

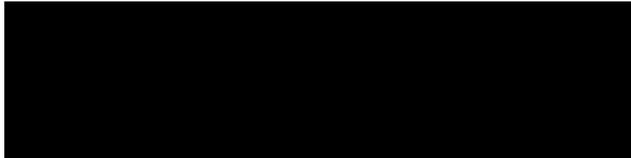
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

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



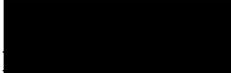
U.S. Citizenship
and Immigration
Services



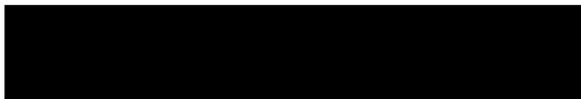
B6

Date: APR 23 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:

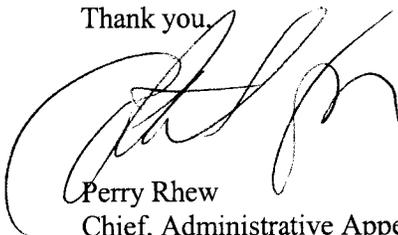


INSTRUCTIONS:

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 rejected pursuant to 8 C.F.R. § 103.3(a)(iii)(B) as the entity listed on Form I-290B has failed to establish that it is the successor-in-interest to the entity listed on the labor certification, and therefore, is not an affected party with standing in the proceeding.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a Mexican Specialty Chef. 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 July 10, 2008 denial, the 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. Additionally, on appeal, the issue of successorship is raised.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 27, 2004. The proffered wage as stated on the Form ETA 750 is \$628 per week (\$32,656 per year). The Form ETA 750 states that the position requires four years of high school education plus four years of experience as a Mexican cook or chef. The labor certification also states the special requirements: must speak English.

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

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The labor certification was filed by [REDACTED] as set forth on the petitioner's tax returns), [REDACTED]. The Form I-140 was filed by [REDACTED].

According to the web site of the Missouri Secretary of State [REDACTED] (accessed April 12, 2012), [REDACTED] voluntarily dissolved on July 30, 2008. The entity which filed the present appeal, [REDACTED] asserts that it is the successor to the initial labor certification applicant. In order for the appellant entity to continue with this appeal and fulfill its obligations with regard to the present petition, it will be necessary to establish that it is the successor-in-interest to the original petitioner, and labor certification applicant.

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*, 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, [REDACTED] 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

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).

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] 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] 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 482-83 (emphasis added).

In some cases, USCIS Service Center Directors have 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.*, at 482.

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: “[O]ne 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 (defining “successor in interest”). A petitioner is not precluded from demonstrating a successor-in-interest relationship simply because it acquired a division of the predecessor entity instead of purchasing the predecessor in its entirety.

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.* 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.* at 482.

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 or asset transaction, 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.³ *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 the relevant parts 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 can establish eligibility 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 acquired 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 successor’s essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at

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 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 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).

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.

The appellant submitted the following documentation in an effort to establish that it is the present petitioner and successor-in-interest to [REDACTED]

- A bill of sale dated March 26, 2006 showing the transfer of all stock of [REDACTED] from [REDACTED] for the sum of \$1.
- A bill of sale dated November 5, 2007 showing the transfer of all of [REDACTED] right, title and interest to its intangible assets (including goodwill and all variations of the name of [REDACTED] used in its day-to-day operations to [REDACTED]
[REDACTED]
- A bill of sale dated November 5, 2007 from [REDACTED] transferring all of its right, title and interest to restaurant machinery, equipment, office furniture and furnishings used in the day-to-day operations of [REDACTED]
[REDACTED]
- Articles of Organization dated October 23, 2007 establishing [REDACTED] and listing [REDACTED]
- A bill of sale dated January 31, 2008 from [REDACTED] transferring all of its right, title and interest in and to restaurant machinery and equipment, office furnishing and furnishings used in the operation and management of [REDACTED]
[REDACTED]
- A "License to Use Name" dated January 31, 2008 between the licensee, [REDACTED] whereby the licensor gives and grants the licensee the non-exclusive right and license to operate a single restaurant located at [REDACTED] identified by the name, facsimile signature, initials, portrait or any nickname of [REDACTED] or any combination thereof at this location.
- A letter dated August 4, 2008 signed by [REDACTED] which states that in 2007 [REDACTED] divided its name and good will from other assets and subsequently sold its name and good will to [REDACTED] and

