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



U.S. Citizenship
and Immigration
Services

DATE: DEC 18 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a computer integrator. It seeks to employ the beneficiary permanently in the United States as a network administrator. 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; that the entity which is now the appellant is the successor-in-interest to the I-140 petitioner; and that the beneficiary possessed the minimum educational qualifications as stipulated on Form ETA 750 as of the priority date. 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 April 17, 2009 denial, the first 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 and this correlating to whether the petitioner has demonstrated that the appellant is the successor-in-interest to the I-140 petitioner.

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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$38,500 per year. The Form ETA 750 states that the position requires an Associate's Degree in a quantitative discipline as well as one year of experience in the job offered: network administrator.

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 submits a brief; a copy of a postal money order; a copy of a postal receipt; an educational evaluation dated June 8, 2009 from [REDACTED] a copy of an Associate's Degree certificate from [REDACTED] a copy of a Certificate of Distinction from [REDACTED]; a copy of a Certificate of Membership from [REDACTED] a copy of an Award for Excellence from [REDACTED] a copy of a document, entitled Friends University Worksheet; a copy of an Intermediate Higher Secondary Certificate Examination and a copy of a Secondary School Certificate Examination from the [REDACTED] Dhaka, Bangladesh; a copy of an academic transcript from [REDACTED]; a copy of an academic transcript from the [REDACTED] a letter dated October 20, 2002 from [REDACTED] of [REDACTED] a copy of a Microsoft Professional Certificate; a copy of a letter dated November 5, 2008 from the California Secretary of State acknowledging the dissolution of [REDACTED] as of October 20, 2008; copies of the appellant's U.S. Corporation Income Tax Return (Form 1120) for 2006 and two U.S. Income Tax Returns for an S Corporation (Form 1120S) for 2007; and copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for fiscal years 2000, 2002, 2003, 2004 and 2005.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation.² On the petition, the petitioner claimed to have been established in 1983, to have a gross annual income of \$2,044,370, and currently to employ nine workers. According to the tax returns in the record, the petitioner's fiscal year is July 1 until June 30.³ On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

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).

² The petitioner, [REDACTED] is structured as a C Corporation. The appellant, [REDACTED] was structured as a C Corporation in 2006 but then restructured as an S Corporation in 2007.

³ The appellant's fiscal year is based on a calendar year.

On appeal, counsel asserts that the evaluation submitted on appeal demonstrates that the beneficiary has the equivalent of an Associate's degree by virtue of his having completed 70 credits of tertiary education; that the fact that the appellant has virtually the same address as the petitioner, that the petitioner dissolved and that the appellant is active with the same registered agent, and that the corporate names are nearly the same all go to demonstrating that the appellant is the successor-in-interest to the I-140 petitioner; and that the petitioner has the ability to pay the beneficiary even though the record of proceeding does not contain a copy of the petitioner's 2001 federal income tax return. Counsel asserts that the petitioner's prior attorney submitted the petitioner's 2001 corporate income tax return even though United States Citizenship and Immigration Services (USCIS) has no record of having received it and the original cannot be obtained as it was sent to the petitioner's prior attorney.

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, 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 Sonegawa*, 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. In the instant case, neither the petitioner nor the appellant claims to have ever employed the beneficiary and provided no evidence of having ever paid the beneficiary. Further, on Form ETA 750B, the beneficiary does not claim to have ever worked for the petitioner. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *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).

Form I-140 was filed by [REDACTED] using the Federal Employment Identification Number (FEIN) [REDACTED]. With its initial petition submission, as evidence of its ability to pay the petitioner submitted copies of its U.S. Corporation Income Tax Returns (Form 1120) for fiscal years (FY) 2000, 2002, 2003, 2004 and 2005. All five documents bear the name [REDACTED], use the FEIN [REDACTED] and the address [REDACTED] the same information which is attributed to the petitioner in Part 1 of Form I-140. On December 19, 2008, the director issued a request for evidence (RFE), asking the petitioner to submit evidence of any wages paid to the beneficiary, in the form of IRS Form W-2, from the priority date onwards for

any of the years in which the petitioner employed the beneficiary. The director indicated that if the petitioner had either not employed the beneficiary or had paid the beneficiary less than the proffered wage in any year, then it should submit its federal income tax returns for the applicable years from 2001, 2005, 2006 and 2007.

