

(b)(6)



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

[Redacted]

Date: **APR 05 2012**

Office: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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:

[Redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

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

The petitioner is a business which engages in software design for packaging and related businesses. It seeks to employ the beneficiary permanently in the United States as a senior packaging technologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's December 29, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on December 29, 2004. The proffered wage as stated on the Form ETA 750 is \$82,875 per year. The Form ETA 750 states that the position requires four years of experience in the job offered or a related occupation, specifically CAD packaging design.

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.¹ On appeal, counsel for the petitioner submits a brief; a letter dated February 27, 2009 from [REDACTED] Chief Executive Officer of [REDACTED]; a description of the petitioner's business retrieved from [REDACTED] web site; a description of the petitioner's management team retrieved from the company's web site; an article dated May 2004, entitled "Survey: Packaging lag in IT" from packworld.com; an article dated October 2001, entitled "Package It: Thinking *About* the Box," from ZDNet, an online business report; an article dated July 20, 2001, entitled "Purchasing's 2010 vision series: Packaging will follow product," from Manufacturing.Net; an article dated February 2001, entitled, "webPKG: Part of the HP Package," from Boxboard Containers International; an article dated February 2001, entitled "New Packaging Development: When Collaboration is King," from netsourcingmag.com; an article dated December 2000, entitled "Wrapping up package design efficiencies," from manufacturingsystems.com; an article dated November 7, 2000, entitled "webPKG Looks to Wrap It Up," from crm.com; an article dated October 2000, entitled "On-Line Collaboration: The Next Frontier in Package Design," from devicelink.com; an article dated October 6, 2000, entitled [REDACTED] a biographical sketch of [REDACTED] the petitioner's CEO; a list of events at which the petitioner's CEO spoke about their field of business; two conference presentations which the petitioner's CEO made: the [REDACTED] Department of State Business Registration for [REDACTED]; a Declaration of [REDACTED] in Opposition to Ex Parte Application for Amended Writ of Possession and Amended TRO, dated February 19, 2002; a signed Request for Dismissal from [REDACTED] dated August 26, 2002; invoices; the Assets Sale and Purchase Agreement between [REDACTED] with an attached exhibit, dated December 3, 2007; Articles of Incorporation of [REDACTED] dated September 12, 2007; and a Fictitious Business Name Statement, filed in [REDACTED] on October 31, 2007.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$2 million, and currently to employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 15, 2004, the beneficiary claimed to have worked for the petitioner, as a senior packaging technologist, from July 2002 to the date upon which he signed Form ETA 750.

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).

On appeal, counsel identifies two bases for his appeal. First, counsel asserts that the petitioner, [REDACTED] was bought by [REDACTED] on December 2007 and that this fact should have been taken into consideration when the director denied the petitioner's I-140 petition. Second, counsel asserts that [REDACTED] tax returns do not accurately reflect its ability to pay because it was recovering from two lawsuits filed by investors attempting a hostile takeover of the previous company [REDACTED] which was run by [REDACTED] management team. Counsel further asserts that United States Citizenship and Immigration Services (USCIS) should take into consideration [REDACTED] reputation, experience, increasing profits and well-established corporate clients.

Since counsel for the petitioner asserts that the party which filed the instant appeal is the successor-in-interest to the petitioner, the AAO must analyze the successorship claim in order to be able to consider the evidence supplied with the appeal. After having determined whether or not a bona fide successorship has been demonstrated, we will consider the evidence provided in support of the ability to pay.

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 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

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

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

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

In the present matter, the USCIS Nebraska Service Center Director determined that the petitioner had provided no evidence demonstrating that [REDACTED] was, in fact, the successor-in-interest to [REDACTED]. Rather, the claim was simply stated in the response to the director's request for 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Because the petitioner provided no evidence in support of its claims, the director properly denied the I-140 petition.

On appeal, counsel for the petitioner provided documentary evidence in support of the claims of successorship, the most significant of which is the Assets Sale and Purchase Agreement between [REDACTED]. In reviewing the documents supplied, we note that the Commissioner's decision, in *Matter of Dial Auto*, 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.² *Id.* at 1569 (defining "successor"). When considering other business

² Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that

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

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁴ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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

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).

³ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

⁴ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

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.

Applying the analysis set forth above to the instant petition, the petitioner has established a valid successor relationship for immigration purposes. As explained by [REDACTED] Chief Executive Officer (CEO) of [REDACTED] during the course of a legal battle which was in process until 2002. [REDACTED] and the management team of [REDACTED] "formed a new company, [REDACTED]". The establishment of this entity is confirmed by a review of the database of the Secretary of the State of California/Corporations Division.⁵ According to this cite, [REDACTED] was established on November 16, 2001. [REDACTED] further explains that the new company sought and received funding from an investor, [REDACTED] appears as C [REDACTED] agent on the Secretary of State's website. According to [REDACTED], he and his management team subsequently formed a new company, [REDACTED] and "performed a mutually beneficial buyout agreement" with their investor, [REDACTED]. According to the database of the Secretary of State of California, [REDACTED] was established on September 12, 2007.⁶ Further, according to the same database, the operations of [REDACTED] are currently suspended. Additionally, counsel supplied the Assets Sale and Purchase Agreement between [REDACTED] represented by [REDACTED]. The agreement is dated December 3, 2007 and is signed by [REDACTED] President of [REDACTED] and [REDACTED] President of [REDACTED].

According to the Assets Sale and Purchase Agreement, [REDACTED] sold all of its assets to [REDACTED]. The assets included all contracts, customer lists, and inventory. They also included any liabilities expressly provided for in the sales contract. [REDACTED] did not assume other disclosed liabilities, but instead paid [REDACTED] for these. On October 31, 2007, [REDACTED] filed a registration with the State of California to utilize the fictitious name, [REDACTED]. Further, [REDACTED] operates a website, using the name [REDACTED]. The evidence shows that [REDACTED] carries on the same type of business as [REDACTED] and does so in the same Metropolitan Statistical Area. Thus, the evidence demonstrates that [REDACTED]

⁵ <http://kepler.sos.ca.gov/cbs.aspx> (accessed on February 16, 2012).

⁶ <http://kepler.sos.ca.gov/cbs.aspx> (accessed on February 16, 2012).

is the successor-in-interest of

According to [redacted] web site, the beneficiary is the senior packaging technologist, performing the same duties as those which are enumerated on both Form I-140 and Form ETA 750. Therefore, USCIS is satisfied that the job opportunity remains the same.

The remaining issue in this matter is whether the successor has demonstrated that the petitioner had the ability to pay the beneficiary the proffered wage from the date upon which Form ETA 750 was filed with the DOL and up until the sale of its company was completed and whether the successor has demonstrated the ability to pay the proffered wage from the date of its purchase of [redacted] Inc. and continuing until the beneficiary obtains lawful permanent residence.

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'1 Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'1 Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's IRS Forms W-2 for 2004, 2005, 2006 and 2007 show compensation received from the petitioner, as shown in the table below.

- In 2004, the Form W-2 stated compensation of \$44,200.00.
- In 2005, the Form W-2 stated compensation of \$81,600.00.
- In 2006, the Form W-2 stated compensation of \$64,400.00.
- In 2007, the Form W-2 stated compensation of \$34,250.00.

The petitioner also provided an additional IRS Form W-2 for 2007 which was issued by PKG Technologies, Inc. This document reflects the following compensation:

- In 2007, the Form W-2 stated compensation of \$43,340.00

Since the petitioning entity was bought by [REDACTED] on December 3, 2007, the predecessor must be able to demonstrate the ability to pay through that date, while the successor must be able to demonstrate the ability to pay from December 3, 2007 through the end of the year. Considering the monthly compensation (\$6,906.25) due to the beneficiary, based upon the proffered wage (\$82,875), the predecessor must demonstrate the ability to pay \$75,968.75 and the successor must demonstrate the ability to pay \$6,906.25.

