

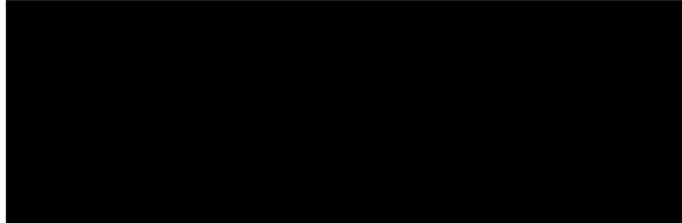
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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**U.S. Citizenship
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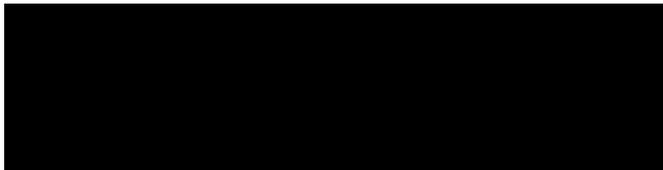
IN RE:

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:

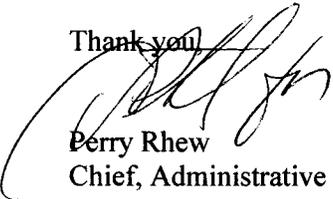


INSTRUCTIONS:

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by 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.

Counsel submits additional evidence on appeal and asserts that the director erred in reviewing the petitioner's ability to pay the proffered wage. Counsel also maintains that the beneficiary's employment verification letter was properly submitted.

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.

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.¹

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143 at 145 (noting that the AAO reviews appeals on a *de novo* basis).

For the reasons set forth below, the AAO concurs with the director's decision that the petitioner failed to establish its continuing financial ability to pay the proffered wage and additionally finds that the petitioner failed to establish that it is the employer stated on the approved labor certification and failed to establish that it is a successor-in-interest to the employer represented to be the petitioner on the labor certification and on the Form I-140 petition, Immigrant Petition for Alien Worker. The AAO further finds that the evidence failed to establish that the beneficiary possessed two years of full-time experience as a specialty cook as of the priority date and as required by the approved labor certification.

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

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

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 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.

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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).² The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Here, the Form ETA 750 was accepted on November 12, 2003, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is \$725 per week (\$37,700 per year). The Form ETA 750 states that the position requires two years in the job offered as a specialty cook. The duties to be performed as described in item 13 of the Form ETA 750 require that the applicant “prepares specialty dishes, dinners and desserts including Flounder St. Thomas, Mussels Bianco, Shrimp and Scallops Casino, Bourbon Street Veal, Chicken Cordon Bleu, Chicken Barrie.”

The petitioner specified on part 1 of the Form I-140 petition states that the petitioner is “[REDACTED]” [REDACTED]. This name matches the name of the employer on item 4 of the Form ETA 750. The federal income tax returns, however, submitted to the record in support of the petitioner’s ability to pay the proffered wage do not identify [REDACTED] [REDACTED] as the filer. The filer’s name is stated as the [REDACTED] [REDACTED] located at [REDACTED]. The date of incorporation is stated as April 1, 2004.⁴ It is noted that both the [REDACTED] [REDACTED] continue to be registered as active separate corporations in New York.⁵ Further, counsel indicates in an August 26, 2008, transmittal letter submitted in response to the director’s Notice of Intent to Deny that the business was purchased by Mortimer in 2004. It is noted that the tax return for 2004 provided to the record indicates that the financial information contained therein claims that it covers the period beginning October 15, 2004. The ending date is not given but the 2005, 2006, and 2007 returns indicate that the petitioner’s fiscal year is a standard calendar year.

In this matter, the petitioner characterized itself on the Form I-140 petition filed on December 4, 2007, as the corporation that filed the Form ETA 750 with the federal employment identification number (FEIN) as 20-xxx7247. This FEIN is also stated as belonging to the [REDACTED] Corporation on the tax returns. As the priority date is November 12, 2003, it is clear that filing as

³ Other evidence in the record as well as the New York state online public corporation records identify this entity as the “[REDACTED]” See http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p... (accessed October 17, 2011).

⁴ This is after the November 12, 2003 priority date. The petitioner must establish that the job offer is realistic from the priority date onward. In analyzing a petitioner’s ability to pay the proffered wage, the fundamental focus is whether the employer is making a “realistic” or credible job offer and has the financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Furthermore a petitioner must establish eligibility at the time of filing a petition ; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

⁵ Other evidence in the record as well as the New York state online public corporation records identify this entity as the “John Mortimor Corporation.” See http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p... (accessed October 17, 2011).

the [REDACTED] with a FEIN belonging to a separate corporation misrepresents the ownership of the petitioning business. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner offers no explanation for these discrepancies.