The director received a response to his RFE on January 30, 2009 through counsel.⁴ In his response, counsel stated:

Note that in 2005 the company reorganized and transferred all of its assets, liabilities, inventory, good will, employees and operations from [redacted] to [redacted]. As such [redacted] of Pasadena is the legal successor in interest and this is not an immigration significant event. In fact [redacted] was and is the sole owner of both [redacted] and [redacted] was [sic]...

In 2008 the inactive [redacted] was formally dissolved. Other than the reorganization and reincorporation it is the same business.

With the response, counsel submitted a copy of the U.S. Corporation Income Tax Return (Form 1120) for [redacted] for 2006 and copies of two U.S. Income Tax Returns for an S Corporation (Form 1120S) for [redacted] for 2007. The two federal income tax returns for 2007 bear differing figures for net income as well as numerous other categories. Counsel supplied no explanation for the submission of two different tax returns for the same year and neither bears any indication that it is an amended return. Nevertheless, the tax returns submitted in response to the director's RFE were all filed by [redacted] using the FEIN [redacted] and the business address [redacted].

In addition to the 2006 and 2007 federal income tax returns, counsel submitted a letter dated November 5, 2008 from the California Secretary of State addressed to [redacted] at [redacted]. The letter affirms the receipt by the California Secretary of State of a Certificate of Dissolution [redacted]. The letter goes on to state that "documents will be processed in chronological order, by date of receipt" and that "notification of action by [the Secretary of State] will be sent after review." No evidence of disposition was ever supplied. Further, counsel supplied no documentary evidence describing the nature of the claimed transfer of ownership from [redacted] to [redacted] or any other evidence substantiating the claimed successorship. The director denied the I-140 petition, finding that the petitioner had not demonstrated that a bona fide successorship had taken place.

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

⁴ During the initial filing of Form I-140 and the response to the director's RFE, the petitioner had been represented by [redacted]. On appeal, the appellant is represented by [redacted].

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 Service Center Director discussed *Matter of Dial Auto* with respect to [REDACTED]'s claim to have assumed "all" of the original employer's rights, duties, obligations, and assets. Those, in fact, were the terms used by counsel to explain the claimed transfer of ownership. However, the director noted that the petitioner provided no documentary evidence demonstrating that [REDACTED] is the successor-in-interest to [REDACTED] or that it had assumed all of the rights, assets and obligations of [REDACTED]. The Commissioner's decision 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, a situation which corresponds to the facts of the instant case. 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.⁵ *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁶

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

⁵ 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).

⁶ 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.

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.⁷ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as 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 not established a valid successor relationship for immigration purposes. First, the petitioner has not described and documented the transaction transferring ownership of any part of [REDACTED] to [REDACTED]. In response to the director's RFE, counsel for the petitioner made the claim that [REDACTED] "reorganized and transferred all of its assets, liabilities, inventory, good will, employees and operations from [REDACTED] to [REDACTED] and that [REDACTED] is the legal successor in interest" of [REDACTED]. However, counsel for the petitioner provided no documentary evidence describing or demonstrating a transfer of ownership of any aspect of [REDACTED] business to [REDACTED]. Counsel provided no sales agreement, no contracts, no merger and acquisition statement, or any

⁷ 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).

other forms of 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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

The petitioner supplied a letter dated November 5, 2008 from the California Secretary of State Business Programs Division indicating that it received a Certificate of Dissolution for [REDACTED] on October 20, 2008. However, this document says nothing regarding a transfer of business ownership, only that a business filed for dissolution.

Second, the petitioner has not established eligibility for the immigrant visa in all respects. Specifically, the petitioner has not established that [REDACTED] had the ability to pay the beneficiary the proffered wage as of the priority date and until the date of the supposed transfer of ownership to [REDACTED]. In addition, the petitioner has not established [REDACTED] ability to pay the proffered wage in accordance from the date of the supposed transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

For a C corporation ([REDACTED]), 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 January 30, 2009 with the receipt by the director of submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return would not yet have been due. Therefore, the petitioner's income tax return for 2007 would have been the most recent return available. However, the most recent return supplied by the petitioner was its federal income tax return for FY 2005 which indicates that it is a final return. The petitioner's tax returns demonstrate its net income for FY 2000, 2002, 2003, 2004 and 2005, as shown in the table below.

