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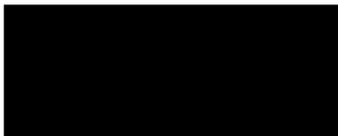
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



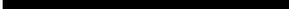
**U.S. Citizenship
and Immigration
Services**

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FILE:  Office: NEBRASKA SERVICE CENTER Date: **MAR 29 2011**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer application designing and writing firm. It seeks to employ the beneficiary permanently in the United States as a systems administrator pursuant to Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), 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 January 28, 2009 denial, the single 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 Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the original Form ETA 750 was filed by [REDACTED] with Federal employer identification number (FEIN): [REDACTED] at [REDACTED] Fremont, CA [REDACTED] on October 31, 2001 on behalf of the instant beneficiary and the labor certification was certified on January 3, 2007. The proffered wage as stated on the Form ETA 750 is \$30.71 per hour (\$63,876.80 per year).¹ The Form ETA 750 states that the position requires two years of experience in the job offered or related occupation of system administration or networking. On July 27, 2007, [REDACTED] filed the instant petition with the Nebraska Service Center. In response to the director's request for evidence dated December 1, 2008, counsel claimed that [REDACTED] (FEIN: [REDACTED] merged with [REDACTED] d/b/a [REDACTED] (Fein: [REDACTED] effective on June 5, 2008 and became the successor-in-interest to [REDACTED].

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.

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, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. 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.

¹ In his January 28, 2009 decision, the director erred in calculating the annual proffered wage as \$60,876.80 per year. The annual proffered wage in the instant matter is \$60,876.80 based on \$30.71 per hour stated on Form ETA 750 times 40 hours per week and 52 weeks per year. On appeal, counsel made the same miscalculation as the director did.

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

The legacy INS and United States Citizenship and Immigration Services (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. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner 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. *Id.* (defining “successor”). 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).

Evidence in the record shows that [REDACTED] was incorporated on June 1, 1998²

² See the company's tax returns and *also see* California Secretary of State official business

and doing business under the name of [REDACTED] since then. [REDACTED] Inc. was formed as a California corporation at [REDACTED] Fremont, CA [REDACTED] on [REDACTED] 2008.³ After [REDACTED] Inc. merged [REDACTED] on [REDACTED] 2008, the predecessor corporation was dissolved. *Id.* Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, the petitioner in the instant case established a valid success relationship with its predecessor company and established that it became the successor-in-interest to [REDACTED] on [REDACTED] 2008 for immigration purposes. Consequently, the petitioner is also 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.

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.⁴

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claimed to have worked for the predecessor company and the record also contains the H-1B approval for the beneficiary with employment with the predecessor. However, counsel did not submit the

⁴ 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).

beneficiary's W-2 forms or paystubs from the predecessor company for any relevant years. Instead, counsel submitted the beneficiary's W-2 forms and paystubs issued by [REDACTED] Inc. (FEIN: [REDACTED]) for 2004 through 2006. The beneficiary's individual income tax returns show that the beneficiary's total income for 2004 through 2006 was paid by [REDACTED]

The record does not contain any documentary evidence showing that the predecessor or the successor paid the beneficiary any compensation in these years. W-2 forms would have demonstrated the amount of wages the predecessor and/or the petitioner reported to the IRS and further revealed its ability to pay the proffered wage through examination of wages actually paid to the beneficiary. Because corporations are separate business entities, wages paid by other corporations cannot be considered as wages the predecessor actually paid to the beneficiary in determining the petitioner's and the predecessor's ability to pay the proffered wage in the instant case. Therefore, the petitioner failed to establish the ability to pay the proffered wage through an examination of wages actually paid to the beneficiary by the predecessor during the period from the priority date of October 31, 2001 to the successorship date of June 5, 2008, and by the petitioner from the successorship established date to the present.

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 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).

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).

Since the petitioner claimed to be the successor-in-interest to the predecessor entity, [REDACTED] in June 2008, the petitioner must submit evidence of the predecessor’s ability to pay the proffered wage beginning on the priority date until the date the transfer of ownership to the successor is completed and also submit evidence that the petitioner has had the continuing ability to pay the proffered wage from the transaction date forward. The record contains the predecessor corporation’s Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001 through 2006. According to the tax returns in the record, the predecessor’s fiscal year ran on calendar year. These tax returns demonstrate the predecessor’s net income as shown in the table below.

- In 2001, the Form 1120S stated net income⁵ of \$124,502⁶.
- In 2002, the Form 1120S stated net income of \$3,377.
- In 2003, the Form 1120S stated net income of \$83,364.
- In 2004, the Form 1120S stated net income of \$99,565.
- In 2005, the Form 1120S stated net income of (\$24,188).

