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



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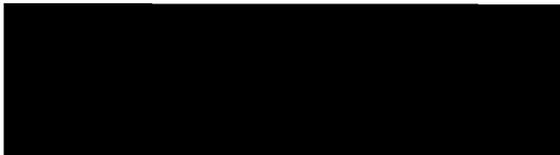
Date: **NOV 23 2011** Office: TEXAS SERVICE CENTER



IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner, [REDACTED] operates a poultry products business in the state of [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a halal butcher. The petitioner requests classification of the beneficiary as a skilled worker (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available 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). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), certified by the U.S. Department of Labor (DOL).¹

As with all immigrant visa petitions requiring a certified labor certification, the history of this case involves both the DOL and United States Citizenship and Immigration Services (USCIS). On April 20, 2001, the beneficiary's original employer, [REDACTED] d/b/a [REDACTED] filed the labor certification application with the DOL on behalf of the beneficiary for the occupation of [REDACTED]. The DOL certified the labor certification application on April 3, 2003. Subsequently, on May 13, 2005, the instant petitioner, [REDACTED] was incorporated in the state of [REDACTED] and in May 6, 2006, the petitioner hired the beneficiary to fill the position of Halal Butcher. No evidence has been submitted to demonstrate that the original petitioner, [REDACTED] transferred ownership of its business or a division of the business to the instant petitioner, [REDACTED].

On October 9, 2007, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, with USCIS. The petitioner claims that it is a successor-in-interest to [REDACTED] because it has assumed the rights and obligations of the labor certification application in the same area of intended employment. The petitioner claims that it is offering the beneficiary the same job with the same duties and salary as set forth in the approved labor certification, therefore it has succeeded to the interests of the alien labor certification application approved for [REDACTED] on behalf of the beneficiary. The petitioner submitted the following documentation in support of its claim:

1. Memorandum of Agreement dated November 29, 2006, and executed on December 7, 2006 between [REDACTED] Inc. and the petitioner stating that [REDACTED] Inc. closed its store in the

¹ No evidence has been presented to suggest that DOL was notified of or approved the change in petitioner.

██████████ in zip code ██████████² and that it transferred the rights and obligations of the labor certification to the petitioner that had a store also in the ██████████ but in zip code ██████████, approximately 2.25 miles away.³

2. IRS Form 1120 for ██████████ from tax year 2001.
3. IRS Forms 1120 for ██████████ from tax years 2005 and 2006.
4. A brief from counsel.

No additional evidence describing and documenting any corporate transaction between ██████████ ██████████ has been submitted to the record. On February 20, 2009, the director denied the petition after finding that the petitioner failed to establish that it qualified as a valid successor-in-interest to ██████████ and that the petitioner failed to establish that the original employer has the ability to pay the proffered wage from the priority date until the date the alleged successorship was established⁴ or that the petitioner has the ability to pay the proffered wage from the date the alleged successorship was established,⁵ May 2006, when it began to employ the beneficiary, continuing through the present. In the context of general corporate law, a successor is a business organization that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of a predecessor business organization. *See Black's Law Dictionary* 1569 (9th ed. 2009).

The petitioner subsequently appealed the decision to the AAO. The record shows that the appeal was properly filed, timely, and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143,

² The AAO notes that the date on which the original petitioner closed its store in the ██████████ ██████████ is not included anywhere in this Memorandum of Agreement and that no additional documentation of the purported transaction has been provided with the I-140 submission or on appeal.

³ The AAO notes that the December 7, 2006 Memorandum of Agreement is addressed to the Nebraska Service Center within USCIS. The AAO questions whether this document in fact memorializes a corporate transaction that took place between the original petitioner and the new petitioner or whether it was created in an effort to obtain approval of the instant immigrant petition. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

⁴ The record does not contain any evidence showing when the alleged successorship was established.

⁵ As noted above, the petitioner did not submit any evidence showing the date of successorship established, but claimed that it began to employ the beneficiary in May 2006.

145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁶

II. ISSUES

The director stated that a successor must assume all of the rights, duties, obligations and assets of the original employer and continue to operate the same type of business as the original employer. Citing *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*"), the director concluded that the petitioner is not a successor-in-interest to Primo Poultry. The director also denied the petition for failure to demonstrate ability to pay from the priority date through the present.

On appeal, the petitioner asserts that it is a valid successor-in-interest and that the labor certification application remains valid. Specifically, the petitioner asserts that pursuant to 20 C.F.R. § 656.30(c)(2), the labor certification remains valid regardless of whether the new employer assumes ownership of the original employer per se as long as the job opportunity and area of intended employment remain the same. Thus, the petitioner qualifies as a successor-in-interest without having to fully describe the transfer and assumption of ownership of [REDACTED] because it is offering the beneficiary the same job opportunity in the same area of intended employment reflected on the labor certification application. In support of the appeal, the petitioner submits a brief, but no new additional evidence.