- In FY 2000, the Form 1120 stated net income of \$10,005.00.
- For FY 2001, the petitioner provided no regulatory prescribed evidence of its net income.⁸

⁸ On appeal, counsel for the petitioner asserts that former counsel was supposed to have submitted the petitioner's FY 2001 federal income tax returns and maintains that he did so. However, the record of proceeding contains former counsel's response to the director's RFE and the response does not include the FY 2001 federal income tax return. Further, in the letter which accompanies former counsel's response, he makes reference to the petitioner's income (\$10,005) and net assets (\$246,164) for 2001. However, at least the figure for the net income corresponds to the information contained in the petitioner's FY 2000 federal income tax return which was submitted with the initial

- In FY 2002, the Form 1120 stated net income of \$1,489.00.
- In FY 2003, the Form 1120 stated net income of \$932.00.
- In FY 2004, the Form 1120 stated net income of \$11,026.00.
- In FY 2005, the Form 1120 stated a net loss of \$12,234.00.

The evidence in the record of proceeding shows that [REDACTED] was structured as a C Corporation in 2006 but was structured as an S corporation in 2007 and had a fiscal year based upon a calendar year. [REDACTED] tax return for 2006 demonstrates its net income as shown in the table below.

- In 2006, the Form 1120 stated net income of \$307.00.

For 2007, counsel for the petitioner submitted two U.S. Income Tax Returns for an S Corporation, one which purports to have been prepared on April 7, 2008 and the other which purports to have been prepared on April 10, 2008. Each form bears a different net income and contains differing figures for items such as the cost of goods sold, gross profit, total income, purchases and inventory. Additionally, the balance sheets contain differing figures for current assets and current liabilities. Counsel provided no explanation for the two different returns for the same year (2007) and has not claimed that one return represents an amended return.

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

Without independent, objective evidence demonstrating the accurate income for 2007, the appellant has not demonstrated any net income for that year.

Therefore, the petitioner has not demonstrated that it has sufficient net income to pay the beneficiary the proffered wage for FY 2000, 2002, 2003, 2004 or 2005. Further, in failing to provide any regulatory prescribed evidence of its net income for FY 2001, the petitioner has not demonstrated sufficient net income to pay the beneficiary the proffered wage for that year. The appellant [REDACTED] has not demonstrated sufficient net income to pay the beneficiary the proffered wage for either 2006 or 2007.

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.⁹ A corporation's year-end

petition submission. With his response, former counsel submitted only federal income tax returns for 2006 and 2007.

⁹According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 FY 2000, 2002, 2003, 2004 and 2005, as shown in the table below.

- In FY 2000, the Form 1120, Schedule L stated net current assets of \$250,202.00.
- For FY 2001, the petitioner provided no regulatory prescribed evidence of its net current assets.¹⁰
- In FY 2002, the Form 1120, Schedule L stated net current assets of \$252,280.00.
- In FY 2003, the Form 1120, Schedule L stated net current assets of \$279,295.00.
- In FY 2004, the Form 1120, Schedule L stated net current assets of \$274,705.00.
- In FY 2005, the Form 1120, Schedule L stated net current assets of \$0

The appellant's tax returns demonstrate its end-of-year net current assets for 2006, as shown in the table below.

- In 2006, the Form 1120, Schedule L stated net current assets of \$63,148.00

Again, for 2007, the appellant submitted two separate tax returns with no explanation and no indication regarding which one is accurate. Therefore, the appellant has not demonstrated its net current assets for 2007.

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.

