

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

[REDACTED]

DATE: DEC 27 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:

[REDACTED]

INSTRUCTIONS:

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

If you believe the 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 Director, Nebraska Service Center (director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner, "Abundant World Mission Center" describes itself as a church. It seeks to permanently employ¹ the beneficiary in the United States as an administrative assistant. The petitioner requests classification of the beneficiary as skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition on September 2, 2010, concluding that the petitioner had failed to establish that the beneficiary's required employment experience for the offered position.

The petitioner, through counsel appealed the director's decision, asserting that the director had not reviewed the petitioner's response to the Notice of Intent to Deny (NOID) the petition, which had been previously issued on June 2010.

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.²

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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

¹ The regulation at 20 C.F.R. § 656.3 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.

Employment means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

² 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification is an integral part of this petition, but the issuance of an ETA Form 9089 does not mandate the approval of the relating petition. In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate its continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on November 10, 2008. The proffered wage is set forth on the labor certification application as \$17.84 per hour, which amounts to \$37,107.20 per year.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on November 10, 2009. The petitioner claims that it has 1 employee, was established on August 18, 2005, and claims a gross annual income of \$1,272,346.25 and a net annual income of \$101,203.88.

Regulatory guidelines permit a United States employer to file a Form I-140 on behalf of an alien it wishes to employ. As in this case, to be properly filed, it must be accompanied by any required individual labor certification. *See* 8 C.F.R. § 204.5(a). In this case, the underlying ETA Form 9089, Part H set forth the minimum requirements for the position of Administrative Assistant. Part H, Item(s) 4 and 4-B reflect that the proffered position requires only 24 months (two years) of experience in the job offered. Part H, Item 7 indicates that the employer will accept an alternate field of study of theology.³ Part H, Item 8 indicates that the employer will accept an alternative combination of education and experience consisting of 2 years of education in theology or related field. Part H, Item 9 indicates that a foreign educational equivalent is acceptable.

The job duties of the certified position of administrative assistant⁴ are set forth in Part H-11:

³ Part H.4. states the education requirement as "none."

⁴ It is noted that the alien had been sponsored by a previous employer on a Form I-140, filed on December 17, 2002. The petitioner was "LA Open Blessing Church," located in Los Angeles, California. The accompanying labor certification (Form ETA 750) identified the offered position as

Oversee daily affairs of missions; performing general office work. Involved in all aspects of Christian mission work. Providing support to Pastor and other clergy members as well as to the various missions. Responsible for the maintenance of all records.

It is noted that on July 30 2012, the AAO issued a Notice of Intent to Dismiss and Derogatory Information (NOID/NDI) to the petitioner, "Abundant World Mission Center." It informed the petitioner that according to the State of California online corporation records, the petitioner's status was "suspended," and provided a copy of the status report to the petitioner. The AAO informed the petitioner that if it was no longer in business, then no *bona fide* job offer exists, and the petition and appeal were moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. See 8 C.F.R. § 205.1(a)(iii)(D). Moreover, any concealment of the true status of the petitioner seriously compromises the credibility of the remaining evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988). The petitioner was requested to resolve any inconsistencies in the record with independent, objective evidence. *Id.* The petitioner was also requested to demonstrate its continued existence, operation, and good standing. Finally, the AAO requested clarification and specific documentation from the petitioner relevant to its *bona fides*, its ability to pay the proffered wage, and the beneficiary's qualifications.

In response, the petitioner, through counsel, asserts that the petitioner was now known as "Abundant Mission Church." An affidavit, dated August 28, 2012, from [REDACTED] states that the petitioner could not financially manage Abundant World Mission Center alone and therefore it was brought within Abundant Mission Church as its missionary arm. [REDACTED] states, "[as] the successor to the former petitioner, ABUNDANT WORLD MISSION CENTER, with solid financial footing, ABUNDANT MISSION CHURCH will continue to offer the position of 'Administrative Assistant to the beneficiary. . .'"

