, a successor is a business organization that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of a predecessor business organization. See *Black's Law Dictionary* 1569 (9th ed. 2009). Citing *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm'r 1986) (“*Matter of Dial Auto*”), the Director stated in his Decision that “[a] successor in interest must assume the rights, duties, obligations, and assets of the original employer and continue to operate the same type of business as the original employer.”

U.S. 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*, a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary’s former employer, [REDACTED], filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to [REDACTED]. 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 [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.

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

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* at 1570 (defining "successor in interest"). With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.² *Id.* at 1569 (defining "successor").

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.

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

The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold.³ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. 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. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. 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. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. 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 the successor's ability to pay the proffered wage from the date of transfer of ownership forward. See 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the foregoing analysis to the instant petition, the AAO determines that the petitioner has not established a valid successor relationship for immigration purposes.

Looking at the first condition, the petitioner has not fully described or documented any transaction transferring ownership of a part of [REDACTED] to [REDACTED]. The record indicates that [REDACTED] was the sole owner of [REDACTED] during its years of operation in Fremont, California (1989-2004), and remained the sole owner of the company after its relocation to Santa Ana. While the petitioner asserts that it took over [REDACTED] operations in northern California in 2004, no documentation thereof has been submitted. The federal income tax returns (Form 1120S) filed by [REDACTED] confirm that the petitioner was incorporated in June 2004 and was wholly owned by [REDACTED] but they contain no information concerning any prior relationship with [REDACTED]. There is no

³ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. See 19 Am. Jur. 2d *Corporations* § 2170; see also 20 C.F.R. § 656.12(a).

documentation showing that the petitioner purchased assets from [REDACTED] or assumed essential rights and obligations of [REDACTED] to carry on that company's pre-existing business. There is no contract between the two companies or their principals, or any other written interchange, documenting a transfer of any business operations from [REDACTED] to the petitioner. Thus, the petitioner has not satisfied the first condition in the *Matter of Dial Auto* analysis to establish a valid successor relationship. Since the record does not show that the petitioner is a successor-in-interest to [REDACTED] the instant petition is not accompanied by a labor certification valid for the proffered position, in accordance with 8 C.F.R. § 204.5(l)(3)(i) and 20 C.F.R. § 656.30(c)(2). On that ground alone the petition cannot be approved.

Ability to Pay

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

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

With respect to the three types of documentation identified in the foregoing regulation, the petitioner has not submitted copies of any annual reports or audited financial statements. As for federal tax returns, the record includes [REDACTED] tax returns for 2002 and 2003 and the petitioner's tax returns for 2004-2007.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the ETA Form 750 was accepted on April 5, 2002.⁴ The proffered wage as stated on the ETA Form 750 is \$17.56 per hour for a 40-hour work week (which amounts to \$36,524.80 per year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 establishes a priority date for any immigrant petition later based on that document,

⁴ The petitioner claims that the priority date of its labor certification should be April 30, 2001, rather than April 5, 2002, as entered by the DOL on the ETA Form 750 and confirmed on its Final Determination of August 28, 2007, certifying the ETA Form 750. The record shows that the petitioner has submitted several letters to the DOL on this issue, apparently without resolution. While this matter rests ultimately with the DOL, the AAO notes that the signatures of the employer and the beneficiary on the copy of the ETA Form 750 submitted in response to the NDI/RFE are both dated March 20, 2002. These dates are consistent with the DOL's designation of April 5, 2002, as the date it accepted the application for processing.

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

In determining the petitioner's ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 case, the record indicates that the petitioner has never employed the beneficiary.