If there is no longer an employer that proposes to employ the beneficiary in permanent full-time work as set forth on the labor certification and as required by 20 C.F.R. § 656.3, then the preference petition may not be approved. If a new entity is claiming that it is a successor-in-interest to the employer identified on the labor certification, in order to use that labor certification, it must submit evidence sufficient to establish that it is a successor-in-interest to [REDACTED]

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. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). 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. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482.

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. In this case, the petitioner has provided no evidence of a valid successor-in-interest relationship. The record also lacks evidence of the predecessor's ability to pay the proffered salary from the priority date until the date of sale or subsequently.

It is noted that the [REDACTED] is structured as an S corporation. On the petition, the Form I-140 petitioner claims to have been established in 2004, have an annual gross income of \$735,479 and a net annual income of \$477,017. On Part B of the Form ETA 750, the beneficiary does not claim to have worked for the petitioner. In response to the director's notice of intent to deny, issued on July 28, 2008, the petitioner provided no documentation that it had employed the beneficiary.

On Part B of the Form ETA 750, the beneficiary also lists one prior job. He claims to have worked as a specialty cook for [REDACTED] from May 2000 to June 2002. No address is given for this business.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

It is noted that the director denied the petition on September 15, 2008, based on the director's determination that the petitioner had failed to establish its continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). The director concluded that neither the petitioner's net income nor net current assets, as shown on the tax returns submitted to the record, demonstrated the petitioner's ability to pay the proffered wage.

On appeal, counsel submits additional evidence in support of the petitioner's ability to pay the proffered wage, which includes a letter, dated October 22, 2008, signed by [REDACTED] and [REDACTED]. The letter merely states that they are capable of and intend to pay the beneficiary's salary. The letter is accompanied by copies of [REDACTED] 2007 individual tax returns, a copy of a deed to real property and relating documents appearing to be the residence of [REDACTED].

First, we initially observe that the petitioner in this case is a corporation, not individual shareholders, or a sole proprietorship. Second, nothing in the record of proceedings specifically identifies the position(s) that [REDACTED] hold in the [REDACTED]. It is noted that the state online corporation records indicates that [REDACTED] is a chairman or chief executive officer,⁶ however it is unclear what position [REDACTED]. From their individual 2007

⁶See New York state online public corporation records for the John Mortimor Corporation at [http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p...\(accessed](http://appext9.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p...(accessed)

tax returns submitted on appeal, it may be inferred that they are also both shareholders in the corporation. Regardless, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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."

Compensation of officers is an expense category that is stated on page one of the federal corporate tax return. In some cases, where the circumstances are warranted, it may be considered as an additional financial resource of the petitioner, in addition to its figures for net income.⁷ In this case, we decline to consider officer compensation paid to these shareholders/officers as applicable toward the corporate ability to pay the proffered wage. Moreover, it is unclear what other personal expenses these shareholders would incur on an annual basis in 2007 before considering any application of personal income paid as officer compensation to the corporate petitioner's ability to pay. Further, with respect to the other relevant years of 2004 through 2006, it is noted that no individual tax returns were supplied or other documentation to confirm the position of these individuals during these years, and how much, if any, officer compensation would have been reasonably available even if other factors had been established. Additionally, based on the amounts stated as officer compensation, which were \$-0- in 2004; \$23,400 in 2005; \$31,200 in 2006; and \$36,200 in 2007, even if all the officers' compensation was used in each year, which we find to be unrealistic, the petitioner could not establish its ability to pay the proffered wage in any of those four years.⁸ Further, as set forth above, the officers appear to be from the alleged successor-in-interest entity. Without evidence to establish the successorship of the John Mortimor Corporation, we cannot consider the officer compensation from these individuals. 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).⁹ It may not be concluded that the

October 17, 2011).

⁷It is also noted that officer compensation represents compensation paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not ordinarily be considered to be an available source with which to pay the beneficiary. Here, it is unclear, how many additional duties performed by either of these officer/shareholders of the corporate petitioner are going to be assumed by the beneficiary.

⁸ If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

⁹As noted above, even if we did consider the compensation, it would be insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary.

assertions of the individual officers/shareholders establishes the corporate petitioner's ability to pay the proffered wage from the priority date onward or outweighs the evidence contained in the corporate tax returns as set forth below.