all its other physical assets to [REDACTED]. The letter states that these to limited liability corporations were owned by the same owners as [REDACTED]. [REDACTED] then sold its interest in certain physical assets to [REDACTED]. [REDACTED] then leased its interest in [REDACTED] name and good will to [REDACTED]. The letter states that [REDACTED]⁴ continues to run the operations of [REDACTED] at the same business location, employs the same employees (including the present beneficiary). The letter further states that [REDACTED] assumes all the duties and obligations, including all immigration obligations and duties, regarding those employees. Finally, it is noted that the present beneficiary continues to be employed as a Mexican Cook/Chef in accordance with the requirements of the approved labor certification.

From the foregoing, the documents describe the transfer of assets from the intervening entity [REDACTED]. [REDACTED] Nothing shows, however, that [REDACTED] assumed the essential rights and obligations of the predecessor. Although [REDACTED] states that it assumed the duties and obligations, the record contains no evidence in terms of any agreement. 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)). Therefore, we cannot conclude that the new entity is the valid successor-in-interest to the entity listed on the labor certification and the stated petitioner on Form I-140.⁵ This must be established in any further filings in order for [REDACTED] to continue processing under the present labor certification.

As the entity that filed Form I-290B has not established that it is the successor-in-interest to the initial labor certification applicant and I-140 petitioner, [REDACTED] does not have standing as an affected party under 8 C.F.R. § 103.3(a)(iii)(B) to file the appeal, and the appeal must be rejected on this basis.

However, even if the appeal was not rejected, the AAO affirms the director's decision that the petitioner has not established its continuing ability to pay the beneficiary the proffered wage from the priority date onward.

On the petition, the petitioner claimed to have been established in May 1966 and to currently employ eight full-time and 10 part-time workers. According to the tax returns in the record, the petitioner's

⁴ Missouri records show that this entity incorporated on October 25, 2007. [REDACTED] (accessed on April 12, 2012).

⁵ 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).

fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 16, 2007, the beneficiary claimed to have worked for the petitioner from December 2004. The Form I-140 filed by the petitioner on March 23, 2007 substituted the current beneficiary for the original beneficiary listed on the Form ETA 750.⁶

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004 or subsequently.

⁶ This case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The petitioner submitted W-2 Forms showing the present beneficiary was paid part of the proffered wage from 2004 through 2007. However, none of the W-2 Forms individually could establish that the petitioner paid the beneficiary the proffered wage.⁷

The petitioner submitted W-2 Forms showing the present beneficiary was paid wages as follows:

- 2004 W-2 \$902⁸ (and as reported on the fourth quarter of 2004, Missouri Quarterly Contribution and Wage Report)
- 2005 W-2 \$29,261
- 2006 W-2 \$30,736
- 2007 W-2 \$31,388

The petitioner need only establish the ability to pay the difference between wages paid to the beneficiary and the full proffered wage. Those sums are as follows:

- 2004 - \$31,754
- 2005 - \$3,395
- 2006 - \$1,920
- 2007 - \$1,268

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 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.

⁷ Additionally, Form I-140 does not state any social security number for the beneficiary, but rather states "n/a" (not applicable). The W-2 Forms submitted, however, list a social security number. This unresolved discrepancy calls into question the veracity of the W-2 Forms and whether the wages may all properly be attributed as wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

⁸All wages were paid by the original petitioner, [REDACTED]

In [REDACTED] 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 [REDACTED] 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.

[REDACTED] "[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." [REDACTED] (emphasis added).

The record before the director closed with receipt by the director of the petitioner's response to the director's request for evidence dated June 9, 2008. As of that date, the petitioner's 2007 federal income tax return would have been the most recent return available. The petitioner had, however, requested an extension of time to file the 2007 return.⁹ The 2006 return was, therefore, the most recent return available. The petitioner's tax returns demonstrate its net income for years 2004 through 2006, as shown in the table below.¹⁰

⁹ The asserted successor did not submit its 2007 or any subsequent tax return on appeal. A successor-in-interest must demonstrate its ability to pay the proffered wage from the date of sale onward. The predecessor must demonstrate its ability to pay until the date of sale. *See Matter of Dial Auto*, 19 I&N at 482.

¹⁰ All tax returns submitted are for the original labor certification applicant and the petitioner listed on the Form I-140.

