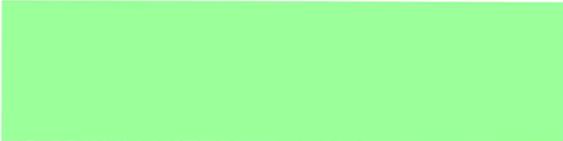




U.S. Citizenship  
and Immigration  
Services

(b)(6)



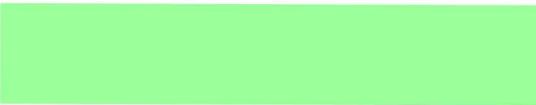
Date: **APR 26 2012**

Office: NEBRASKA SERVICE CENTER FILE: 

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.<sup>1</sup>

The petitioner is an automotive repair business. It seeks to employ the beneficiary permanently in the United States as an automotive service technician mechanic (maintenance mechanic). 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.

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<sup>1</sup> In response to the director's request for evidence, a request was made to send all correspondence to [REDACTED]. This address appears to be the beneficiary's residence. As the beneficiary is not an affected party in the instant matter, this address will not be recognized. The term "affected party" means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). Further, the Form I-290B signed by the petitioner states that the petitioner is self-represented. The address listed for the petitioner on the Form I-290B, however, is "in care of [REDACTED]". The regulation at 8 C.F.R. § 292.4(a) (1994) provides:

An appearance shall be filed on the appropriate form by the attorney or representative appearing in each case. During Immigration Judge or Board proceedings, withdrawal and/or substitution of counsel is permitted only in accordance with Sec. 3.16 and 3.36 respectively. During proceedings before the Service, substitution may be permitted upon the written withdrawal of the attorney or representative of record, or upon notification of the new attorney or representative. When an appearance is made by a person acting in a representative capacity, his or her personal appearance or signature shall constitute a representation that under the provisions of this chapter he or she is authorized and qualified to represent. Further proof of authority to act in a representative capacity may be required. *A notice of appearance entered in application or petition proceedings must be signed by the applicant or petitioner to authorize representation in order for the appearance to be recognized by the Service.*

No properly executed Notice of Entry of Appearance as Attorney or Representative (Form G-28) was included in the file. Therefore, the "in care of" address of [REDACTED] will not be recognized.

As set forth in the director's February 19, 2009 denial, an 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$21.08 per hour (\$43,846.40 per year based on forty hours per week).

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in February 1991 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based

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<sup>2</sup> 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 a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner since January 2001.

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

The name of the petitioner on the I-140 petition is [REDACTED]. The name of the petitioner on the Form ETA 750 is [REDACTED]. The name of the taxpayer on the 2000 and 2001 federal income tax returns in the record and the employer on the Forms W-2 in the record is [REDACTED]. The IRS Tax Identification number listed on the I-140 petition, Forms W-2 and the federal income tax returns is [REDACTED].

On the Form ETA 750, the beneficiary stated that he was employed by [REDACTED] from January 2001 to the present. The beneficiary signed the Form ETA 750 on April 24, 2001. The record also contains three letters addressed to the Foreign Labor Certification (FLC) office in [REDACTED]. Two are dated October 7, 2004 and indicate that they are in response to an assessment notice dated September 1, 2004. One letter is signed by the beneficiary. The other is signed by [REDACTED]. Both include a request to have the tax identification number for the employer changed to the "correct" number, [REDACTED]. The third letter addressed to the FLC is dated November 1, 2004. The third letter requests that the name of the prospective employer be changed from [REDACTED]. The Form ETA 750 contains corrections consistent with these letters and annotated by stamp as approved by DOL April 5, 2007. The record contains inconsistencies with regard to the petitioner's name and tax identification number.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The record does not contain evidence to reconcile the inconsistencies. These inconsistencies must be resolved with any further filings.

Without sufficient evidence to reconcile the inconsistencies, it has not been established that the federal income tax returns and Forms W-2 for [REDACTED] are sufficient evidence of the petitioner's, [REDACTED] ability to pay the proffered wage. Further, without evidence to reconcile the inconsistencies, it has not been established that the petitioner is the same entity as, or a successor-in-interest<sup>3</sup> to, the company that filed the Form ETA 750 with the tax identification number [REDACTED]. However, even if it were accepted that [REDACTED] is the same entity as, or successor-in-interest to, [REDACTED], the petitioner has not established that it had the ability to pay the proffered wage.

In the instant case, [REDACTED] demonstrated that it paid the beneficiary wages as shown in the table below:

- In 2001, Form W-2 not submitted.
- In 2002, the Form W-2 demonstrates wages paid of \$9,358.51.
- In 2003, the Form W-2 demonstrates wages paid of \$45,662.05.
- In 2004, the Form W-2 demonstrates wages paid of \$52,914.66.
- In 2005, the Form W-2 demonstrates wages paid of \$49,944.66.
- In 2006, the Form W-2 demonstrates wages paid of \$55,755.77.

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<sup>3</sup> A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). 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 id.* 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 successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

- In 2007, the Form W-2 demonstrates wages paid of \$53,299.71.
- In 2008, the Form W-2 demonstrates wages paid of \$55,810.92.

Therefore, for the years, 2003 to 2008, [REDACTED]<sup>4</sup> has established that it paid the beneficiary the proffered wage. For the years 2001 and 2002, [REDACTED] has not established that it paid the beneficiary the proffered wage.

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 (1<sup>st</sup> 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

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

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<sup>4</sup> As stated above, it has not been established that [REDACTED] with IRS Tax Identification number [REDACTED] is the petitioner in the instant case.

represent current use of cash, neither does it represent amounts available to pay wages.

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

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

The record before the director closed on February 6, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner did not submit copies of any federal income tax returns with the response. However, on appeal, the petitioner has submitted tax returns for [REDACTED] for the years 2000 and 2001. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, April 30, 2001. The 2000 tax return precedes the priority date and is not evidence of the net income or net current assets of the petitioner during the relevant period.

The tax return for [REDACTED] demonstrates its net income<sup>5</sup> for 2001 was \$34,427. No evidence was submitted to document the petitioner's net income in 2002.

Therefore, even if we accept that [REDACTED] is the same entity as, or successor-in-interest to [REDACTED] for the years 2001 and 2002, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A corporation's year-end current assets are shown

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<sup>5</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 19, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because [REDACTED] Inc. did not have additional income, credits, deductions or other adjustments shown on its Schedule K for 2001, [REDACTED] net income is found on line 21 of its tax return.

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The 2001 tax return for [REDACTED] demonstrates its end-of-year net current assets for 2001 as -\$11,599. No evidence was submitted to document the petitioner's net assets in 2002.

Therefore, even if we accept that [REDACTED] is the same entity as, or successor-in-interest to, [REDACTED] for the years 2001 and 2002, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, even if we accept that [REDACTED] is the same entity as, or successor-in-interest to, [REDACTED] from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

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.

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

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one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 been in business since 1991 and has ten employees. The petitioner has not established that [REDACTED] is the same entity as, or successor-in-interest to, [REDACTED]. However, even if we accept that [REDACTED] is the same entity as, or successor-in-interest, to [REDACTED], no evidence was provided to explain any temporary or uncharacteristic disruption in its business activities during 2001 and 2002. No evidence was provided to establish an outstanding reputation in the industry comparable to the petitioner in *Sonegawa*. No evidence was provided to establish the historical growth of the business. No evidence was provided to document that the beneficiary is replacing a former employee or an outsourced service. 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.

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. As discussed above, the petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

There is no evidence in the record to explain the relationship between the petitioner and [REDACTED] using a different tax identification number. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.