III. ANALYSIS

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

⁶ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2), *see also Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979).

The regulation at 8 C.F.R. § 204.5(l)(3)(i) requires that every petition under this classification must be accompanied by an individual labor certification from the Department of Labor. Unless a new I-140 petitioner qualifies as a successor-in-interest to the petitioner listed on the labor certification application, the new petitioner must have an independent and valid labor certification to support the immigrant visa petition.

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

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED] filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to [REDACTED] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] 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 [REDACTED] Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, and it is determined that an actual *successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

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

USCIS used to 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 employer’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 specifically *represented* that it had assumed all of the original employer’s rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner’s claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: “if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved” *Id.* (emphasis added).

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

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of “all” or a totality of a predecessor entity’s rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: “One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009) (defining “successor in interest”).

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.⁷ *Id.* at 1569 (defining “successor”). When

⁷ [REDACTED] and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. *19 Am. Jur. 2d Corporations* § 2165 (2010).

considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁸

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁹ *See generally 19 Am. Jur. 2d Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

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

⁸ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

⁹ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See 19 Am. Jur. 2d Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

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. § C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has failed to establish a valid successor relationship for immigration purposes.

In the instant case, the petitioner has not fully described and documented its acquisition of [REDACTED] and, in fact, the record of proceeding establishes that no transfer of ownership took place in this case. Rather, it appears that the original employer ceased operations at some point in time after the filing of the labor certification application on April 20, 2001 and prior to the filing of the instant I-140 petition¹⁰ on December 10, 2007. In May 2005, the petitioner incorporated in the state of [REDACTED] and began operating a similar company in a similar location.

As emphasized in *Matter of Dial Auto*, the critical piece of evidence in assessing the nature of the corporate transaction is the Asset Purchase Agreement or other agreement setting forth the terms of the transaction. No such document exists in the instant case.

¹⁰ In her brief, counsel claims that [REDACTED]

[REDACTED] No independent evidence of this purported date of closing has been provided, thus, the AAO cannot establish a specific date on which to analyze any potential transfer of ownership from [REDACTED] or to establish ability to pay the proffered wage. In addition, the evidence presented raises questions as to whether [REDACTED] actually went out of business or simply closed a specific store. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

The record contains the Memorandum of Agreement dated November 29, 2006, executed by [REDACTED] on behalf of [REDACTED] on December 7, 2006 and addressed to the Nebraska Service Center. The memorandum of agreement states in pertinent part that:

Please be advised that [REDACTED] closed its store which was located at 711 [REDACTED]. Subsequently, we transferred the rights and obligations of the alien labor certification to [REDACTED] Inc. located at [REDACTED]. [REDACTED] is located within the same geographical area as [REDACTED] and is 2.25 miles away in the next zip code area.

[REDACTED] as successor to the labor certification is offering [the beneficiary] the same job (Halal butcher) has assumed the rights and obligations of the labor certification and is offering [the beneficiary] the job of Halal butcher with the same duties and salary as that listed on the labor certification.

The memorandum of agreement is not credible for establishing a successor-in-interest relationship because it fails to describe any asset, property, or other portion of the business being conveyed to the petitioner. All it transferred is the rights and obligations of the alien labor certification.

Moreover, the fact that the Memorandum of Agreement is addressed to the Nebraska Service Center and executed in December 2006 raises significant questions with respect to its veracity. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The AAO finds it concerning that the exact date on which the original employer went out of business is not clearly established in the record. There is a dearth of information regarding operations of the original employer, such as evidence of corporate dissolution, the date of dissolution, pay stubs issued to the beneficiary, etc. Moreover, counsel of record for the instant petitioner is also listed as counsel of record on the certified Form ETA 750 that was approved by the DOL on April 3, 2003. Thus, it appears that counsel in this matter has represented both the original employer and the current petitioner. It is unusual, then, that counsel would not have access or evidence of the corporate activity of the original employer.

The record contains the original employer's tax return for 2001 and a letter dated May 6, 2008 from [REDACTED]. The only evidence in the record that sheds light on the dates of the original employer's business operations is the letter from [REDACTED] stating that the beneficiary was employed by that company from June 1996 through February 2004.

Therefore, the petitioner failed to submit documentary evidence to establish that it qualifies as the successor-in-interest to the original employer who filed and was certified by DOL the underlying labor certification.

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.

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.

Accordingly, the petitioner must demonstrate that the alleged predecessor entity paid the beneficiary the proffered wage or had the ability to pay the proffered wage beginning on the priority date, which is April 20, 2001, until the date of the alleged successorship,¹¹ and that the petitioner had and has been having such ability from the date of successorship to the present.

