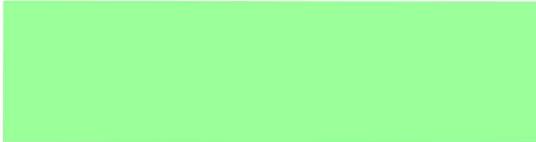




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **JUL 26 2012** OFFICE: CALIFORNIA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

If you believe the 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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Mexican food restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 and that the evidence did not demonstrate that the beneficiary met the minimum required experience as stated on the labor certification. 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 September 25, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

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Here, the Form ETA 750 was accepted on April 11, 2001. The proffered wage as stated on the Form ETA 750 is \$9.67 per hour (\$20,113.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petition was filed without copies of tax returns or other regulatory-prescribed evidence of its ability to pay the proffered wage. In response to the director's request for evidence (RFE) issued on July 16, 2004, the petitioner submitted copies of the 2001, 2002, and 2003 tax returns for an entity named [REDACTED] as well as Forms W-2 for wages paid by [REDACTED] to the beneficiary in 2000, 2001, and 2002.

[REDACTED] is structured as a C corporation, which according to its tax return, was incorporated in 1994. On the petition, the petitioner claimed to have been established in 1966. The AAO notes that the petitioner's address of [REDACTED] is the same address listed on the tax returns and Forms W-2 from [REDACTED]. However, the petitioner did not submit sufficient evidence to establish how these two entities are related or if one is a successor-in-interest to the other.

The United States Citizenship and Immigration Services (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 [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED] filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between [REDACTED] and itself are issues which have not been resolved. In order to

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).

determine whether the petitioner was a true successor to [REDACTED], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the petitioner's claim of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

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

In the present matter, the USCIS California Service Center Director did not reference *Matter of Dial Auto*. The Commissioner's decision did 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.² *Id.* at 1569 (defining "successor"). When considering other business

² Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group

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.³

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 predecessor necessary to carry on the business.⁴ *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

includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

³ 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.

⁴ 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).

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. The record contains no probative evidence that [REDACTED] assumed any of the rights, duties, and obligations of the petitioner. The record contains a letter from [REDACTED], a CPA with [REDACTED] dated October 12, 2009, which states that [REDACTED] does business as [REDACTED]. However, the AAO notes that according to the California Secretary of State website available at <http://kepler.sos.ca.gov/> (accessed June 18, 2012), several corporate entities using the names [REDACTED] [REDACTED] have conducted business as separate corporations using the same or a similar name. Thus, it is not clear that [REDACTED] is the corporate entity doing business as [REDACTED] the name of the petitioner. The tax returns for [REDACTED] do not mention [REDACTED] on the forms.

It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980).

Thus, it has not been demonstrated that [REDACTED] is a successor-in-interest to the petitioner or that it is a parent, a subsidiary, doing business as (DBA), or related to the petitioner in any other way which might establish the evidentiary relevance of the tax returns from [REDACTED]. Nevertheless, these tax returns and the Forms W-2 submitted into the record have been reviewed and analyzed below.

On the Form I-140, the petitioner claimed to have a gross annual income of \$1,550,948, and to currently employ 30 workers. According to the tax returns in the record, the fiscal year of [REDACTED] begins on May 1st and ends on April 30th. Therefore, the priority date in the instant case of April 11, 2001, would have fallen within the period reported during the corporation's 2000 fiscal year. No tax return or other regulatory prescribed evidence from 2000 was submitted. On the Form

ETA 750B, signed by the beneficiary on April 4, 2001, the beneficiary claims to have worked for the petitioner from May 1996 to the present.

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, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Although the Form ETA 750 states that the beneficiary worked for the petitioner from May 1996 to the present, and the record contains two statements signed by the beneficiary to that effect, the record does not contain any Forms W-2 or 1099 from [REDACTED] reflecting wages paid to the beneficiary. The record also contains a statement from the beneficiary dated September 22, 2004, stating that he was not on the business' payroll in 1996 and 1997, but instead received payments of cash until 1998 when he started receiving checks with deductions and Forms W-2.⁵

The petitioner has submitted Forms W-2 indicating wages paid to the beneficiary according to the table below.