Additionally, the petitioner provided electronic statements, entitled "Advice of Deposit," for January through November 2008. Counsel asserts that these are records of the compensation which [REDACTED] made to the beneficiary for that period of time. If we accept these records, the rate of pay identified is \$3,550 bi-weekly. As of November 15, the statements reflect that the beneficiary had received \$74,550 in total compensation for the year to date. According to these records, the successor is compensating the beneficiary at a rate at least equivalent to the rate of the proffered wage. Therefore, the evidence would seem to suggest that the petitioner had the ability to pay for 2008, though none of the recognized forms of evidence were supplied (e.g. tax returns, audited financial statements or annual reports) to corroborate the assertion.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage for any of the years under consideration, from 2004 through 2007. However, the successor was obligated to pay the beneficiary \$6,906.25 for 2007 and exceeded that amount of compensation. Thus the successor has satisfied its burden for 2007. Additionally, the successor satisfied its burden for 2008, based upon the pay statements provided. However, since the petitioner did compensate the beneficiary for each year from 2004 through 2007, yet at a rate less than the proffered wage, the petitioner must still demonstrate the ability to pay the difference between the wages paid and the proffered wage for each year, that difference being \$38,675, \$1,275, \$18,475 and \$41,718.75 for 2004, 2005, 2006 and 2007 respectively.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on December 5, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, neither the petitioner's nor the successor's 2008 federal income tax return was yet due. Therefore, the petitioner's and successor's income tax returns for 2007 are the most recent returns available. The petitioner's tax returns demonstrate its net income for 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2004, the Form 1120 stated net loss of \$76,547.00.
- In 2005, the Form 1120 stated net loss of \$46,548.00.
- In 2006, the Form 1120 stated net loss of \$20,083.00.
- In 2007, the Form 1120 stated net income of \$70,534.00.

Counsel also provided a tax return for the successor-in-interest for 2007. Even though the successor has satisfied its burden of demonstrating the ability to pay for 2007, through wages already paid to

the beneficiary, we will include the tax return here for informational purposes. That return demonstrates the following:

- In 2007, the Form 1120 stated net loss of \$9,842.00

Therefore, when considering the petitioner's net income, it has demonstrated the ability to pay the difference between the wages already paid and the proffered wage for 2007 only. However, for 2004, 2005 and 2006, the petitioner has not demonstrated sufficient net income to be able to pay the difference between the wages already paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004, 2005 and 2006, as shown in the table below.

- In 2004, Schedule L of the Form 1120 stated net current liabilities of \$454,533.00.
- In 2005, Schedule L of the Form 1120 stated net current liabilities of \$501,081.00.
- In 2006, Schedule L of the Form 1120 stated net current liabilities of \$521,164.00.

Therefore, for the years 2004, 2005 and 2006, the petitioner did not have sufficient net current assets to be able to pay either the proffered wage or the difference between wages already paid to the beneficiary and the proffered wage.

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

On appeal, counsel asserts that though the beneficiary was only paid \$44,200 in 2004, the petitioner filed Form ETA 750 on December 29, 2004 and therefore, is not obligated to demonstrate the ability

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less; such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

to pay for the full year.⁸ Counsel asserts that, on the contrary, the petitioner is only obligated to demonstrate the ability to pay for two days and that based upon the beneficiary's daily rate of pay (\$226.44), the petitioner's obligation is only \$452.88 for 2004. Counsel also maintains that the petitioner ended 2004 with cash assets of \$26,717 which was sufficient to be able to pay the beneficiary for the two days.

Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. 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. Further, were USCIS to prorate the proffered wage, we would likewise have to prorate the petitioner's income. However, for 2004, the petitioner reported a net loss of \$76,547.

Further, though the petitioner would like for USCIS to consider its end-of-year cash assets alone for purposes of calculating the ability to pay for 2004, USCIS has already considered the petitioner's net current year-end assets. Based upon the rationale explicated above, we noted that the petitioner's net current year-end assets reflect the difference between the petitioner's current assets and current liabilities. We further noted that, 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Rather than being able to isolate one type of asset from the petitioner's current assets and utilize that sum for ability to pay, without taking into consideration the other forms of current or current liabilities, USCIS considers all current assets and current liabilities. For 2004, the petitioner reported current year-end liabilities of \$454,533. Thus, the petitioner did not have sufficient current year-end assets to have been able to pay the beneficiary the proffered wage or the difference between the wages already paid to the beneficiary and the proffered wage.