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$15.15 per hour (\$31,512.00 per year).¹²

¹¹ As previously discussed, the record does not contain any evidence establishing the exact date of successorship. The petitioner provided Memorandum of Agreement dated November 29, 2006 but executed on December 7, 2006. The memorandum of agreement does not describe any ownership transfer, the date of the transfer or even the date the predecessor's store closed. The record contains the beneficiary's Form 1099 issued by the petitioner for 2006. Therefore, the AAO assumes that the petitioner is responsible to establish its ability to pay the proffered wage to the beneficiary from 2006 only for purpose of determining the ability to pay the proffered wage in this matter.

¹² The AAO notes that on the uncertified Form ETA 750A submitted by the petitioner with the initial filing of the instant petition, the petitioner indicates that the beneficiary will work 35 hours per week at the rate of \$15.15 per hour. The petitioner filed the instant petition as the successor-in-interest to [REDACTED] based on the certified labor certification approved by DOL to the original employer. The uncertified Form ETA 750 cannot be used as basis to file an immigrant petition and the underlying certified labor certification clearly

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner 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 petitioner did not submit any documentary evidence showing that the predecessor entity paid the beneficiary any compensation during the period from the priority date to the alleged date of the successorship. The petitioner submitted the beneficiary's Form 1099 issued by the petitioner for 2006 showing that the petitioner paid the beneficiary \$18,558.75 that year. The petitioner failed to establish the predecessor's ability to pay the proffered wage for 2001 through 2005 through examination of wages actually paid to the beneficiary and also failed to establish its ability to pay the proffered wage for 2006 through the present through examination of wages actually paid to the beneficiary. The petitioner must demonstrate that the predecessor had sufficient net income or net current assets to pay the full proffered wage for 2001 through 2005 and that the petitioner had sufficient net income or net current assets to pay the difference of \$12,953.25 between wages actually paid to the beneficiary and the proffered wage in 2006 and the proffered wage per year in 2007 onwards.

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

indicates that the beneficiary will work 40 hours per week, and therefore, the certified proffered wage in this matter is \$31,512.

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. The petitioner’s total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. 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. 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.¹³ A corporation’s year-end current assets are shown on Schedule L, lines 1

¹³ 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

through 6, of the IRS Form 1120 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 evidence in the record of proceeding shows that both the predecessor and the petitioner are structured as C corporations and file their federal tax returns on the Internal Revenue Services (IRS) Form 1120, U.S. Corporation Income Tax Return. According to the tax returns in the record, the predecessor's fiscal year begins on June 1 and ends on May 31 and the petitioner's fiscal year begins on May 1 and ends on April 30. The record contains the predecessor's federal tax return for 2001 and the petitioner's tax returns for 2005 and 2006. Although the record does not contain any documentary evidence to establish the date of alleged successorship for this matter, the submitted memorandum of agreement is dated November 29, 2006 and executed on December 7, 2006, and counsel claims that the petitioner began to employ the beneficiary in May 2006. Therefore, the petitioner's 2005 tax return is not necessarily dispositive because it is unlikely that the date of successorship would be in 2005. These tax returns demonstrate the predecessor's and the petitioner's net income and net current assets for relevant years, as shown in the table below.

- In 2001, the predecessor's IRS Form 1120 stated net income of \$2,049.00¹⁴ and net current assets of \$13,304.00.
- In 2006, the petitioner's IRS Form 1120 stated net income of (\$1,338.00) and net current assets of \$ were \$31,215.00.

The predecessor did not have sufficient net income or net current assets to pay the instant beneficiary the full proffered wage for its fiscal year of 2001 (covering June 1, 2001 to May 31, 2002).

Because the priority date is April 20, 2001 in this matter, the predecessor's tax return for its fiscal year 2001 does not cover the period from April 20, 2001 to May 31, 2001. The petitioner failed to establish the predecessor's ability to pay the proffered wage for this period because it did not submit any regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements of the predecessor for the period from April 20, 2001 to May 31, 2001.

securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹⁴ The AAO notes that net income is listed on line 28 of the IRS Form 1120.

The petitioner also failed to establish the predecessor's ability to pay the proffered wage for the period from June 1, 2002 to the date whenever the petitioner alleged to become the successor-in-interest to the predecessor because the record does not contain the predecessor's annual reports, tax returns or audited financial statements for this period.

Therefore, the petitioner failed to establish the predecessor's ability to pay the proffered wage from the priority date to the date it alleged to qualify as the successor-in-interest to the predecessor through examination of wages actually paid to the beneficiary and the net income or net current assets.

For 2006, the petitioner did not have sufficient net income but had sufficient net current assets to pay the difference of \$12,953.25 between wages actually paid to the beneficiary and the proffered wage that year.