¹⁰ The beginning-of-year net current assets for 2002 were \$246,151. This figure should correspond with the end-of-year net current assets for 2001. However, that the petitioner did not submit the federal income tax return for FY 2001, even after having been requested to do so, casts doubt upon the veracity of the evidence and cannot be excused.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner did not provide copies of its tax return for FY 2001. The tax return would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, for FY 2001 and 2005, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage. However, the petitioner demonstrated sufficient net current assets to pay the beneficiary the proffered wage in FY 2000, 2002, 2003 and 2004. For 2007, the appellant did not demonstrate sufficient net current assets to pay the proffered wage. However, for 2006 the appellant demonstrated sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL until the purposed transfer of ownership, 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, with the exception of FY 2000, 2002, 2003 and 2004. The appellant has not established that it had the continuing ability to pay the beneficiary the proffered wage from the date of the purported transfer of ownership onwards through an examination of wages paid to the beneficiary, or its net income or net current assets, with the exception of 2006.

On appeal, counsel asserts that the fact that the appellant has virtually the same address as the petitioner; that the petitioner dissolved; that the appellant is active with the same registered agent; and that the corporate names are nearly the same all go to demonstrating that the appellant is the successor-in-interest to the I-140 petitioner.

However, 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. The first condition is that the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. 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.

Notwithstanding counsel's assertions, the petitioner provided no documentary evidence demonstrating a transfer of ownership from [REDACTED] to [REDACTED]. The petitioner has not demonstrated that [REDACTED] assumed any portion of [REDACTED].

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)).

The petitioner has not demonstrated, therefore, that [REDACTED] is the successor-in-interest to [REDACTED].

On appeal, counsel asserts that the petitioner's prior counsel "maintains that his office did, in fact, forward the 2001 income tax return initially and again when requested subsequently." Counsel further states that the petitioner sent the original FY 2001 tax return to its former counsel and that formal counsel mailed both the original return and a file copy to USCIS. However, the record of

proceeding contains no federal income tax return for FY 2001, a situation which is difficult to explain if the petitioner's prior counsel indeed submitted two separate copies with two separate packages. The record of proceeding contains the initial petition submission and counsel's response to the director's RFE. Further, all other documents which were purported to be contained in the initial petition submission and in counsel's response to the director's RFE are present in the record of proceeding. Therefore, it is more likely that the petitioner's prior counsel is mistaken than that two separate copies of the same document would have gone missing when all of the other documents purportedly submitted made their way into the record.

On appeal, counsel asserts that the amount for the proffered wage for 2001 could be extrapolated from the \$279,295 in net current assets for FY 2003 or the \$252,280 for FY 2002. While the AAO might be willing to consider such a prospect if FY 2001 were the only year in which a shortfall were realized, that is not the case. FY 2005 and calendar year 2007 remain problematic.

On appeal, counsel asserts that \$0 in net current assets for FY 2005 is not accurate because "that return should have been filed by [REDACTED]". Counsel further asserts that "the Applicant is in the process of retrieving that return, so that it can be submitted."

However, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

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 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, considering all of the tax returns submitted as evidence, the gross sales, officer compensation and payroll reflected from 2001 through the 2007 all remained consistent. The petitioner has not demonstrated the historical growth of the business enterprise, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether 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.

As set forth in the director's April 17, 2009 denial, the second issue in this case is whether or not the beneficiary has the educational qualifications which are set forth on Form ETA 750 and is therefore qualified for the proffered position as of the priority date.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Six (6) years

High School: Six (6) years

College: Two (2) years

College Degree Required: Associate's Degree

Major Field of Study: Quantitative Discipline: Computer Science, Computer Applications, MIS, Engineering (Computer, Communications, Electrical, Electronic, Civil), Mathematics, Statistics, Physics, Business or other quantitative discipline.

TRAINING: None Required.

EXPERIENCE: One (1) year in the job offered

OTHER SPECIAL REQUIREMENTS: None.

The labor certification states that the beneficiary qualifies for the offered position based upon having earned a Bachelor's degree in Computer Science at the [REDACTED] with the degree having been conferred in March 1985. Additionally, the labor certification states that the beneficiary attended the [REDACTED] from January 1990 until September 1992, earning credit towards a degree in Computer Science; [REDACTED] in [REDACTED] from February 1993 until February 1994, earning credit towards a degree in Computer Science; and the [REDACTED] in [REDACTED] Kansas from December 1995 until September 1997, earning credit towards a degree in Computer Science.