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. As noted above, the petitioner has not submitted any evidence that it paid the beneficiary any wages during any relevant timeframe including the period from the priority date onward. Further, copies of the state quarterly wage reports for the second, third, and fourth quarters of 2005 and the first quarter of 2006 did not indicate that the petitioner employed the beneficiary during that period.

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. Falmer*, 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:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of

funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. 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 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.¹¹

With regard to the [REDACTED] continuing financial ability to pay the proffered wage of \$37,700 per year, the petitioner has submitted partial copies of its 2004, 2005, 2006 and 2007 Form 1120S, U.S. Income Tax Return for an S Corporation. Further, this petitioner did not provide any financial information relevant to the predecessor corporation, [REDACTED]. As noted above, the evidence of the ability to pay a given wage must show that the predecessor corporation had the ability to pay the proffered wage beginning as of the priority date and running until the transfer of ownership. As the record indicates that the [REDACTED] 2004 tax return covered the period from October 15, 2004 until the end of the year, any financial documentation must cover from the priority date of November 12, 2003 until October 15, 2004. As the petitioner failed to provide such information, the ability to pay the proffered wage has not been shown for 2003.

¹⁰According 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.

¹¹A petitioner’s total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Rather, USCIS considers a petitioner’s net current assets.

The petitioner's stated net income¹² and net current assets as shown by the corporate tax returns contained in the record indicate the following:

Year	2003	2004	2005
Net Income	\$ not provided	\$ 2,609	\$ 7,389
Current Assets	\$ not provided	\$14,957	\$12,462
Current Liabilities	\$ not provided	\$ 4,123	\$ 4,392
Net Current Assets	\$ n/a	\$10,834	\$ 8,070

Year	2006	2007
Net Income	-\$12,337	\$ not established
Current Assets	\$ 7,367	\$ not provided
Current Liabilities	\$ 12,408	\$ not provided
Net Current Assets	-\$ 5,041	\$ n/a

As set forth in the above table and as noted above, the petitioner failed to provide any documentation for 2003 through October 15, 2004 and failed to provide complete copies of its federal tax returns, particularly with reference to its 2007 return, which contained only page 1 and failed to clearly establish its net income (see footnote 10 herein). 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).

As indicated above, the petitioner's net income was not sufficient in 2003, 2004, 2005, 2006 or 2007 to cover the proffered wage of \$37,700. Similarly, in each of those years as shown in the table above, the petitioner's net current assets were not sufficient to cover the proffered wage of \$37,700. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered

¹² 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 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions or other adjustments shown on its Schedule K, for 2004, its net income is found on line 17e of Schedule K. For 2005 and 2006, the petitioner's net income is found on line 21 of page one of those corporate tax returns. For 2007, the petitioner only submitted page one of that return. Net income is unable to be determined.

wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 (Reg. Comm. 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 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, or the petitioner's reputation within its industry. In the instant case, there is little evidence that the petition merits an approval based on *Sonogawa*. The record indicates that the Form I-140 was filed approximately three years after transfer of ownership and the incorporation date of the new corporate owner. The tax returns reflect modest net income and net current assets that have not been sufficient to cover the proffered wage in any of the relevant years indicated. The record contains no unusual or unique circumstances analogous to those which prevailed in *Sonogawa*. Thus, assessing 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.

Relevant to the beneficiary's qualifying two years of experience, on appeal, the petitioner submits a copy of a letter, undated, from [REDACTED]. It is signed by an individual identified as [REDACTED]'s job title is not stated. Although the letter is typed on this firm's letterhead, no physical address is given. Only a website is stated. [REDACTED] states that the beneficiary worked for [REDACTED] at from May 2000 to June 2002. [REDACTED] also states that the beneficiary "started as a Dishwasher. He moved up to Prep cook and then Line Cook," and "at the time of the restaurant's closing," the beneficiary was capable of any duty required in the kitchen. [REDACTED] failed to specifically indicate the duties that the beneficiary performed in each of his positions with this business and failed to verify that the beneficiary's experience encompassed two full-time years as a specialty cook as set forth on the Form ETA 750. The lack of specificity as to the restaurant's location, [REDACTED]'s title, and the duration and nature of the beneficiary's duties with this business do not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii). As the record currently stands, the petitioner has not credibly established that the beneficiary possessed two full-time years of work experience as a specialty cook as of the priority date of November 12, 2003, as required by the terms of the labor certification. 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 evidence submitted fails to demonstrate that a valid successor-in-interest relationship has been established or that the petitioner has had the continuing ability to pay the proffered wage from the priority date onward. Further, the petitioner has not established that the beneficiary possessed the requisite two years of qualifying experience.

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.