

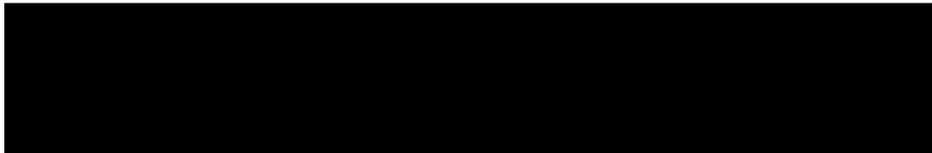
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



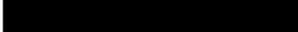
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and Immigration
Services

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Date: **MAY 04 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:

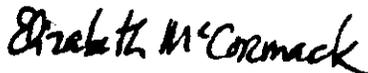
SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,



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 in an art foundry.¹ It intends to employ the beneficiary permanently as a skilled worker² in the United States, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).³ 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 did not have sufficient net income or net current assets to continuously pay the proffered wage of the beneficiary from the priority date. The director also found that the beneficiary did not qualify for the position. Accordingly, the petition was denied.

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 a threshold issue, the petition was filed under the wrong category and must be denied for this reason.⁴

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning

¹ The petitioner's website [REDACTED] describes its business as a full service art foundry offering engineering support, architectural services, mold making, sand and lost wax casting, finishing, patination and coating, transport and installation as well as a full range of conservation and restoration services.

² The AAO observes that the petitioner marked, under Part 2 of the Form I-140, "Any other worker (requiring less than two years of training or experience)" or box g. The director, when adjudicating the petition, classified the petition filed as the petition for a skilled worker (requiring at least two years of specialized training or experience).

³ 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.

⁴ 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).

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.

Further, the regulation at 8 C.F.R. § 204.5(1)(2), in pertinent part, provides:

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

In this case, the petitioner requested the unskilled worker classification (**less than two years of experience**) on the Form I-140 petition. However, the Form ETA 750 labor certification indicates that the beneficiary must have at least four (4) years of work experience in the job offered. There is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) or the AAO to accept a petition under a different visa classification. In addition, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Nevertheless, since the director failed to raise the issue, the AAO will give the petition a full adjudication and for purposes of this decision will treat the petition as a petition for a skilled worker as did the director.

The issues in this proceeding, as set forth in the director's May 5, 2010 decision, are (1) whether or not the beneficiary had the requisite work experience for the position before the priority date, and (2) whether or not the petitioner has the continuing ability to pay the proffered wage from the priority date.

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

Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, 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 Department of Labor (DOL) – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 9, 2001. The name of the job title or the position for which the petitioner sought to hire is "art craftsman."⁶ Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote:

The job entails the use of both power and hand tools in the divesting of molds with either sand or shell castings. The person must be able to utilize hand held as well as pneumatic hammers, a carbon arc for cutting, and [a] grinder for smoothing edges. Must be able to maintain control and account for parts and patches of material cut off. Must also be adept in cleaning the castings using a glass head cabinet with portable sandblaster and power washer. Employee must use overhead hoists, lift trucks, a "bobcat", and a "reclaiming system". Maintenance and repair of equipment is also required.

Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of six (6) years of grade school and four (4) years of work experience in job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. 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, Madany v. Smith*, 696 F.2d, 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).

As set forth above, the proffered position requires the beneficiary to have a minimum of six years of grade school and four years of work experience in the job offered. On the Form ETA 750, part B, signed by the beneficiary on April 4, 2001, he represented that he had been working as an art craftsman with the petitioner since December 1999. Submitted along with the approved Form ETA 750 and the I-140 petition were the beneficiary's vocational and school diplomas showing that the beneficiary graduated from a welding school on July 18, 1995 and finished sixth grade education on June 30, 1992, both in Mexico.

In adjudicating the petition, the director determined that the beneficiary did not have four years of work experience in the job offered before the priority date (April 9, 2001) and requested that the petitioner submit additional evidence.

In response to the director's request, the petitioner submitted copies of all of the correspondence received from and sent to the DOL concerning the beneficiary's qualification for the position offered and stated that the DOL was aware of the problem when it adjudicated the Form ETA 750. The petitioner claimed that the beneficiary qualified for the position offered, even though he did not

⁶ The DOL classified the job offered in this case as a molder.

have the requisite four years experience before the priority date, because at the time the petitioner filed the Form ETA 750, it was not feasible to hire a U.S. worker with the training or experience equivalent to that required by the job offer. The record shows that the DOL approved the Form ETA 750 on May 31, 2005.

Upon review, the director concluded that since the record contains no evidence that the beneficiary had four years of work experience in the job offered before the priority date, the beneficiary did not qualify for the position.