- In 2004, the Form 1120S stated net income¹¹ of (\$41,354).
- In 2005, the Form 1120S stated net income of \$0.
- In 2006, the Form 1120S stated net income of (\$109,001).

Therefore, for the years 2004, 2005 and 2006, the petitioner's tax returns do not state sufficient net income to pay the difference between wages paid and the full 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.¹² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for years 2004 through 2006, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of (\$6,463).
- In 2005, the Form 1120S stated net current assets of (\$39,690).
- In 2006, the Form 1120S stated net current assets of \$13,153.

Therefore, for the years 2004 and 2005, the petitioner's tax returns do not state sufficient net current assets to pay the difference between the proffered wage and wages paid to the beneficiary. USCIS records indicate that the petitioner has filed a Form I-140 petition for another worker with a priority date of October 1, 2001. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from their respective priority dates until the beneficiaries obtain permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The petitioner's 2006 tax return states sufficient net current assets to pay the difference between wages paid to the present beneficiary and the full

¹¹ Where an [REDACTED] 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 [REDACTED] 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 17e (2004-2005) and line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at [REDACTED] (accessed July 12, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions and/or other adjustments shown on its Schedule K for 2004, the petitioner's net income is found on Schedule K of its 2004 tax return.

¹²According 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.

proffered wage. However, from the record it is unclear that the petitioner could pay the wage of the other sponsored worker in this year if applicable.

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 difference between wages paid to the beneficiary and the full proffered wage in 2004 and 2005 through an examination of wages paid to the beneficiary, or its net income or net current assets. Whether the petitioner can pay both sponsored workers in 2006 is unclear.

On appeal, counsel states that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward, or the ability to pay the difference between wages paid to the beneficiary and the full proffered wage. Counsel states that the director erred in his determination and that the petitioner's corporate bank accounts should have been considered and that depreciation should have been added back into the petitioner's net income or net current assets in determining the ability to pay as depreciation is not a monetary expense. Counsel says that a totality of the circumstances establish the petitioner's ability to pay considering the petitioner's longevity and reputation in the community.

The AAO does not agree with counsel's assertions that the petitioner's corporate bank accounts should be considered in its analysis of whether the petitioner has the ability to pay the proffered wage.¹³ 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(s), 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.

The AAO does not agree with counsel's assertions that depreciation should be added to the petitioner's net current assets or net income in an ability to pay analysis because depreciation does not represent a cash expenditure of the business for the reasons previously set forth in this decision and would not represent amounts available to pay wages. [REDACTED]

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition

¹³ Commercial bank statements were submitted for [REDACTED] showing monthly bank balances for all months in years 2005, 2006 and 2007.

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 [REDACTED]. Her clients included [REDACTED]. The petitioner's clients had been included in the lists of the [REDACTED]. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in [REDACTED]. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 initial petitioner had either \$0 or negative net income in all relevant years. Its net current assets were negative in 2004 and 2005, and only \$13,153 in 2006. Although the initial petitioner had been in business for a number of years, its gross receipts steadily decreased from 2004 through 2006. The initial petitioner states that its negative net income in 2004 was due to start up costs for a new business location. Documentation of those expenses was provided in the form of copies of checks made payable for various expenses.¹⁴ It is noted however, that in following years the initial petitioner's net income was \$0 in 2005 and (\$109,001) in 2006. The record does not establish that the initial petitioner had a sustained history of growth or profitability. The record does not establish that the initial petitioner's reputation in the industry was such that it was more likely than not that it had maintained the continuing ability to pay the proffered wage. The purported successor-in-interest did not submit any tax or financial documentation to show the continuous operation of the business or any substantial growth or increase in the business. While the petitioner provided documentation showing local chamber of commerce awards, online consumer comments¹⁵ and a magazine award for its food and service, these recognitions are not of such stature to overcome the financial picture drawn from the initial petitioner's tax returns. The petitioner sponsored a second worker and must establish its continuing ability to pay all of its sponsored workers. It is further noted that the record contains no financial documentation showing the present purported successor's petitioner's ability to pay the proffered wage. Thus, assessing the totality of the

¹⁴ The check copies provided are copies of the face of the check only. A copy of the back of the checks was not provided which could establish that the checks had been cashed by the payee of the check.

¹⁵ Some of the online comments were not favorable and would not establish a favorable reputation.

[REDACTED]

[REDACTED]

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, and as stated above, the entity listed on Form I-290B failed to establish that it is the successor-in-interest to the entity listed on the labor certification.

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 rejected.