In support of the beneficiary's academic qualifications, the petitioner initially submitted a partial transcript from the [REDACTED] indicating that the beneficiary completed eight (8) units or credits during the Spring 1989 semester. The beneficiary took one course in English as a Second Language (ESL) and one course in algebra (review). The petitioner also submitted a partial transcript from the [REDACTED] indicating that the beneficiary completed 20 semester credit hours between the Fall of 1990 and the Fall of 1992. The beneficiary took courses in computers, CIS, Electronics, Physical education, physics and political science. The petitioner also submitted a partial transcript from the [REDACTED] indicating that the beneficiary completed eight (8) semester hours during the Fall quarter of 1993. The beneficiary took one course in Digital Engineering and one course in General Physics. The petitioner also submitted a partial transcript from [REDACTED] City, Kansas, indicating that the beneficiary completed a total of six (6) semester credit hours between the Fall of 1994 and Summer of 1995.¹¹ The beneficiary took two courses in English composition. The petitioner also submitted a Secondary School Certificate Examination dated 1983 and an Intermediate (Higher Secondary Certificate) Examination dated 1985 from the Board of Intermediate and Secondary Education Dhaka, Bangladesh. However, both documents bear the

¹¹ Neither the [REDACTED] nor [REDACTED] was identified in Section 11 of Form ETA 750B.

name of [REDACTED] which is not the beneficiary's name. The record of proceeding contains the beneficiary's Application to Register Permanent Residence or Adjust Status, Form I-485 with the associated supporting documentation (e.g. Form G-325A, Biographic Information Form), the beneficiary's passport, and the beneficiary's birth certificate. None of these documents contain the name [REDACTED]. Further, Form G-325A permits the applicant / beneficiary to identify any other names used and this field contains the word "none." Therefore, the evidence would indicate that neither certificate from the Board of Intermediate and Secondary Education in Dhaka, Bangladesh belong to the beneficiary of the instant petition. Further, the record does not contain a Bachelor's degree awarded to the beneficiary by the [REDACTED] as claimed on Form ETA 750B, in Section 11, or from any other institution. Moreover, the record does not contain an Associate's degree awarded by any institution.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience and any other requirements of the individual labor certification...

Section 14 of Form ETA 750 specifically requires the prospective employee to have an Associate's Degree in a Quantitative Discipline identified above. Form ETA 750 makes no allowance for any alternate combinations of education and experience to equate to an Associate's degree or aggregation of tertiary credits to equate to an Associate's degree. The beneficiary claims on Form ETA 750B to qualify for the proffered position based upon having earned a Bachelor's degree in Computer Science from [REDACTED]. Additionally, the beneficiary claims to have completed additional study in the field of Computer Science in the United States at various colleges. However, the petitioner provided no documentary evidence demonstrating that the beneficiary earned a Bachelor's Degree or an Associate's Degree at any college or university either in Bangladesh or in the United States. Rather, the only educational evidence pertaining to the beneficiary of the instant petitioner which was submitted with the initial petition submission consists of four partial academic transcripts which appear to indicate that the beneficiary completed a total of 42 semester hours from four different colleges between 1989 and 1995.

In his RFE, the director requested that the petitioner submit "evidence that the beneficiary obtained the required Associates degree in the field indicated by the Labor Certification before the priority date of April 24, 2001." The director indicated that "evidence of education must be in the form of an official record showing the dates of attendance, area of concentration of study, and date of degree award." The director further explained that an educational evaluation by a credential evaluation service *may* be submitted in support of other evidence" (emphasis added). In his response, counsel for the petitioner provided none of the requested evidence but merely summarized, in his letter, the list of courses which the beneficiary was supposed to have completed and the number of credit hours associated with each course. In his summary, counsel includes 16 semester credit hours which the beneficiary supposedly earned at the [REDACTED]. However, counsel provided no transcript from the [REDACTED] either in the initial petition submission or in