We agree. The DOL did not change the terms of the labor certification to allow the beneficiary to have fewer years of experience. The petitioner wrongly assumed that the DOL's approval of the Form ETA 750 meant that the beneficiary qualified for the position.

The regulation at 20 C.F.R. § 656.1(a) states that it is the job of the DOL to certify to the Department of State (DOS) and Department of Homeland Security (DHS) that "(1) there are not sufficient U.S. workers who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of U.S. workers similarly employed."

Relying in part on *Madany v. Smith*, 696 F.2d at 1008 (D.C. Cir. 1983), the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to INS under section 204(b) of the Act, 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. **The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.**

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS (now USCIS), therefore, may make a *de novo*

determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984).

The petitioner’s assertions that the DOL was aware of the beneficiary’s lack of work experience and yet approved the labor certification application are, therefore, without basis. The law is clear that the DOL does not have the authority to determine whether an applicant for a job offer qualifies for the position set forth on the Form ETA 750. Such authority is vested with USCIS. In this case, the beneficiary, as noted earlier, had two (2) years of work experience in the job offered, and not four (4) years, as required by the petitioner in the approved Form ETA 750. Therefore, the beneficiary did not have the requisite work experience to perform the duties of the position offered as of the priority date.

Further, the petition may not be approved since the petitioner has not established by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date. 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.

Therefore, 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. Here, as noted earlier, the Form ETA 750 was filed and accepted for processing by the DOL on April 9, 2001. The rate of pay or the proffered wage stated on that form is \$13.32 per hour or \$27,705.60 per year.

To show that the petitioner has the ability to pay \$13.32/hour or \$27,705.60/year beginning on April 9, 2001, the petitioner originally submitted copies of a federal tax return of [REDACTED] filed on Form 1065, U.S. Return of Partnership Income, for 2006.

On April 2, 2009, the director issued a request for evidence (RFE), advising the petitioner to submit, among other things, additional evidence to demonstrate that the petitioner has the ability to pay the proffered wage from the priority date.

In response to the director’s RFE, the petitioner submitted the following relevant evidence:

- Copies of Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2001 through 2006;
- A copy of an individual income tax return of [REDACTED] filed on a Form 1040, U.S. Individual Income Tax Return, for 2007;

- Copies of the beneficiary's Forms W-2 issued by the petitioner [REDACTED] for the years 2001 through 2006 and by [REDACTED] for 2007 and 2008 and;
- A letter dated November 6, 2008 from [REDACTED] stating that in November 2006 [REDACTED] (Employer Identification Number [REDACTED]) merged with another company and formed a new company called [REDACTED]

Upon receipt, the director determined that the evidence submitted did not support that [REDACTED] merged with, was acquired, or otherwise became [REDACTED] in November 2006. More specifically, the director stated, "The evidence does not include documentation showing the merger, change of name, assumption of rights, duties, obligations, and assets of the original employer." Therefore, the director did not consider any of the tax returns from [REDACTED] as evidence of the petitioner's ability to pay and concluded that the petitioner had failed to establish its ability to pay from the priority date.

On appeal, [REDACTED] submits the following relevant evidence to demonstrate that the petitioner merged with and became [REDACTED] in November 2006:

- A letter dated January 4, 2010 stating that [REDACTED] merged with another company and formed a new company [REDACTED]
- A document filed on April 10, 2003 changing the legal name of the petitioning business from [REDACTED] to [REDACTED]
- A filing receipt dated October 30, 2006 showing that [REDACTED] was registered in the New York Department of State, Division of Corporations; and
- A notice from the Internal Revenue Service (IRS) giving [REDACTED] a Federal Tax ID or EIN.

Based on the evidence submitted, the AAO finds that the petitioner in this case is [REDACTED]⁷ and that [REDACTED] is not the successor-in-interest to the petitioner. The AAO agrees with the director that the record does not support the assertions that the petitioner merged with and became [REDACTED] in 2006. A search of the New York Department of State, Division of Corporations, reveals that the petitioner – [REDACTED] is, in fact, still an active business.⁸ The record does not contain any evidence showing the merger (there are

⁷ This petition, as set forth in Part 1 of the Form I-140 about the person or organization filing this petition, is filed by "[REDACTED]" but the IRS Tax # or [REDACTED], as stated in Part 1 of the Form I-140, belongs to [REDACTED] [REDACTED] according to New York State Department, Division of Corporations, was formed on October 30, 2006. [REDACTED] cannot be the petitioner as the organization was not yet in existence on the priority date.