If the petitioner has not previously employed the beneficiary, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *See 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. *See 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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation

methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets as reflected on the petitioner’s federal income tax return. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁵ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

In this case, however, the petitioner has failed to submit copies of its federal income tax returns for the years 2008-2010, despite the AAO’s specific request in the NDI/RFE on April 14, 2011 for copies of all federal income tax returns “to present date.” Thus, the AAO cannot determine whether the petitioner’s net income or net current assets were sufficient to establish its continuing ability to pay the proffered wage from the priority date in 2002 all the way to the present. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

Furthermore, even if the petitioner submitted its tax returns for the years 2008-2010, the tax returns for [REDACTED] in 2003 and the petitioner in 2005 show that both the net income and the net assets in those years were insufficient to pay the proffered wage. In 2003 [REDACTED] net

⁵ 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.

income (Line 23 on Schedule K)⁶ was -\$251,453 and its net assets (calculated as above on Schedule L) were -\$14,557. In 2005 the petitioner's net income (Line 17e of Schedule K) was -\$110,292 and its net assets (calculated as above on Schedule L) were \$8,637. Since all of these figures were less than the annualized proffered wage of \$36,524.80, the petitioner cannot establish its ability to pay the proffered wage in 2003 or 2005 based on net income or net current assets.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining 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 [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 instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner has been doing business independent of [REDACTED] for seven years. While its federal income tax returns for the years 2004 to 2007 show steady growth as measured by gross receipts (\$461,340 in 2004, \$781,868 in 2005, \$891,929 in 2006, and \$1,079,607 in 2007) the

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2010). *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

absence of tax returns for the following years makes it impossible to determine whether this growth has continued up to 2011. Moreover, the petitioner's gross receipts during the years 2004-2007 were far less than those of [REDACTED] during the two preceding years (\$2,307,976 in 2002 and \$1,658,922 in 2003). The petitioner has submitted no evidence whatsoever of its business operations and profitability since 2007. Accordingly, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continued ability to pay the proffered wage for the subject position from the priority date up to the present.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish its ability to pay the proffered wage for the subject position from the priority date up to the present. On that ground as well, the appeal cannot be sustained.

Has the petitioner properly classified the proffered position?

On the immigrant visa petition, Form I-140, the petitioner categorized the sprinkler technician position in Part 2.g. as "[a]ny other worker (requiring less than two years of training or experience)." As identified on the petition, therefore, the proffered position fits the classification of an "other worker" capable of performing "unskilled labor" pursuant to section 203(b)(3)(A)(iii) of the Act. On the ETA Form 750 certified by the DOL, however, the petitioner stated that the minimum experience required for the subject position was six years either in the job offered or in a related occupation. As described in the labor certification, the proffered position fits the classification of a "skilled worker" capable of performing "skilled labor (requiring at least two years training or experience)" pursuant to section 203(b)(3)(A)(i) of the Act.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the petitioner stated on the labor certification that the proffered position requires more than two years of employment experience, which makes it a "skilled worker" position under the Act. However, the petitioner requested an "other worker" classification on the Form I-140. Thus, the position described in the labor certification does not correlate with the position identified on the Form I-140. Accordingly, the instant petition is not accompanied by a labor certification valid for the proffered position, in accordance with 8 C.F.R. § 204.5(l)(3)(i) and 20 C.F.R. § 656.30(c)(2). On that ground as well, the petition cannot be approved.

Beneficiary's work experience

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this case,

the beneficiary stated on the ETA Form 750, which he signed and dated on March 20, 2002, that he had worked as a [REDACTED] for [REDACTED] in Fremont, California from April 1995 to the present. That seven-year time period exceeded the six years of experience required for the proffered position. As evidence of the beneficiary's employment by [REDACTED] the petitioner has submitted the copy of a "letter of reference" signed by the company's office manager and dated March 13, 2002. The subject letter, however, stated that the beneficiary had been employed as a sprinkler technician since October 1999, which was four and a half years after the starting date asserted by the beneficiary in the labor certification. According to [REDACTED] therefore, the beneficiary had only worked two and a half years as a sprinkler technician as of the priority date of the labor certification (April 5, 2002) – far less than the six years specified in the labor certification for the proffered position. By the terms of the labor certification, therefore, the beneficiary was not qualified for the position.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

Neither the petitioner nor the beneficiary has provided any explanation for the evidentiary conflict discussed above. Thus, the record does not establish that the beneficiary had the requisite six years of experience as a sprinkler technician on the priority date of the labor certification. For this reason as well, the petition cannot be approved.

Conclusion

For all of the reasons discussed in this decision, the appeal cannot be sustained.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.