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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Now, for the first time, on appeal, the petitioner submits a copy of an Associate in Computer Engineering degree Certificate supposedly granted to the beneficiary by [REDACTED] on December 10, 2000. The copy of the degree certificate is accompanied by all of the partial transcripts previously referenced and these are consolidated into one transcript bearing the name of the Friends University.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Further, even if the AAO were to consider the copy of the Associate's degree which was submitted for the first time on appeal, such a certificate would not satisfy the educational requirements which are stipulated on Form ETA 750. At no time did the beneficiary claim to have attended [REDACTED]. There is no claim made on Form ETA 750B that the beneficiary ever attended [REDACTED] and no evidence was previously submitted which would even suggest that the beneficiary attended this institution. The first time the institution was mentioned was on appeal. Further, according to its own web site, [REDACTED] grants degree certificates based upon life experience.¹² Moreover, [REDACTED] is not accredited by any accreditation agency recognized by the United States Department of Education. According to the [REDACTED] web site, they state:

In an effort to keep program cost down and the current motivational based format, BU has not sought nor been approved by the US DOE, CHEA or DETC organizations

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[REDACTED] (accessed September 17, 2012)

and does not represent itself to be an accredited program of any of these organizations. BU incorporates an internal review or self-auditing approach to assure consistent standards that include but are not limited to...¹³

The labor certification requires the completion of two years of college and the attainment of an actual Associate's Degree in a quantitative discipline. The only rational manner by which the AAO would read or interpret such requirements is by analyzing the plain language of the labor certification. A degree, whether an Associate's or a Bachelor's is a specific higher educational qualification which consists of specific general education requirements and a separate set of requirements pertaining directly to the major field of study. The petitioner must have discerned some value in the obtaining of an actual degree because it stipulated the requirement of a specific degree on the labor certification and made no allowances for equivalence either through a combination of education and work experience or through amalgamating various college-level courses.

The petitioner has provided evidence demonstrating that the beneficiary completed various individual college-level courses at between two and four junior colleges. However, the petitioner has not demonstrated that the beneficiary was involved in a specific degree program or that he was awarded an actual degree.

On appeal, the petitioner provides an evaluation of the beneficiary's educational credentials and asserts that this information demonstrates that the beneficiary has the equivalent of an Associate's Degree in Computer Science as a result of having completed "over 70 credits of post secondary education for over a period of two years."

USCIS uses an evaluation by a credentials evaluation organization of a person's *foreign* education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

While the petitioner claims to have earned a foreign Bachelor's degree from [REDACTED] in Bangladesh, it provided no evidence of such degree. The remainder of the beneficiary's claimed education was pursued in the United States. The evaluator, like the petitioner, simply added the total number of semester credit hours completed to arrive at a total which he claims is equivalent to an Associate's Degree. However, even the total of claimed credits which appear in the evaluation conflicts with the totals which appear in the various transcripts provided as evidence.

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

Further, in order to obtain a degree by an accredited institution of higher learning, one cannot simply assume that all courses which have ever been completed will transfer into a given college's degree program. Colleges may accept some transfer credit but colleges evaluate the nature of the courses taken and the grade received in order to determine whether to accept the transferred courses or not. The petitioner assumes that any of the institutions identified will accept all of the coursework which the beneficiary has completed without providing any evidence that such is the case.

The petitioner provided no evidence demonstrating that the beneficiary was awarded an Associate's Degree or any other type of degree. Further, though the petitioner claims that the beneficiary completed 25 semester credit hours from [REDACTED] in Kansas, it did not provide an academic transcript from this institution either with the initial petition submission or with its response to the director's RFE. On appeal, for the first time, the petitioner submits a copy of a document entitled "[REDACTED] Worksheet." This document which contains credit hours earned at other colleges only indicates that the beneficiary completed 56.36 semester hours as of the summer of 1997 and does not indicate that the beneficiary was granted a degree.

Thus, based upon the evidence provided, the petitioner has not demonstrated that the beneficiary earned an Associate's Degree in a quantitative discipline or any other field and has, therefore, not demonstrated that the beneficiary satisfies the educational requirements which are set forth on Form ETA 750.