Counsel for the petitioner asserts that USCIS should again consider just the petitioner's end-of-year cash assets when considering the ability to pay for 2005. According to counsel, the petitioner paid the beneficiary only \$1,275 less than the proffered wage. However, counsel asserts that the petitioner had \$6,069 in cash assets at the end of the year. While it is true that the petitioner reported \$6,069 in cash assets, he also reported \$507,150 in current year-end liabilities for a net liability of \$501,081. Thus, the petitioner did not have the ability to pay even the difference between the wages

⁸ It is worthy of note that though the petitioner asserts the obligation of having to pay the beneficiary for only two days during 2004, the beneficiary was employed by the petitioner for all of 2004 but was only paid \$44,220.

already paid and the proffered wage, based upon a consideration of current year-end assets or net income for that year.

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

On appeal, counsel asserts that the petitioner's tax returns do not accurately reflect its ability to pay the proffered wage because the company was still recovering from two lawsuits filed by investors attempting a hostile takeover of the previous company run by [REDACTED] management team. Because of this situation, counsel asserts that USCIS should take into consideration [REDACTED] reputation, experience, increasing profits and well-established corporate clients when considering the petitioner's ability to pay.

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

In the instant case, the petitioner has not demonstrated that the petitioner's business situation corresponds with the situation presented in *Matter of Sonogawa*. Rather than being able to demonstrate a significant history of business operations with marked profitability, at the time the petitioner filed Form ETA 750 with the DOL, their company had only been in existence for three years. Further, the petitioner indicates that [REDACTED] was formed out of the aftermath of litigation involving a prior business enterprise. [REDACTED] The evidence shows that during the settlement of a suit to determine ownership of [REDACTED] the petitioner established [REDACTED] The petitioner also states that since it lost its largest client, [REDACTED] spent the next

four years trying "to acquire new large-scale enterprise customers." Thus, rather than having a well-established history of profitability, the petitioner was a new enterprise which spent four years trying to build a clientele.

It should also be noted that in *Sonegawa*, the business had 11 years of profitability with one year of unanticipated business interruption. In the instant situation the petitioner commenced operation in November 2001 and appears to have had slow growth. Counsel for the petitioner indicates that the difficulties were due to two law suits involving the management team of [REDACTED]. In fact, the law suits were filed against a company by the name of webPKG. While the management team of [REDACTED] went on to establish [REDACTED], the suits were not filed against [REDACTED] Inc. and cannot be considered an unforeseen business interruption of Global PKG, Inc.

Counsel asserts that USCIS should consider [REDACTED] business reputation, experience, increasing profits and well-established corporate clients. However, the petitioner has provided little probative documentary evidence demonstrating that Global PKG has a well established reputation within its industry. The petitioner provided articles which were published on various internet sites. However, of the articles, only one mentions Global PKG. The remainder relate to webPKG. Further, the articles are from internet sites with no evidence to demonstrate the readership of the sites or of the articles, in particular. Therefore, pointing to mere mention in internet articles is not sufficient to demonstrate a significant reputation.

Correspondingly, the petitioner indicates that Global PKG, Inc.'s CEO, Robert DeNola has been involved in making presentations regarding the field of packaging. However, the evidence shows that Mr. DeNola made presentations at what appear to be trade conferences. The petitioner provided no evidence describing the process by which individuals were selected or invited to make such presentations or the criteria by which participants were evaluated. Nor did the petitioner provide any evidence to establish the reputation or recognition which said conferences received. Thus, the evidence does not demonstrate that Mr. DeNola was invited because of his outstanding reputation in the field or that he spoke at distinguished engagements.

In the case of *Sonegawa*, the petitioner was renowned in her field of fashion design. Her 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 petitioner has provided no evidence which demonstrates a similar level of notoriety on the part of the petitioner or its president.