Successor-in-interest employer

It is now claimed that Abundant Mission Church is a successor-in-interest to the original petitioner, Abundant World Mission Center, which was specified on the Form I-140 and the underlying ETA Form 9089.⁵

For the purpose of filing a labor certification, the regulation at 20 C.F.R. § 656.3 defines an "employer" as a person, association, firm or a corporation that is located in the United States that possesses a valid Federal Employer Identification Number (FEIN). A FEIN is a unique Internal Revenue Service (IRS) identifier of tax-filing entities. In this matter, the Form I-140 petitioner, Abundant World Mission

an "evangelist." The priority date was August 17, 2001 and the job required only 2 years of experience in the job offered as an evangelist, with a caveat that "2 years of post-secondary education in theology or related is acceptable in place of experience."

⁵DOL no longer permits substitutions or modifications of the labor certification. 20 C.F.R. § 656.11.

Center's FEIN is [REDACTED]. The claimed successor-in-interest's FEIN is [REDACTED]. As noted above, current DOL rules provide that substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although this DOL regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted."

Similarly, for a Form I-140 to be properly filed with USCIS, it must reflect that the petitioner is the same employer (or successor-in-interest to the employer) which secured the accompanying labor certification. The exception to this guidance may only be permitted if the Form I-140 petitioner can establish that it is the successor-in-interest to the employer identified on the labor certification.

It is noted that the successor-in-interest Abundant Mission Church has not filed an I-140, but claims this status after the appeal and in response to the AAO's NOID/NDI. For pending Form I-140 petitions accompanied by approved labor certification USCIS reviews issues of successor-in-interest relationships in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*"). *Matter of Dial Auto* is 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.

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. *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 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

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.

predecessor necessary to carry on the business.⁷ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Eligibility for the immigration benefit may be shown if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). 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. Therefore, 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.

In this case, the petitioner has furnished [REDACTED] affidavit, a copy of the state of California's online corporate status report indicating that the claimed successor-in-interest was incorporated on February 18, 1999 and is in active status, financial information relevant to the claimed successor-in-interest, undated, unverified photographs showing a building with a sign showing the name of the successor-in-interest and the original petitioner's name, copies of the state corporate statements for 2002, 2004, 2006, completed by the claimed successor-in-interest, a copy of a December 31, 2005 letter from the Internal Revenue Service (IRS) to the successor-in-interest informing it that it is an exempt organization, a copy of a letter, dated December 12, 2005, stating that the claimed successor-in-interest is exempt from state franchise or income tax but may be subject to other reporting requirements, a copy of a "General Synod Directory" for 2011 that shows a listing of the claimed successor-in-interest and [REDACTED], and a copy of a 2003 resolution indicating gratitude to Korean Christians from the General Synod of the Reformed Church in America. Also submitted is a copy of the articles of incorporation, dated February 18, 1999, of an entity named the "Eastern Korean Church," an amendment, dated March 4, 2002, to the articles of incorporation filed with the state of California by the Eastern Korean Church stating that its name is "Abundant Mission Church," and a copy of a letter, dated October 7, 1999, from the IRS to the Eastern Korean Church informing it that it is an exempt organization.

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).

This evidence submitted in response to the AAO's NOID/NDI does not establish the date or document that any transfer of ownership between the entities such as a contract of sale, mortgage closing, or merger agreement ever occurred. No audited financial statements of both entities for the year in which the transfer occurred or copies of financial instruments used to execute any transfer have been submitted. No evidence has been provided that the successor-in-interest acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before any transfer. Therefore, the evidence in the record is not sufficient to establish that Abundant Mission Church is the successor-in-interest to Abundant Mission Center.

Relevant to the AAO's request for clarification and specific documentation from the petitioner, Abundant World Mission Center, related to its *bona fides*, its ability to pay the proffered wage, and the beneficiary's qualifications, the requests and responses received from the petitioner to the AAO's NOID/NDI are summarized as follows:

1. Evidence consisting of federal tax returns, audited financial statements or annual reports (supported by audited financial statements for the petitioner, "Abundant World Mission Center," FEIN [REDACTED] for the years 2009, 2010, 2011 and continuing until the present.

Response: The petitioner failed to submit and failed to address.

2. Copies of all Form(s) 990 or Form(s) 990Z for 2008, 2009, 2010 and 2011, if the petitioner has filed such reports with the IRS.

Response: The petitioner did not provide.

3. A signed declaration from the accountant that prepared the 2008 audited financial statement of "Abundant World Mission I," as submitted to the record, that it represents Abundant World Mission Center with the FEIN of [REDACTED]

Response: The petitioner did not provide.

