

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: DEC 17 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)

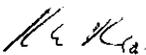
ON BEHALF OF PETITIONER:  


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 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,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a bakery shop. It seeks to employ the beneficiary permanently in the United States as a baker. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The priority date of the petitioner is April 18, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The director determined that the petitioner had not established that the beneficiary was qualified for the proffered position and failed to demonstrate its 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 and 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

As set forth in the director's June 10, 2010 denial, an issue in this case is whether or not the petitioner had established that the beneficiary was qualified for the proffered position.

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 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*

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Immigration and Nationality 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.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

*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 Form ETA 750 states that the offered position requires a minimum of two years of experience in the job offered as a baker. No other experience, education or training is listed. The beneficiary signed the Form ETA 750B 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.

On Form ETA 750B, the beneficiary stated that he was employed by Golden Gate Bakery in India as a baker from February 1997 to April 1999. In support of the beneficiary’s experience, the petitioner provided a March 25, 1999 letter from [REDACTED] owner of Golden Gate Bakery, stating that the beneficiary worked as a chief baker from October 1, 1995 through August 10, 1998.

In a Request for Evidence (RFE), dated January 13, 2010, the director noted the discrepancies in employment dates and job title, and requested documentation of actual employment dates, including pay stubs or foreign tax documentation. In response to the RFE, the petitioner submitted an undated letter from [REDACTED] partner of Golden Gate Bakery, stating that the beneficiary worked

as a chief baker from February 1997 to August 1998, and as a staff baker from October 1995 to February 1997.<sup>3</sup> The director stated no corroborating evidence of this employment, such as paystubs or foreign tax documentation, was submitted, nor was any explanation offered as to why the job title and dates listed by the beneficiary on his Form ETA 750B differ from those reported by his former employer. The director stated that the discrepancies cast significant doubt upon the veracity of the statements contained in both the beneficiary's Form ETA 750B and the letters from Golden Gate Bakery. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Given this, the director determined that the petitioner failed to establish the beneficiary was qualified for the proffered position.

On appeal, the petitioner submitted a photocopy of the beneficiary's appointment letter from Golden Gate Bakery. The letter, dated September 15, 1995, offered the beneficiary a job as a baker starting on October 1, 1995. The letterhead of Golden Gate Bakery used for this September 15, 1995 letter differs significantly from the two other letters previously provided. In total, three letters on three different types of letterhead were provided. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Matter of Ho*, 19 I&N Dec. at 591. The petitioner also submitted the beneficiary's hand-written pay stubs from October 1995 through August 1998 and the beneficiary's hand-written time sheets from October 1995 through April 1998.<sup>4</sup> This documentation was previously requested in the director's RFE.

The purpose of the RFE 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 Obaighena*, 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 AAO 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.

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<sup>3</sup> It is noted that the letterhead of Golden Gate Bakery used for this undated letter differs significantly from the letterhead used for the letter dated March 25, 1999.

<sup>4</sup> It is noted that all of the pay stubs and time sheets are in the same red ink and handwriting over the entire time period.

Another issue in this case is whether or not the petitioner qualifies as a successor-in-interest to the original entity on the labor certification, G.K. Donuts, Inc.

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

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

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

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

In the present matter, the director determined that the petitioner failed to establish a successor-in-interest between 2002 Donuts, Inc. and G.K. Donuts, Inc. A strict interpretation of *Matter of Dial Auto* limits a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true,

and it is determined that an actual successorship exists, the petition could be approved . . . .” *Id.* (emphasis added).

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

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

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>5</sup> *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.<sup>6</sup>

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.

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<sup>5</sup> 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).

<sup>6</sup> 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.

However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>7</sup> *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 failed to establish a valid successor relationship for immigration purposes.

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. The record contains a photocopy of pages 1, 2 and 16 of the sales agreement between G.K. Donuts, Inc. and 2002 Donuts,

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<sup>7</sup> 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).

Inc. The sales agreement states that 2002 Donuts, Inc. assumes the following:

[A]ll of the tangible and intangible assets reasonably used in connection with the operation, management, maintenance, promotion, and/or advertising of the Store or in connection with the preparation of goods at the Store, including, but not limited to fixtures, equipment and the like (all of the assets being purchased hereunder being referred to as the "Purchased Assets").

Page 16 of the agreement shows that it was signed on December 26, 2003. The director determined that the petitioner provided sufficient evidence to describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. However, upon review, the AAO finds the documentation to be incomplete and insufficient. On page 2 of the agreement, the transaction specifically excludes a) all financial/corporate books and records, b) all cash, bank accounts, accounts receivable, checks, notes and other securities of the Seller, c) obsolete inventory and obsolete supplies, and d) all other personal property and assets not related to or used in connection with the Store.