Further, though the director did not specifically address the experiential requirement which is set forth on the labor certification, this requirement has not been satisfied. The labor certification also states that the beneficiary qualifies for the offered position based on experience in sales with [REDACTED] in Los Angeles from November 2000 until the date upon which the labor certification was signed (April 23, 2001). The labor certification also indicates that the beneficiary worked as a network administrator for [REDACTED] in Los Angeles, California from December 1997 until December 1999. The labor certification also indicates that the beneficiary worked in sales for [REDACTED] in Wichita, Kansas from May 1994 until September 1997; as a mail room supervisor for [REDACTED] from March 1992 until April 1994; as an assistant manager for [REDACTED] from June 1989 until March 1992; and as a cashier at [REDACTED] (gas station) from March 1988 until May 1989. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter dated October 20, 2002 from [REDACTED] Manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a “full time employee and a Network Administrator” from November 2000 until October 2002. The letter identifies duties which the beneficiary was purportedly responsible for performing, to include:

Create backup and recovery schemes, ensure integrity and access security, assist developers in troubleshooting problems encountered with the Microsoft and Novel System, tune systems to improve performance with respect to memory and input/output (I/O), deploy applications on various client workstations, integrate various LAN/WAN utilizing TCP/IP.

However, on Form ETA 750B, in Section 15, the beneficiary described his work with [REDACTED] stating that he worked in sales, engaging in “telephone sales of [REDACTED] long distance products.”

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

The letter provided to substantiate the beneficiary’s claimed experience with [REDACTED] conflicts with the description which the beneficiary provided on the certified labor certification. Further, there is no independent, objective evidence in the record which demonstrates which of the two scenarios is accurate. The petitioner provided no other evidence in support of the beneficiary’s claimed experiential qualifications and, therefore, has not demonstrated that the beneficiary meets the experiential requirements as set forth on Form ETA 750.

The AAO, therefore, affirms the director’s decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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).

Beyond the decision of the director, the petitioner has not demonstrated that it was able to or intended to employ the beneficiary, at the time the petition was filed, and was, therefore, authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien

under...section 203(b)(3) of the Act.” In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3¹⁴ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, Form ETA 750 was filed on April 24, 2001 by [REDACTED] Form I-140 was filed on August 16, 2007 by [REDACTED] using the FEIN [REDACTED]. With the initial petition submission, the petitioner supplied the federal income tax returns for [REDACTED], using FEIN [REDACTED] for FY 2000, 2002, 2003, 2004 and 2005. The evidence indicates that [REDACTED] was the initial employer identified on Form ETA 750 and that it did business as [REDACTED]. The U.S. Corporation Income Tax Return (Form 1120) for [REDACTED] for FY 2005 indicated that it was a final return. In his response to the director’s December 19, 2008, former counsel for the petitioner claimed that [REDACTED] transferred ownership of its assets, liabilities, inventory, good will, employees and operations to [REDACTED] and that this transaction was completed in 2005. According to the web site, maintained by the California Secretary of State Business Entities Division, [REDACTED] was incorporated on August 31, 2004.¹⁵

The record of proceeding contains a letter dated November 5, 2008 from the California Secretary of State Business Programs Division, acknowledging receipt of a Certificate of Dissolution which was filed on October 20, 2008. However, according to former counsel for the petitioner, [REDACTED] was inactive when it was formally dissolved in 2008. Therefore, in this case, even though the petitioner did not demonstrate that [REDACTED] is, in fact, the successor-in-interest to [REDACTED] the evidence indicates that [REDACTED] ceased operating in 2005, two years prior to the filing of the instant petition.

Thus, at the time the instant I-140 petition was filed, on August 16, 2007, it was filed using the name of a corporation which was no longer operational and had, in fact, ceased to do business. Such an entity does not meet the definition of a U.S. employer, as articulated above. Further, the evidence shows that the inactive entity did not intend to employ the beneficiary. The intended employer was [REDACTED] which began operating in 2005. Therefore, [REDACTED] DBA [REDACTED] with FEIN [REDACTED] was not able or eligible to file Form I-140.

¹⁴ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

¹⁵ <http://kepler.sos.ca.gov/cbs.aspx> (accessed September 17, 2012).

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.