⁵ 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 (2001-2003), line 17e (2004-2005), on line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 10, 2011) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

⁶ The AAO notes that the director mistakenly considered the figure on line 21 of page one of Form 1120S as net income for 2001 and 2002.

- In 2006, the Form 1120S stated net income of \$187,254.

Therefore, for the years 2001, 2003, 2004 and 2006, the predecessor had sufficient net income to pay the instant beneficiary the full proffered wage of \$63,876.80 per year, however, the predecessor did not have sufficient net income to pay the beneficiary the proffered wage for 2002 and 2005.

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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Counsel's requests to consider loans to shareholder as part of net current assets and to deduct accounts payable from the petitioner's current liabilities are misplaced. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 predecessor's tax returns demonstrate its end-of-year net current assets for 2002 and 2005, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of \$23,607.
- In 2005, the Form 1120S stated net current assets of \$7,445.

For the years 2002 and 2005, the predecessor did not have sufficient net current assets to pay the proffered wage, and thus, the petitioner failed to establish the predecessor's ability to pay the proffered wage for 2002 and 2005 through an examination of wages actually paid to the beneficiary by the predecessor and its net income or net current assets.

The record does not contain any documentary evidence showing that the predecessor entity paid any compensation to the beneficiary in 2007, nor does it contain any regulatory-prescribed

⁷According 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.

evidence, such as an annual report, tax return or audited financial statements, of the predecessor for 2007. Instant appeal was filed on February 27, 2009. As of that date the predecessor's annual report, federal tax return or audited financial statements for 2007 should have been available. However, the petitioner did not submit any of these documents for 2007, nor did counsel explain why these documents were not submitted. The record does not contain any evidence showing that the predecessor had the ability to pay the beneficiary the proffered wage in 2008 for the period from January 1 to June 5. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Although the director specifically and clearly indicated in his decision that lack of the predecessor's ability to pay for 2007 is one of the ground of the denial, the petitioner declined to provide copies of the predecessor's annual report, tax return or audited financial statements for 2007. The annual reports, tax returns or audited financial statements would have demonstrated the amounts of net income and net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without these documents for 2007 and 2008, the AAO cannot determine whether the predecessor had sufficient net income or net current assets to pay the beneficiary the proffered wage in these years. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner failed to establish that the predecessor had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date to the establishment of successorship.

On appeal, counsel asserted that the shareholder of the predecessor had personal assets and other businesses which could be used to establish the predecessor's ability to pay the proffered wage for the relevant period and submitted documents to prove the assets, especially his Schedule Cs to the Form 1140 for his sole proprietorship businesses. The record shows that while the predecessor had only one shareholder, it was structured as an S corporation. Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. In the instant case, although [REDACTED] is the sole shareholder of the predecessor corporation, the corporation is a separate and distinct legal entity from [REDACTED] and therefore, any assets of [REDACTED] including the assets in his other corporation or sole proprietorships cannot be considered in determining the predecessor corporation's ability to pay the proffered wage. Counsel's assertion that the shareholder's assets and his other business assets should be considered in determining the predecessor's ability to pay is misplaced. In a

similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Counsel submitted the petitioner’s financial statements for the year ended December 31, 2008 as evidence to establish its ability to pay the proffered wage as a successor-in-interest to the predecessor from June 5, 2008 to the present. However, these financial statements are not audited. Counsel’s reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The record contains bank statements of the petitioner’s check accounts with Bank of America covering a period from July 2008 to January 2009. However, counsel’s reliance on the balance in the petitioner’s bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that would be considered in determining the petitioner’s net current assets.

On appeal, counsel submitted the petitioner’s business plan, open contracts sample vendor invoices and documents showing its business activities. While these documents provide the petitioner’s expectation of increasing profits, in calculating the ability to pay the proffered wage, USCIS will not rely on the petitioner’s future income or profits. 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. 1971). Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

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

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 predecessor could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL to the successorship and the petitioner failed to submit regulatory-prescribed evidence to establish its ability to pay the proffered wage from the successorship to the present.