4. A list of all officers, directors, and shareholders of the petitioner from inception to the present, together with job titles, and percentage of ownership interest held for each year, if applicable.

Response: The petitioner did not provide. The record of proceeding contains only a copy of the articles of incorporation of the Abundant World Mission Center showing [REDACTED] as the Incorporator and a copy of the annual state coporation statement of information for 2005 showing [REDACTED] to be the CEO, CFO, and Secretary.

5. Copies of all state quarterly wage unemployment/employment reports filed with the state of California for all quarters beginning with the fourth quarter of 2008 and continuing until the present. They must show worker identities and wages paid.

Response: The petitioner did not address and did not provide.

6. A signed declaration from all owners, directors, and officers of Abundant World Mission Center declaring whether they are related to the beneficiary through blood or marriage to any degree and identifying such relationship, if it exists.

Response: The petitioner did not provide.

7. Copies of all W-2s, Form 1099s issued to the beneficiary for all periods of employment by the petitioner. Copies of any of the petitioner's payroll records reflecting any compensation paid to the beneficiary in 2012.

Response: The petitioner did not address.

8. Since the beneficiary's full-time experience at Open Blessing Church in Los Angeles is claimed on the ETA Form 9089 from 1997 to 2004, please submit copies of the beneficiary's W-2s or Form 1099s issued by this entity for this period of time. Copies of the beneficiary's individual Form 1040 for 2008, 2009, 2010, and 2011 with pertinent W-2s are also requested as the evidence must show that a full-time *bona fide* job opportunity is available to be offered and accepted.

Response: The petitioner did not provide.

9. If the petitioner has filed Form I-140s for other beneficiaries, for each beneficiary, please submit name, job title, date of birth, receipt number, proffered wage, priority date, date of hire, evidence of any wages paid, date and date and nature of termination, if applicable.

Response: The petitioner did not address. However, USCIS electronic records indicate that this petitioner has only sponsored the instant beneficiary.

10. Please submit a certified official transcript and diploma of the beneficiary's degree from the University of the Islands. The ETA Form 9089 lists only the beneficiary's possession of a Bachelor's degree from the "University of the Islands," completed in 1999, as the highest level achieved relevant to the requested occupation. If you are claiming this education fulfills the alternative requirement of "2 Years of education in Theology or Related Field," as set forth on the ETA Form 9089, submit evidence that it is or was accredited by any accrediting organization recognized by the U.S. Department of

Education.⁸ It must show that the University of the Islands is or was accredited by a U.S. post-secondary school association of regional or national scope recognized by the U.S. Department of Education to be equipped to accredit institutions offering baccalaureate level classes. Such evidence should indicate whether such accreditation was in place during the time that the beneficiary attended classes.

Response: The petitioner failed to address or provide any verification of accreditation as requested. It is noted that the a sworn statement signed by the beneficiary on July 7, 2010, was submitted by former counsel in response to the director's NOID questioning some of the inconsistencies with dates of the beneficiary's employment and observing the that the beneficiary claimed to be a student at the Fundamental Presbyterian General Assembly Theological Seminary in Seoul, South Korea according to a previously filed labor certification. The beneficiary responded to this in his affidavit by stating that he was an evening student at this school between March 1992 and August 1994, but never completed his studies. He then states that he attempted to contact the school to get prior transcripts and records, but the school is closed. There is no mention of the "University of the Islands," which is the claimed on the ETA Form 9089.

11. No other education was listed on the ETA Form 9089. In such a case, if you are claiming foreign education, not listed on the ETA 9089, as a fulfillment of the alternative requirement, proof of this education, including any diploma and grade transcript showing two full years of attendance must be submitted directly from that institution, under unbroken seal, directly to the AAO at the address listed on page 1 of this notice and addressed to the attention of Branch 6. Any foreign document must be accompanied by a certified English translation that complies with 8 C.F.R. § 103.2(b)(3).⁹

Response: The petitioner did not provide. (See question 10 above).

As noted above, 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).

⁸The U.S. Department of Education recognizes certain accrediting bodies for the accreditation of institutions of higher (postsecondary) education. In order to ensure a basic level of quality, private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluation of institutions or programs to determine whether they are operating at basic levels of quality.