⁸ A search of the New York Department of State, Division of Corporations reveals that [REDACTED] or the petitioner was established on December 18, 1998 and remains active today. The New York Department of State, Division of Corporations, can be accessed online at the following website address: http://www.dos.state.ny.us/corps/bus_entity_search.html (last

no articles of merger in the record), the transfer of assets and liabilities to, and the assumption of rights, duties, and obligations by [REDACTED]

Nor does the record explain why the petitioner was unable to produce such evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The only way for [REDACTED] to be able to use a Form ETA 750 approved for the petitioner is if [REDACTED] establishes that it is a successor-in-interest to the petitioner. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). In this matter, the record is devoid of such evidence. 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. *Matter of Dial Auto* is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act.

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

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

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and

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

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

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

As noted above, in this matter, the record is wholly devoid of evidence that [REDACTED] the successor-in-interest to the employer identified in the Form ETA 750 [REDACTED]. The fact that [REDACTED] is doing business at the same location as [REDACTED] or that they have the same stockholders, members, officers, and employees, does not establish that [REDACTED] merged with the petitioner [REDACTED] or that [REDACTED] is the successor-in-interest to the petitioner. In fact, given that [REDACTED] and [REDACTED], [REDACTED] are both active and in existence, it seems improbable that [REDACTED] could be a successor-in-interest to the petitioner. Without any evidence of successorship-in-interest in the record, we find that the original petitioner has not been replaced by [REDACTED] as a successor-in-interest; and therefore, we will not consider the evidence submitted by [REDACTED] [REDACTED] to determine whether the petitioner has the ability to pay.

The evidence submitted shows that the petitioner – [REDACTED] – is an S corporation, established in 1998. On the petition, the petitioner claims to have no employees and gross annual income and net annual income of \$5,242,000 and \$140,000, respectively.

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 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Based on the evidence submitted, the petitioner has established that it has employed the beneficiary from 2001 to 2006, although it has not consistently paid the beneficiary the full proffered wage.

Based on the Forms W-2 submitted, the petitioner paid the beneficiary the following wages between 2001 and 2006 (all in \$):

Tax Year	Actual wage (AW) (Box 1, W-2)	Yearly Proffered Wage (PW)	AW minus PW
2001	24,425.00	27,705.60	3,280.60
2002	28,443.58	27,705.60	Exceeds the PW
2003	33,181.59	27,705.60	Exceeds the PW
2004	39,703.83	27,705.60	Exceeds the PW
2005	39,222.40	27,705.60	Exceeds the PW
2006	31,996.89	27,705.60	Exceeds the PW

Thus, in order for the petitioner to meet its burden of proving by a preponderance of the evidence that it has the continuing ability to pay the proffered wage from the priority date, the petitioner must be able to demonstrate that it can pay \$3,280.60 in 2001 and the full proffered wage of \$27,705.60 in 2007 and 2008.

The petitioner can show that it can pay these amounts through either its net income or net current assets. If the petitioner chooses to pay these amounts through its net income, USCIS will 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 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).

The petitioner’s tax returns demonstrate its net income (loss) for 2001, as shown below:

- In 2001 the Form 1120 stated net income (loss)⁹ of (\$59,598) (line 23 of schedule K).

Therefore, the petitioner does not have sufficient net income to pay the proffered wage in 2001.

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.¹⁰ 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 tax returns demonstrate its end-of-year net current assets (liabilities) for 2001, as shown in the table below.

- In 2001, the Form 1120S stated net current assets (liabilities) of \$4,914.

Therefore, the petitioner has sufficient net current assets to pay the remainder of the beneficiary’s wage of \$3,280.60 in 2001.

Nonetheless, since we cannot consider any evidence from [REDACTED] for the reasons stated above, and as the record includes no federal tax returns, audited financial statements, or annual reports of the petitioner for the years 2007 and 2008, we conclude that the petitioner has not established that it has sufficient net income or net current assets to pay the proffered wage continuously from the priority date.

⁹ For an S corporation, USCIS considers net income (loss) to be the figure shown on line 21 of the Form 1120S so long as the S corporation has no other income, credits, deductions or other adjustments from sources other than a trade or business. Otherwise, the net income (loss) is found on line 23 (2002), line 17e (2005), or line 18 (2006-2009) of schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-prior/i1120s--2006.pdf> (accessed on June 15, 2010) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

¹⁰ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Though not raised 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. 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.

Here, the record includes no evidence of unusual circumstances that would explain the petitioner's inability to pay the proffered wage in 2007 and 2008. The petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception in 1998. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements. The record does not contain any newspapers or magazine articles, awards, or certifications indicating the company's accomplishments.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, the AAO is not persuaded that the petitioner has that ability.

The petition will be denied for the reasons stated above. 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.