- In 2000, a Form W-2 from [REDACTED] stated wages paid of \$14,560.00.⁶
- In 2001, a Form W-2 from [REDACTED] stated wages paid of \$16,622.76.

⁵ The AAO notes that every employer engaged in a trade or business who pays remuneration, including noncash payments of \$600 or more for the year (all amounts if any income, social security, or Medicare tax was withheld) for services performed by an employee must file a Form W-2 for each employee. *See* <http://www.irs.gov/instructions/iw2w3/ch01.html> (accessed June 18, 2012). In addition, non-wage payments to an individual of over \$600 made in conjunction with a trade or business are required to be reported on Form 1099-MISC. *See* <http://www.irs.gov/pub/irs-pdf/i1099misc.pdf> (accessed June 18, 2012).

⁶ As the Form W-2 submitted from 2000 covers a period prior to the priority date of April 11, 2001, it is not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally.

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- In 2002, a Form W-2 from [REDACTED] stated wages paid of \$17,150.00.
- In 2008, a Form W-2 from [REDACTED] stated wages paid of \$20,140.30

Therefore, as the proffered wage was \$20,113.60 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 payments, and [REDACTED] the entity the petitioner claims is the corporate entity doing business as [REDACTED] did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 except 2008, and would have been obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

| Year | Proffered Wage | Wages Paid | Balance |
|------|----------------|-------------|-------------|
| 2001 | \$20,113.60 | \$16,622.76 | \$3,490.84 |
| 2002 | \$20,113.60 | \$17,150.00 | \$2,963.00 |
| 2003 | \$20,113.60 | \$0 | \$20,113.60 |
| 2004 | \$20,113.60 | \$0 | \$20,113.60 |
| 2005 | \$20,113.60 | \$0 | \$20,113.60 |
| 2006 | \$20,113.60 | \$0 | \$20,113.60 |
| 2007 | \$20,113.60 | \$0 | \$20,113.60 |
| 2008 | \$20,113.60 | \$20,140.30 | \$0 |

The AAO notes that the second page of the beneficiary's Form 1040 from 2003 was also submitted, but did not reflect the name of the beneficiary's employer. No other Forms W-2 or 1099 were submitted. The AAO also notes that although none of the above payments have been demonstrated to have been paid by the petitioner, the 2008 Form W-2 from [REDACTED] is the only one reflecting wages at or above the amount of the proffered wage of \$20,113.60. Further, the AAO notes that the beneficiary's social security number on the Forms W-2 is 622-09-3892, while the social security number listed at the top of page two of the beneficiary's 2003 Form 1040 shows the social security number [REDACTED] with the two middle digits unreadable, next to the beneficiary's name. The social security numbers provided do not match. In addition, a search of available databases indicates that the social security number used by the beneficiary on the Forms W-2 has also been used by several other individuals.⁷ Since the evidence submitted by the petitioner

⁷ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of*

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fails to demonstrate the correct social security number of the beneficiary, the AAO does not accept the Forms W-2 as persuasive evidence of payments made to the beneficiary.

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.

Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).*

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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).

For a C corporation, 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 October 12, 2004, 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 2004 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2003 would have been the most recent return available. The petitioner’s tax returns were not submitted. The tax returns for [REDACTED] the entity which the petitioner claims is the corporate entity doing business as [REDACTED] do not demonstrate the ability of the petitioner to pay the proffered wage, but have been provided and reflect net income for 2001, 2002, 2003, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2001, the Form 1120 stated net income of \$0.
- In 2002, the Form 1120 stated net income of \$0.
- In 2003, the Form 1120 stated net income of \$0.
- In 2005, the Form 1120 stated net income of \$0.

- In 2006, the Form 1120 stated net income of \$16,839.00.
- In 2007, the Form 1120 stated net income of \$9,572.00.
- In 2008, the Form 1120 stated net income of -\$90,799.00.