Moreover, in the case of *Sonegawa*, not only was the petitioner able to demonstrate a significant history of profitability with one year of unforeseen business interruption, but she was also able to establish excellent prospects for the resumption of healthy business operations. That is due to the fact of her outstanding reputation, the high demand for her designs and continued requests for her presence at lectures and fashion shows around the nation. In the instant case, the petitioner has not demonstrated an interruption of business activities after a series of profitable years. Rather, the

petitioning enterprise was founded after the dissolution of a prior company. The petitioning enterprise began the work of building a clientele and then sought to sever the relationship with their primary source of funding, [REDACTED]. Through the petitioner's brief history, they have not demonstrated any pattern of profitability. Nor have they demonstrated an increase in sales and salaries through the years. Rather, from 2004 through 2007, Form 1120 shows a steady decrease in sales while salaries have remained relatively consistent. Further, though the petitioner claims that its net profits have increased – the predecessor showed a profit for 2007 only – its net assets decreased for each year of operation. Moreover, while the petitioner claims to have secured relationships with significant corporate clients through the completion of contracts, it provided no evidence of such contracts. Again, going on record without supporting documentary evidence do not meet the burden of proof in these proceedings. *Matter of Soffici, supra*. Further, counsel's assertions do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

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

An additional issue of eligibility must be mentioned and which the petitioner will have to overcome should it decide to pursue this matter further. 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). Based upon evidence in the record, the beneficiary appears to be a partial owner of [REDACTED] the successor to [REDACTED]. [REDACTED] makes this assertion, in his letter, dated February 27, 2009. Therein, speaking of the successorship between [REDACTED] and [REDACTED], states:

In 2007 we performed a mutually beneficial buyout agreement with our investor and formed [REDACTED] with all core team members participating in the ownership of the company, including [REDACTED].

However, the evidence also suggests that the beneficiary was a partial owner of [REDACTED] the entity which filed both Form ETA 750 with DOL and Form I-140 with USCIS. In his letter, [REDACTED] speaks of his relationship with the beneficiary, [REDACTED] stating:

In 1999 I founded [REDACTED] with a core team of associates including [REDACTED]. When the dotcom bubble burst the venture capital firm scanned its portfolio and found only one web-based company with established customers and revenue – [REDACTED]. They set about to acquire all of the remaining stock of our company in a hostile manner...At that time, we formed a new company, [REDACTED] with a new investor.

As evidence of the law suit which the venture capital firm filed against [REDACTED], the petitioner provided a Declaration of [REDACTED] in Opposition to Ex Parte Application for Amended Writ of Possession and Amended TRO. On this document, dated February 19, 2002, the defendants are listed as “[REDACTED]” (Emphasis added). In this document, [REDACTED] goes on to speak of the defendants as [REDACTED] in Section 1. In Section 3, [REDACTED] asserts, “only the four individuals are defendants in the present action by plaintiffs” (emphasis added). Thus, according to this evidence the beneficiary was identified as one of five individual identified in a suit against [REDACTED]

In speaking of the aftermath of the legal proceedings, [REDACTED] states again in his letter, regarding the parties to the legal action:

At that time, *we* formed a new company...(emphasis added).

After settling the lawsuit to *our* favor in April 2002, *we* set about on the long sales cycle process to acquire new large-scale enterprise customers. That process took 4 years, and during two of those years *we reduced our salaries* in order to bridge the gap to accomplishing the new sales with the understanding that *shares in the company would offset those salary concessions*.

(Emphasis added). When speaking of the management team which formed the new company ([REDACTED] the beneficiary being a member of that team, [REDACTED] speaks in terms of *we*, seeming to indicate something more than a mere employment relationship. Further, during the period in which the new company, [REDACTED] was seeking to build a clientele, [REDACTED] states, “*we reduced our salaries...*” Given the fact that employees do not have the ability to modify their own salaries, it would seem that those who do are in positions at least of a different nature than employees. Further, [REDACTED] indicates that in exchange for salary concessions during the initial start-up phase, those who opted to have their salaries reduced, did so with the understanding that they would receive shares in the company. Thus, the beneficiary as a member of that team would have received shares, or ownership, in the new company in exchange for foregoing part of his salary during at least the first two years of operation, though the process actually took four years.

