

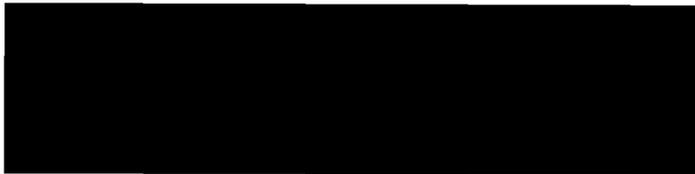
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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Date: JUN 30 2011

Office: TEXAS SERVICE CENTER

FILE:



IN RE:

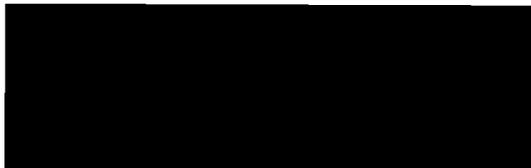
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a landscaping business. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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.

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

As set forth in the director's February 21, 2008, denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

On August 4, 2010, this office notified the petitioner that according to the records at the website maintained by the Maryland Department of Assessments and Taxation, the petitioner had forfeited its corporate status in the State of Maryland.¹ This office allowed the petitioner 30 days in which to provide evidence that the records maintained by the Maryland Department of Assessments and Taxation were not accurate and that the petitioner remains in operation as a viable business or was in operation during the pendency of the petition and appeal. In response, counsel asserted that the petitioner's sole shareholder, [REDACTED], had organized [REDACTED] as a successor-in-interest to the petitioner, on February 11, 2008.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) (*Matter of Dial Auto*) a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(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. on behalf of an alien beneficiary

¹ <http://sdatcert3.resiusa.org/ucc-charter> (accessed July 15, 2010).

for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

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

19 I&N Dec. at 482-3 (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"). When considering other business

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

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.³

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same 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 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. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. 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

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).

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.

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. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, [REDACTED] is wholly-owned by the sole owner of the petitioner. [REDACTED] is continuing to operate the same type of business as the petitioner, and the manner in which the business is controlled by [REDACTED] appears to be substantially the same as it was before the transfer. In addition, the Maryland Department of Assessments and Taxation Form 1 submitted in response to the NDI states that [REDACTED] succeeded the petitioner's business and shows that [REDACTED] acquired the furniture, fixtures, tools, machines and equipment of the petitioner. Therefore, the petitioner has fully described and documented the transaction transferring ownership of all, or a relevant part of, its business to [REDACTED]. However, the petitioner has not established its ability to pay the proffered wage from the priority date until the business transfer in February 2008, and Greenspace has not established its continuing ability to pay the proffered wage from the date of business transfer in February 2008 until the beneficiary adjusts status to lawful permanent resident. *Id.*

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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, Application for Alien Employment Certification, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.94 per hour (\$24,835.20 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or as a landscape laborer or tree pruner.

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.⁵

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. [REDACTED] is structured as a limited liability company. On the petition, the petitioner claimed to have been established on December 22, 1997, and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. [REDACTED] fiscal year is also based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 28, 2001, the beneficiary claimed to have worked for the petitioner as a landscape worker from October 1998 to June 2001 and as a landscape gardener since June 2001.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, IRS Forms W-2, Wage and Tax Statements issued by the petitioner and Greenspace to the beneficiary reflect the beneficiary was paid as follows:

- 2001 = No documents submitted
- 2002 = \$28,214.08 paid by the petitioner
- 2003 = \$25,300.11 paid by the petitioner
- 2004 = \$17,433.94 paid by the petitioner
- 2005 = \$28,823.75 paid by the petitioner
- 2006 = \$32,166.52 paid by the petitioner

⁵ 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).

- 2007 = \$26,085.50 paid by the petitioner
- 2008 = \$12,368.50⁶
- 2009 = \$22,593.25 paid by Greenspace

The petitioner established that it employed and paid the beneficiary the full proffered wage in 2002, 2003, 2005, 2006 and 2007, and that it paid partial wages to the beneficiary in 2004 and 2008. The petitioner did not establish the payment of any wages to the beneficiary in 2001. established that it paid partial wages to the beneficiary in 2008 and in 2009. Since the proffered wage is \$24,835.20 per year, the petitioner must establish that it can pay the full proffered wage in 2001, the difference of \$7,401.26 between the wages actually paid to the beneficiary and the proffered wage in 2004, and the difference of \$161.20 between the wages actually paid to the beneficiary and the proffered wage from January 1, 2008 to February 10, 2008.⁷ Further, must establish that it can pay the difference of \$12,305.50 between the wages actually paid to the beneficiary and the proffered wage from February 11, 2008 to December 31, 2008,⁸ and the difference of \$2,241.95 in 2009 between the wages actually paid to the beneficiary and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

⁶ In 2008, the beneficiary was paid \$2,628.50 by Greenspace and \$9,740 by the petitioner.