⁹That regulation provides:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Qualifications of Beneficiary

The director denied the petition based on the petitioner's failure to demonstrate that the beneficiary had 2 years of employment experience in the job offered as administrative assistant or alternatively, 2 years of education in theology or related field. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

At the outset and as stated above in the AAO's NOID/NDI, the ETA Form 9089 lists only the beneficiary's possession of a Bachelor's degree from the "University of the Islands," (Honolulu, Hawaii) completed in 1999, as the highest level achieved relevant to the requested occupation. If the petitioner was claiming that this education fulfills the alternative requirement of "2 Years of education in Theology or Related Field," as set forth on the ETA Form 9089, the petitioner was instructed to submit evidence that the University of the Islands is accredited by any accrediting organization recognized by the U.S. Department of Education.¹⁰ It must show that the University of the Islands is or was accredited by a U.S. post-secondary school association of regional or national scope recognized by the U.S. Department of Education to be equipped to accredit institutions offering baccalaureate level classes. Such evidence should indicate whether such accreditation was in place during the time that the beneficiary attended classes. The petitioner failed to address this question and failed to submit certified copies of the beneficiary diploma and transcripts by separate seal from the school as requested in the NOID/NDI.

The only qualifying past experience listed on the ETA Form 9089 is stated as having occurred as a "church worker" for the "L.A. Open Blessing Church AKA Hallelujah Presbyterian Church" in Los Angeles at 40 hours per week from December 18, 1997 to December 2, 2004. In view of the past discrepancies observed by the director involving the dates and period of time claimed by the beneficiary to have been employed by this employer, the AAO requested in its NOID/NDI issued on July 30, 2012 that the petitioner submit copies of the beneficiary's W-2s or Form 1099s issued by this entity for the period of time employed. The petitioner did not address this or provide the requested documentation in response to the AAO's NOID/NDI. 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).¹¹

¹⁰The U.S. Department of Education recognizes certain accrediting bodies for the accreditation of institutions of higher (postsecondary) education. In order to ensure a basic level of quality, private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluation of institutions or programs to determine whether they are operating at basic levels of quality.

¹¹It is also noted that the description of job titles and duties that the beneficiary performed for the L.A. Open Blessing Church have been clearly changed in different applications. In a Form ETA

It is further noted that the record contains a copy of an employment verification letter from "The Presbyterian Church of Korea Sukbyung 'Chruch'" in Korea, claiming that the beneficiary worked there from January 1, 1992 to December 31, 1994. It claimed he worked as an administrative assistant but failed to describe his duties. Further, this employment was omitted from the ETA Form 9089, signed under penalty of perjury by the petitioner and the beneficiary and will not be considered as probative of the beneficiary's qualifying experience.¹²

It is also claimed in an employment verification letter dated May 11, 2000, signed by [REDACTED] Ahn of the L.A. Open Blessing Church that the beneficiary worked for that entity from December 1996 to the present (date of signing) as a "pastoral assistant," having volunteered previously as a Sunday School Instructor from September 1995 to December 1996.

Finally, it is noted that a copy of a diploma showing that the beneficiary received a B.A. degree in Biblical Counseling Studies from the University of the Islands was submitted to support the previous Form I-140 filed by L.A. Open Blessing Church to sponsor the beneficiary as an evangelist. The diploma is stated to be conferred in recognition of "attained evaluated cumulative scholastic credits & on-site full campus education training." The accompanying transcript reflects that the beneficiary took courses in 1997, 1998 and 1999. It is unclear from the record how the beneficiary would gain on-site baccalaureate credit in those years in Hawaii if he was employed from December 1997 to December 2004 in Los Angeles. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As the record currently stands, the petitioner has not established that the beneficiary gained two full-time years in the job offered or possessed the alternative two years of education in theology or a related field.

Ability to Pay the Proffered Wage

Beyond the decision of the director, and as noted above, a claimed successor must establish eligibility for the immigrant visa in all respects and must support its claim with all necessary

750, the L.A. Open Blessing Church sponsored the beneficiary as an "evangelist." It required two years of experience. The beneficiary signed the Form ETA 750 under penalty of perjury on August 15, 2001 claiming that he had worked full-time (40 hours per week) as an evangelist assisting in worship services, delivering sermons and prayer, leading bible groups, providing counseling, assisting in blessings and participating in meetings with pastors and other evangelists to coordinate activities of the church. His G-325A, Biographic Information submitted in connection with his permanent residency application also describes his position as an evangelist. On the current ETA Form 9089, his duties are described generally as above, except it omits that he delivered sermons and prayers.