The record before the director closed on May 16, 2008 with the receipt by the director of the petitioner's response to the director's request for evidence. As of that date, the petitioner's federal income tax return for its fiscal year of 2007 was not available yet. Therefore, the petitioner's tax return for its fiscal year of 2006 is the most recent available tax return. However, the record before the AAO closed on March 31, 2009 when the instant appeal was properly and timely filed. As of that date, the beneficiary's W-2 or 1099 forms for 2007 and 2008, and the petitioner's federal income tax return for its fiscal year of 2007 should have been available. However, the petitioner did not submit its tax return for 2007 and the beneficiary's W-2 or 1099 forms for 2007 and 2008. 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). The petitioner failed to establish its ability to pay the proffered wage for 2007 and 2008 because it failed to submit the regulatory-prescribed evidence for these years.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his request for evidence issued on April 16, 2008, the petitioner declined to provide copies of the predecessor's tax returns for 2002 through 2005. The tax returns would have demonstrated the amount of taxable income the predecessor reported to the IRS and further reveal its ability to pay the proffered wage. 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).

Accordingly, from the priority date of April 20, 2001, the petitioner has not established the continuing ability to pay the beneficiary the proffered wage through an examination of wages

paid to the beneficiary, its net income, or its net current assets. USCIS electronic records show that the petitioner does not have any other Form I-140 petitions, which have been pending during the time period relevant to the instant petition.

On appeal, counsel asserts that the AAO should consider the petitioner's bank account statements from 2006 to 2008 as evidence of its ability to pay. Counsel's reliance on the balances in the petitioner's bank accounts 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 was considered above in determining the petitioner's net current assets.

Counsel incorrectly maintains that the original employer only had to demonstrate its ability to pay for 2001 and that the wage should be prorated from the priority date in April of that year onwards. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel also maintains that the new petitioner only needs to demonstrate its ability to pay the proffered wage from the date that it hired the beneficiary in May 2006. The AAO notes that the burden is on the new petitioner to show its and its predecessor's combined ability to pay from the priority date to the present. The regulations require proof of continual ability to pay from the priority date onwards. The ability to pay in this case is not continual. Financial data of any sort is also lacking for certain years, and the AAO will not prorate ability to pay.

Counsel states that the new petitioner is an S corporation. The AAO disagrees as the petitioner has submitted IRS Forms 1120 for 2005 and 2006. Counsel also urges the AAO to consider [REDACTED] unappropriated retained earnings of \$7,364.00 for 2001 and the new petitioner's \$82,000.00 in loans to shareholders in 2006 as evidence of a continued ability to pay the beneficiary the proffered salary. As previously stated, the AAO has thoroughly reviewed the prior and current petitioners' respective tax returns for 2001, 2005, and 2006 in order to determine their respective net income and net current assets. The

funds discussed here by counsel are not ones ordinarily considered by the AAO in its ability to pay analysis.

Retained earnings are a company's accumulated earnings since its inception less dividends. *Barron's Dictionary of Accounting Terms* 378 (3rd ed. 2000). As retained earnings are cumulative, adding retained earnings to net income and/or net current assets is duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes less dividends represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings fall under the heading of shareholder's equity on Schedule L of the petitioner's tax returns and generally represent the non-cash value of the company's assets. Thus, retained earnings do not generally represent current assets that can be liquidated during the course of normal business.

Counsel's assertions on appeal do not outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the ETA Form 750 was accepted for processing by the DOL.

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. The petitioner has maintained modest gross sales since 2005, has been in business since 2005, and has employed three workers, but it has failed to demonstrate that it or its predecessor has even close to enough net income or net current assets to pay the proffered wage for 2001 to 2007. The record does not contain any evidence showing that the petitioner has sound business reputation and outstanding reputation as a poultry products provider. Nor does the record show that the petitioner paid modest total wages to its employees. Instead, the petitioner's tax returns show that the petitioner paid a total of \$18,200 in 2005 and \$31,200 in 2006 to its employees. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted fails to establish that the petitioner and its predecessor had the continuing ability to pay the proffered wage beginning on the priority date.

IV. CONCLUSION

In summary, the fact that the petitioner is operating the same type of business within the same geographic area after the original employer closed its store and that the petitioner is offering and employing the beneficiary in the same position under the same condition set forth on the labor certification filed by and certified to the original employer does not qualify the petitioner to be the successor-in-interest to the original employer. The petitioner must provide evidence of transfer of ownership showing that it not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. The memorandum of agreement addressed to the Nebraska Service Center cannot be accepted and considered as such evidence of transfer of ownership because it does not describe any transfer of ownership of the predecessor's entity but only transferring rights and obligations of the labor certification. The petitioner has not established that it is the successor-in-interest to the beneficiary's original employer; accordingly, the labor certification does not remain valid for this petition.

Both entities have also not demonstrated their ability to pay the beneficiary the proffered salary from the priority date onwards.

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.