Thus, the evidence seems to indicate that the beneficiary not only has ownership in the successor, [REDACTED] but also had ownership in the predecessor, [REDACTED] further, if the beneficiary was an owner of the petitioning entity, doubt is cast upon the bona fide nature of the job opportunity with respect to whether it was clearly open to U.S. workers.

Matter of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm’r 1986), discussed a beneficiary’s 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of DOL’s Division of Foreign Labor Certification as follows:

The regulations require a ‘job opportunity’ to be ‘clearly open.’ Requiring the job

opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Sunmart* 374, 2000-INA-93 (BALCA May 15, 2000).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for the position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by Bulk Farms is reasonable related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, “the DOL certification process is built around a central administrative mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” See 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the bona fide job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each years. . .

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

Bulk Farms, Inc., v. Martin, 963 F.2d 1286-1289 (1992).

The regulation at 20 C.F.R. § 656.30 (2001) provided in pertinent part:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving a labor certification. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notice shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.⁹

As outlined by the Board of Immigration Appeals (BIA), a material misrepresentation requires that the alien willfully make a material misstatement to a government official for the purpose of obtaining an immigration benefit to which one is not entitled. *Matter of Kai Hing Hui*, 15 I&N Dec. 288, 289-90 (BIA 1975). "The intent to deceive is no longer required before the willful misrepresentation charge comes into play." *Id.* at p. 290.¹⁰ The term "willfully" means knowing and intentionally, as distinguished from accidentally inadvertently, or in an honest belief that the facts are otherwise. See *Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). To be considered material, the misrepresentation must be one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility, and which might well have resulted in a proper determination that he be excluded." *Matter of Ng*, 17 I&N Dec. 536, 537 (BIA 1980). Accordingly, for an immigration officer to find a willful and material misrepresentation in visa petition proceedings, he or she must determine: 1) that the petitioner or beneficiary made a false representation to an authorized official of the United States government; 2) that the misrepresentation was willfully made; and 3) that the fact misrepresented was material. See *Matter of M-*, 6 I&N Dec. 149 (BIA 1954); *Matter of L-L-*, 9 I&N Dec. 324 (BIA 1961); *Matter of Kai Hing Hui*, 15 I&N Dec. at 288.

⁹ The current regulation provides: provides in pertinent part:

(d) *Invalidation of labor certifications.* After issuance, a labor certification may be revoked by ETA using the procedures described § 656.32. Additionally, after issuance, a labor certification is subject to invalidation by the DHS or by a Consul of the Department of State upon a determination, made in accordance with those agencies' procedures or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to the CO or to the Chief, Division of Foreign Labor Certification, the CO, or the Chief of the Division of Foreign Labor Certification, as appropriate shall notify in writing the DHS or Department of State, as appropriate. A copy of the notification must be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General. 20 C.F.R. § 656.30 (2010).

¹⁰ In contrast, a finding of fraud requires a determination that the alien made a false representation of fact of a material fact with knowledge of its falsity and with the intent to deceive an immigration officer. Furthermore, the false representation must have been believed an acted upon by the officer. See *Matter of G-G-*, 7 I&N Dec. 161 (BIA 1956).

An occupational preference petition may be filed on behalf of a prospective employee who is a shareholder in the corporation. The prospective employee's interest in the corporation, however, is a material fact for DOL adjudicators to be considered in determining whether the job being offered was really open to all qualified applicants. A shareholder's concealment, in labor certification proceedings, of his or her interest in the petitioning corporation constitutes willful misrepresentation of a material fact and is a ground for invalidation of an approved labor certification under 20 C.F.R. § 656.30(d) (1986). *Matter of Silver Dragon Chinese Restaurant, supra.*

Should the petitioner pursue the matter, it must provide sufficient evidence to establish the beneficiary's relationship both to the successor and to the predecessor and that such relationship was revealed to DOL during the labor certification process. The petitioner must further demonstrate that the job opportunity was clearly open to U.S. workers. Without such a demonstration, over and above the findings relative to the I-140 petition, a finding of misrepresentation may be entered and Form ETA 750 would then be subject to invalidation.

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.