In addition, there is no mention in the agreement regarding the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business. The evidence fails to establish that 2002 Donuts, Inc. acquired the essential rights and obligations of G.K. Donuts, Inc. The evidence also does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. A review of the record confirms that the job opportunity offered by 2002 Donuts, Inc. as a baker 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. As noted by the director, the petitioner has failed to demonstrate the continuing ability to pay the beneficiary the proffered wage beginning on the priority date onwards.

The regulation 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 DOI. See 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 18, 2001. The proffered wage as stated on the Form ETA 750 is \$27,000 per year. The Form ETA 750 states that the position requires two years of experience in the job offered as a baker.

The evidence in the record of proceeding shows that the petitioner and its predecessor are structured as S corporations. On the petition, the petitioner claimed to have been established in 2002 and to currently employ seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary did not claim to have worked for the petitioner or its predecessor.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner provided the beneficiary's Forms W-2 issued by the petitioner for 2005 through 2008, as well as the beneficiary's other Forms W-2 issued by other entities. The record indicates the following wages paid to the beneficiary by the petitioner.

<u>Year</u>	<u>Wages Paid</u>
2005	\$4,158
2006	\$2,772
2007	\$4,400
2008	\$28,600

Here, the petitioner has established that it employed the beneficiary at a salary equal to or greater than the proffered wage only in 2008. While the petitioner employed the beneficiary in 2005

through 2007, it failed to establish that it paid the beneficiary the full proffered wage. No documentary evidence of employment was provided for 2001 through 2004 by the petitioner or the original entity on the labor certification. Given this, the petitioner has not established that it or its predecessor employed and paid the beneficiary the proffered wage from the priority date through 2007.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

The record before the director closed on March 17, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. The petitioner's income tax return for 2007 was the most recent return available. The petitioner provided the original entity's tax returns for 2001 through 2003, and the petitioner's tax returns for 2004 through 2007. The original entity and petitioner's tax returns of record for 2001 through 2007 stated its net income, as detailed in the table below.

In 2001, the original entity's Form 1120S stated net income<sup>8</sup> of \$39,059.

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<sup>8</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006-2011) of Schedule K. *See Instructions for Form*

- In 2002, the original entity's Form 1120S stated net income of \$73,951.
- In 2003, the original entity's Form 1120S stated net income<sup>9</sup> of \$10,060.
- In 2004, the petitioner's Form 1120S stated net income of \$21,172.
- In 2005, the petitioner's Form 1120S stated net income of \$63,068.
- In 2006, the petitioner's Form 1120S stated net income of \$95,230.
- In 2007, the petitioner's Form 1120S stated net income of \$36,287.

Therefore, for the year 2003 the original entity did not have sufficient net income to pay the proffered wage of \$27,000 per year. Further, the petitioner did not have sufficient net income to pay the proffered wage in 2004, and the petitioner failed to provide any evidence of its ability to pay the proffered wage in 2003, the year the sale took place.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>10</sup> 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 original entity's tax returns and the petitioner's tax returns demonstrate its end-of-year net current assets for 2003 and 2004, as shown in the table below.

- In 2003, the original entity's Form 1120S stated net current assets of \$(31,693).
- In 2004, the petitioner's Form 1120S stated net current assets of \$20,759.

For the year 2003, the original entity did not establish that it had sufficient net current assets to pay the proffered wage of \$27,000 per year. Further, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2003 or 2004.

On appeal, counsel asserts that depreciation is a non-cash item and should be added back to the ordinary income for 2003. With respect to depreciation, the court in *River Street Donuts* noted:

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1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 16, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). No Schedule K was provided for the original entity for 2001 and 2002.

<sup>9</sup> Because the petitioner had additional income, credits, deductions, and/or other adjustments shown on its Schedule K for 2004 through 2007, the petitioner's net income is found on Schedule K of those tax returns.

<sup>10</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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). The petitioner’s depreciation is a real expense and shall not be added back to the ordinary income.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that the original entity 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. Further, the petitioner has not established that it had the continuing ability to pay the proffered salary from the date of the sale in 2003. The petitioner has failed to establish that it is eligible for the immigrant visa in all respects. Given this, the petitioner has failed to demonstrate it is a successor-in-interest to the original entity on the labor certification.

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 *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 record reflects that the petitioner has been doing business since 2002. The petitioner's net income was \$95,230, \$36,287 and \$39,691 in 2006, 2007 and 2008, respectively. The petitioner has not established steady growth between 2006 and 2008. The petitioner failed to provide any regulatory-prescribed evidence of its ability to pay the proffered wage in 2003, the year that it succeeded the original employer. The petitioner did not establish the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. 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.

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.