The 2004 Form 1120 was not provided. Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not demonstrate sufficient net income to pay the proffered wage, and the tax returns of [REDACTED] failed to demonstrate sufficient net income in 2001 through 2008 as well.

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.⁸ A corporation's year-end 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. As stated previously, the petitioner's tax returns were not submitted. The tax returns for [REDACTED] the entity which the petitioner claims is the corporate entity doing business as [REDACTED] do not demonstrate the ability of the petitioner to pay the proffered wage, but have been provided and reflect net current assets for 2001, 2002, 2003, 2005, 2007, and 2008 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of -\$38,392.00.
- In 2002, the Form 1120 stated net current assets of -\$31,323.00.
- In 2003, the Form 1120 stated net current assets of \$4,517.00.
- In 2005, the Form 1120 stated net current assets of \$41,704.00.
- In 2007, the Form 1120 stated net current assets of \$54,742.00.
- In 2008, the Form 1120 stated net current assets of -\$47,804.00.

The 2004 tax return for [REDACTED] was not submitted, and the 2006 Form 1120 lacked a copy of the Schedule L on which net current assets are reported. Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage, and the tax returns of [REDACTED] failed to demonstrate sufficient net current assets in 2001, 2002, 2003, 2004, and 2006.

⁸According 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.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The entity known as [REDACTED] Inc. which the petitioner claims is the corporate entity doing business under its name, [REDACTED] paid the beneficiary an amount equal to or greater than the proffered wage in 2008, and demonstrated sufficient current net assets to pay the proffered wage if it had been the petitioning employer in 2005 and 2007 only. It failed to provide a tax return or regulatory-prescribed evidence for its fiscal year of 2000, which included the priority date of April 11, 2001, as well as for 2004.

On appeal, the petitioner makes no written assertions as to its ability to pay the proffered wage, and instead submits the evidence referenced above as well as the letter dated October 12, 2009, from [REDACTED] CPA, which states that [REDACTED] is the DBA name of [REDACTED] Inc. The letter also states that the corporation paid one of its owners, Mr. [REDACTED] rent for the real estate on which the restaurant sits, that the corporation had substantial depreciation expenses, that the corporation also paid substantial compensation to its shareholders, that the owners of [REDACTED] own properties with substantial equity, and that in his opinion [REDACTED] has met the burden of establishing its ability to pay any wages for hiring new employees to meet its growing requirements.

The AAO notes that 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 this statement from Mr. [REDACTED] 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 addition, as it has not been established that [REDACTED] is the petitioner or a successor-in-interest to the petitioner, the amounts of shareholder compensation, depreciation, and rent expenses of [REDACTED] are not dispositive of the petitioner's ability to pay the proffered wage in this case. Furthermore, with respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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.

(b)(6)

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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

In regard to the assets held by the owners of a corporation, USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In regard to Mr. [REDACTED] claims that the owners of [REDACTED] have equity in various real estate properties, the AAO notes that real estate is not a readily liquefiable asset. Further, it is unlikely that one would sell or encumber such a significant asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

In regard to the claimed payments of owner compensation by [REDACTED] the AAO again notes that the evidence has not demonstrated that the petitioner and [REDACTED] are the same entity or that the tax returns of [REDACTED] reflect the financial abilities of the petitioner to pay the proffered wage. In addition, even if the AAO accepted the petitioner's claims that [REDACTED] was the corporate entity doing business as [REDACTED] the failure to provide the tax returns or other required regulatory-prescribed evidence for the years of 2000 and 2004 may not be ignored and are sufficient reason to dismiss the petitioner's appeal. 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)).

Mr. [REDACTED] assertions cannot be concluded to outweigh the evidence presented in the record of proceeding that fails to demonstrate that the petitioner could 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, the petitioner has failed to provide the regulatory-prescribed evidence of its ability to pay the proffered wage. Thus, the AAO has insufficient evidence of the petitioner's gross receipts, its officer compensation, the longevity of the business, the petitioner's reputation, the total wages paid to all employees, or any other factors affecting the business. 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.