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

In the instant case, while it is noted that the predecessor entity had been in the business for a long time before it was dissolved, it was structured as a corporation. Therefore, the sole shareholder's personal assets and his assets in other businesses cannot be considered in determining the predecessor's ability to pay the proffered wage. In 2005, the predecessor's net income was negative and in 2002, it only had profits of \$3,377. The petitioner failed to submit required evidence to establish the predecessor's ability to pay the proffered wage for 2007 and 2008. The predecessor claimed on the petition that it had seven employees. However, its tax returns show that the predecessor did not pay any salaries and wages in 2003 and 2004, and only paid \$35,116 in 2005 and \$25,597 in 2006 while it paid \$127,300 and \$111,284 in 2001 and 2002 respectively. This raises a doubt as to whether the predecessor ever paid a minimum wage to its seven employees.⁸ Further, if the predecessor had paid its full wages to its employees, it would not have sufficient net income to establish its ability to pay the instant beneficiary the proffered wage for 2003, 2004 and 2006. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that all these years were

⁸ Even in 2001, the year the predecessor paid most salaries and wages, it paid its seven employees at average of \$15,897.71 per year.

uncharacteristically unprofitable years for the predecessor. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the predecessor and the petitioner had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the predecessor and the petitioner had the continuing ability to pay the proffered wage beginning on the priority date to the present.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss this issue. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered or related occupation in system administration or networking.

The beneficiary set forth his credentials on the labor certification and signed his name on October 25, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section eliciting information of his work experience, the beneficiary represented that he was working for the predecessor as a system administrator since May 2000. Prior to that, he worked for [REDACTED] as a technician from March 2007 to May 2007 and for [REDACTED] Service Provider as an assistant system admin from June 1997 to April 2000. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or

experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

With the initial filing, counsel submitted two letters from [REDACTED], Chief Executive of [REDACTED] and [REDACTED], CEO of [REDACTED] Internet Service Providers ([REDACTED]). The director determined that these two letters do not meet the requirements set forth by the regulation. In the request for evidence (RFE) issued on December 1, 2008, the director requested evidence that the alien obtained the required two years experience in the job offered or the required two years experience in the related occupation before October 31, 2001. In response to the director's RFE, counsel submitted another letter from [REDACTED], CEO of [REDACTED].

Counsel provided a photocopy of the [REDACTED]. The record does not contain any evidence showing when and how this letter was delivered to the United States. The letter is on the company's letterhead, but not dated. This letter certifies that the beneficiary completed three months internship with this company in 1997. Therefore, the [REDACTED] letter cannot be accepted as evidence to establish the beneficiary's requisite two years of experience in the job offered or related occupation.

A photocopy of the first letter from [REDACTED] is also provided. The record does not contain any evidence showing when and how this letter was delivered to the United States. The letter is on the company's letterhead, but not dated. This letter states in pertinent part that:

This letter is to certify that [the beneficiary] is our employee. He is working with us as an Assistant System Administrator. He was employed in June 1997 and is still working with us satisfactorily. [The beneficiary] is a dedicated and hard working employee. Please feel free to contact us for any other relevant information about him.

This letter verifies that the beneficiary started his employment with this company as an assistant system administrator in June 1997 and was still working with this company. However, because this letter is not dated, the AAO cannot determine how long the beneficiary worked for this employer or whether the beneficiary obtained at least two years of experience from the employment. Therefore, the [REDACTED] first letter cannot be accepted as evidence to demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date and thus, the petitioner failed to establish the beneficiary's qualifications in experience.

In response to the director's RFE, counsel provided a photocopy of the second letter from [REDACTED] without any additional evidence showing when and how this letter was delivered to the United States. The letter is on the company's letterhead, but not dated again. This letter states in pertinent part that:

This letter is to certify that [the beneficiary] is our employee. He is working with us as an Assistant System Administrator. He was employed in June 1997 to April 2000. [The beneficiary] is a dedicated and hard working employee. Please feel free to contact us for any other relevant information about him.

The second [redacted] letter has the same content as well as the employment ending date. By adding April 2000 as the ending date, this letter appears to verify the beneficiary's experience as an assistant system administrator for two years and nine months (32 months). However, this letter does not verify the beneficiary's full-time employment, and therefore, the AAO cannot determine whether the beneficiary's 32 months of experience with [redacted] could meet the 24 months of full-time experience requirements as set forth on the Form ETA 750. Further, this letter does not include a specific description of duties performed by the beneficiary in that company. Without such a specific description required by the regulation, the AAO cannot determine whether the beneficiary's experience obtained from his employment with [redacted] as an assistant system administrator qualifies him to perform the duties set forth in Item 13 of the Form ETA 750A for the proffered position of system administrator with the petitioner. Therefore, the [redacted] second letter does not meet the requirements set forth by the regulation at 8 C.F.R. § 204.5(1)(3), and the AAO cannot accept this experience letter as primary evidence to establish the beneficiary's requisite two years of experience in the job offered or related occupation as set forth on the labor certification, and thus, the petitioner failed to demonstrate that the beneficiary possessed the requisite experience for the proffered position prior to the priority date with regulatory-prescribed evidence. The record does not contain any other regulatory-prescribed evidence concerning the beneficiary's qualifying experience for the proffered position in this case.

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.