⁷ Based on a \$2,789.70 total wage obligation at the proffered wage rate.

⁸ Based on a \$22,045.50 total wage obligation at the proffered wage rate.

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 petitioner’s tax returns reflect the following net income⁹

- 2001 \$37,125
- 2004 -\$34,129

The tax returns of [REDACTED] reflect the following net income:

- 2008 -\$11,583¹⁰

⁹ 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 (2001), line 17e (2004), and line 18 (2009) of Schedule K. See Instructions for Form 1120S at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 17, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income and deductions shown on its Schedule K for 2001 and 2004, the petitioner’s net income is found on Schedule K of its tax returns.

¹⁰ 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

- 2009 \$108,722

Therefore, the petitioner had the ability to pay the proffered wage in 2001, and [REDACTED] had the ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2009. However, in 2004, the petitioner did not establish sufficient net income to pay the difference of \$7,401.26 between the wages paid to the beneficiary and the proffered wage. For the period from February 11, 2008 to December 31, 2008, [REDACTED] did not establish sufficient net income to pay the difference of \$12,305.50 between the wages paid to the beneficiary and the proffered wage. Further, the petitioner did not submit its federal tax return, audited financial statements or annual reports covering the period from January 1, 2008 to February 10, 2008, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Thus, the petitioner has not established its ability to pay the difference of \$161.20 between the wages actually paid to the beneficiary and the proffered wage from January 1, 2008 to February 10, 2008.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2004 tax returns reflect its end-of-year net current assets as -\$39,993. Therefore, in 2004, the petitioner did not establish that it had sufficient net current assets to pay the difference of \$7,401.26 between the wages paid to the beneficiary and the proffered wage.

Further, for the period from February 11, 2008 to December 31, 2008, since [REDACTED] did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R.

be treated as a sole proprietorship by the Internal Revenue Service (IRS) 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 by the IRS 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, [REDACTED], an LLC formed under Maryland state law, is considered to be a sole proprietorship for federal tax purposes in 2008, and an S corporation for federal tax purposes in 2009. In 2008, the net loss of [REDACTED] is reported on its member's IRS Form 1040, Schedule C at line 31. In 2009, because Greenspace had additional income and deductions shown on Schedule K to its IRS Form 1120S, its net income is found on line 18 of Schedule K of its IRS Form 1120S.

¹¹According 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.

§ 204.5(g)(2), and current assets and current liabilities are not stated on the Schedule C to IRS Form 1040 submitted by [REDACTED] net current assets cannot be ascertained. Therefore, [REDACTED] did not have sufficient net current assets to pay the difference of \$12,305.50 between wages actually paid to the beneficiary and the proffered wage for the period from February 11, 2008 to December 31, 2008. Further, the petitioner did not submit its federal tax return, audited financial statements or annual reports covering the period from January 1, 2008 to February 10, 2008, as required by the regulation at 8 C.F.R. § 204.5(g)(2). Thus, the petitioner has not established its ability to pay the difference of \$161.20 between the wages actually paid to the beneficiary and the proffered wage from January 1, 2008 to February 10, 2008.

From the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it or [REDACTED] had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director “failed to consider the totality of the petitioner’s circumstances.” Specifically, counsel asserted that the petitioner “has a line of credit of \$50,000 representing additional funds available to finance the daily operations of the business.”

Counsel’s assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner’s net income or net current assets by adding in the petitioner’s credit limits, bank lines, or lines of credit. A “bank line” or “line of credit” is a bank’s unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron’s Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition.¹² As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheets provided in the tax returns and will be fully considered in the evaluation of the corporation’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner’s

¹² The petitioner’s statement dated December 1, 2004, from Mercantile Potomac Bank indicated that the petitioner had only \$5,198.55 in available credit on its \$50,000 credit limit.

liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Act. Reg'l Comm'r 1977).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the gross receipts of the petitioner and [REDACTED] during the relevant period have fluctuated dramatically, from a high of \$1,206,591 in 2002, to a low of \$133,133 in 2008. Salaries and costs of labor paid by the petitioner and [REDACTED] have also fluctuated dramatically throughout the relevant period, from a high of \$372,814 in 2002, to a low of \$8,533 in 2008. Counsel asserts that the petitioner's reorganization from a corporation to a limited liability company in 2008 was an exceptional circumstance that involved significant accounting changes. While the accounting changes may have been necessary, counsel has not established how the accounting changes disrupted the daily procedures of the business such that it had to reduce operations. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the petitioner has failed to claim any extenuating circumstances that led to its inability to pay the difference between the actual wages paid and the proffered wage in 2004. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.