Another issue in this case is whether or not the beneficiary met the requirements as stated on the labor certification. 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: None Required.

High School: None Required.

College: None Required.

College Degree Required: None Required.

Major Field of Study: None Required.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a cook working 40 hours per week for the petitioner, [REDACTED] from May 1996 until the present. No other experience is listed. The beneficiary signed the labor certification on April 4, 2001, 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 petition was filed with a statement from the petitioner addressed to the Employment Development Department, Alien Labor Certification Office dated April 5, 2002, and stamped by DOL on September 22, 2003 as an approved attachment to the labor certification stating that the beneficiary’s experience was gained with the petitioning employer and that additional experience

was gained with [REDACTED] from April 1993 to April 1996. The director's RFE of July 16, 2004, requested a letter of experience on company letterhead which included the title, duties, and dates of employment/experience as well as the number of hours worked per week. In response to the director's RFE, the petitioner submitted: 1) a letter from [REDACTED] president of [REDACTED] stating that the beneficiary had been employed as a full-time cook from April 1996 to the present; and 2) a letter from [REDACTED] on [REDACTED] letterhead stating that the beneficiary worked as a cook 40 hours per week at [REDACTED] for which no city or state was listed on the letter. In addition, no duties were provided, and Mr. [REDACTED] did not give his title.

Regarding the claimed experience with the petitioner, 20 C.F.R. § 656.21(b)(5) [2004] states:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.⁹

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)¹⁰ in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-

⁹ In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. See *E & C Precision*.

¹⁰ 20 C.F.R. § 656.21(b)(5) [2004].

BALCA decisions,¹¹ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position of cook are two years of experience in the job offered. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004].

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. In the instant case, the beneficiary did represent on Form ETA 750, Part B that it had been employed with the petitioner as a cook, but it also provided a statement to DOL addressed to the Employment Development Department, Alien Labor Certification Office dated April 5, 2002, and stamped by DOL on September 22, 2003 as an approved attachment to the labor certification stating that additional experience was gained with [REDACTED] from April 1993 to April 1996. Therefore, the DOL was precluded from conducting a *Delitizer* analysis of the dissimilarity of the offered position and the position in which the beneficiary gained experience.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary’s experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary’s experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

As stated previously, the record contained an experience letter from [REDACTED] letterhead stating that the beneficiary worked as a cook 40 hours per week at [REDACTED] from April

¹¹ See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

1993 to April 1996. However, no city or state was listed in the address, and no duties were provided. In addition, Mr. [REDACTED] did not give his title. The director cited the deficiencies in the experience letter in his denial of September 25, 2009.

On appeal, the petitioner provided a letter dated October 20, 2009, on [REDACTED] letterhead from [REDACTED] one of the owners of the petitioner, reiterating that the beneficiary gained two years of experience from April 1993 to April 1996 with [REDACTED]. The letter also provided a list of the beneficiary's duties. The petitioner also submitted a letter dated October 19, 2009, from [REDACTED], General Manager of [REDACTED] on [REDACTED] letterhead stating that the beneficiary is employed with the petitioner and gained previous experience at [REDACTED] where the beneficiary worked for two years prior to working for the petitioner.

The AAO notes that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires "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 letter from Mr. [REDACTED] was insufficient in that it did not provide the full address of the prior employer, the title of the trainer, or a description of the training or experience of the beneficiary. The two letters submitted by the petitioner on appeal are also insufficient in that they are not from the prior employer or trainer, but from the petitioner who is attesting to the experience of the beneficiary at a different place of employment. Further, the AAO notes that the beneficiary set forth his credentials on the labor certification and signed his name on April 11, 2001, under a declaration that the contents of the form are true and correct under the penalty of perjury. At Part B, under "Work Experience" where the beneficiary is required to list "all jobs held during the last three (3) years" and to "list any other jobs related to the occupation for which [he] is seeking certification," the beneficiary did not list the claimed work experience with [REDACTED].

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

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.

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.

(b)(6)

ORDER: The appeal is dismissed.