¹² *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

evidence, including evidence of ability to pay. The claimed 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. As set forth below, the AAO finds that even if the claimed successor were considered as a successor-in-interest to Abundant World Mission Center, which it is not, it has failed to demonstrate the continuing financial ability to pay the proffered wage of \$37,107.20 from the priority date of November 10, 2008, onward. This includes the obligation to establish the predecessor's ability to pay the proffered wage as well as the claimed successor's ability from the date of transfer onward.

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.

As noted above, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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). As noted above, the priority date is November 10, 2008 with a wage of \$17.84 per hour (\$37,107.20 annually).

It is noted that on the ETA Form 9089, signed by the instant beneficiary on November 6, 2009, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 overall 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 has not established that it paid the beneficiary the full proffered wage, or any wages, during any relevant timeframe.

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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹³ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In cases where corporate income tax returns are provided, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.¹⁴

With respect to the petitioner's ability to pay the proffered wage of \$37,107.20, the record contains copies of financial statements for 2006 and 2007.¹⁵ They appear to be unaudited as the accompanying "Independent Auditor's Report" from Lee & Lee Accountancy Corporation only mentions a financial statement for 2008.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

¹³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹⁴ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

¹⁵ Both of these statements would be for a time period before the priority date.

With respect to the audited financial statement for 2008, the accompanying accountant's transmittal letter refers to the audited financial statement as initially being that of Abundant World Mission Center then later refers to it as belonging to "99 Abundant World Mission Center. Finally, and as noted on the AAO's NOID/NDI, the statement was identified for an entity "Abundant World Mission I" as noted on the statements themselves. As set forth above in question #3 of the NOID/NDI, the petitioner did not address this discrepancy. As it is unclear if this statement actually reflects the petitioner's financial profile in 2008, it cannot be considered to be probative of the petitioner's ability to pay the proffered wage during this period.

The petitioner subsequently provided copies of "reviewed" financial statements for 2009. Again, the accountant's transmittal letter refers to the statements not as belonging to the petitioner, Abundant World Mission Center, but to "Abundant World Mission Center II." It is not clear that these statements actually show the petitioner's ability to pay the proffered wage, rather than another entity's financial information. Further, the accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

As set forth above, the petitioner failed to establish its continuing ability to pay the proffered wage for any of the relevant years, from the priority date onward. Additionally, the petitioner failed to address or provide the requested evidence relevant to its continuing ability to pay the proffered wage as set forth above in the AAO's NOID/NDI. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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).

Even if the claimed successor-in-interest, Abundant Mission Church, had established its successor status, which it has not, it failed to submit any of its own audited financial statements, federal tax returns or annual reports (supported by audited financial statements) as evidence of its ability to pay the proffered wage from the date of transfer onward. In the petitioner's response to the AAO's NOID/NDI, it submitted a copy of an "Annual Report for 2011/2012 Forecast." Copies of unaudited financial statements identified as "annual confirmed income report for 2011" and "annual expense report for 2011" appear to be internally prepared documents and are not probative of an entity's ability to pay the proffered wage from the priority date onward. As indicated above, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As

there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In some cases, 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 such 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, or the petitioner's reputation within its industry.

In the instant case, as the petitioner failed to resolve the discrepancies of the financial statements that were submitted to the record and failed to provide additional documentation of its continuing ability to pay the proffered wage as requested by the NOID/NDI, there is no probative evidence to establish its ability to pay. Further, as noted above, the claimed successor, Abundant Mission Church, has failed to demonstrate that it is a successor-in-interest or that the predecessor entity had the ability to pay the proffered wage beginning at the priority date.

The claimed successor has failed to establish that it is a successor-in-interest to the original petitioner. The petitioner has failed to demonstrate that the beneficiary possessed the required qualifying employment experience or education and the petitioner has failed to establish that it has had the continuing financial ability to pay the proffered wage from the priority date onward.

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).

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.