



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 28 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 with the field office or service center that originally decided your case by filing a 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a hand forged ornamental business. It seeks to employ the beneficiary permanently in the United States as an ornamental iron worker. 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 is the successor-in-interest to the proposed employer on the labor certification and that the petitioner did not have the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's April 16, 2009 denial, the issues in this case are whether or not the petitioner is a successor-in-interest to the proposed employer on the labor certification and 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.

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

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

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

In the present matter, the USCIS Nebraska Service Center Director strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed "all" of the original employer's rights, duties, obligations, and assets. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved" *Id.* (emphasis added).

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

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.¹ *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.²

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.³ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or 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

¹ Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

² 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.

³ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. The sole proprietor who filed the labor certification operated using federal employer ID number (EIN) [REDACTED] the partnership created on April 1, 2003, operated using EIN [REDACTED] and the petitioner, [REDACTED] operated using EIN [REDACTED]. The petitioner submitted a written statement from [REDACTED] which states among other things that he is the founder and original owner of [REDACTED] located at [REDACTED] California who submitted the labor certification for the beneficiary. He also states that: 1) on or about April 1, 2003, [REDACTED], a family member, purchased 50% of the business and formed a partnership with him to operate the business; 2) on or about June 1, 2005, Mr. [REDACTED] purchased the remaining portion of the business for \$150,000 and assumed all liabilities and assets of the business; and 3) that Mr. [REDACTED] subsequently transferred all liabilities and ownership of [REDACTED] into a corporation. The petitioner also submitted a written statement in which he reiterates Mr. [REDACTED] statements regarding the establishment of the partnership, the purchase of the business, the assumption of all liabilities and assets of the business, and the establishment of a corporation. Although the director in his denial noted that a statement regarding the petitioner's assumption of the rights, duties, obligations, and assets without corroborating evidence of the transactions is not sufficient, the petitioner did not submit additional probative evidence such as a contract, a bill of sale, an agreement, or other partnership or corporate documents reflecting the initial transfer of stock to Mr. [REDACTED] and establishment of the partnership or the purchase of the remaining stock by Mr. [REDACTED] and subsequent restructuring into a corporation. Thus, it is not clear if the purchase of the entity involved merely the transfer of assets or also involved the assumption of the essential rights, duties, and obligations to carry on the business.

Therefore, the petitioner has failed to demonstrate that it is the successor-in-interest to the proposed employer who filed the labor certification.

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

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

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

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$26.08 per hour (\$54,246.40 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.⁴

The evidence in the record of proceeding shows that the proposed employer was structured as a sole proprietorship and reported income and expenses on Form 1040 in 2001 and 2002. On or about April 1, 2003, the proprietor, [REDACTED], entered into a partnership, [REDACTED] with [REDACTED] which reported its activity on Form 1065 in 2003, 2004, and 2005, the year in which it filed its final return. On or about June 1, 2005, Mr. [REDACTED] states he purchased the remaining shares in the partnership and then began operating the business through his wholly-owned corporation, [REDACTED] which reported its activity on Form 1120 in 2005, 2006, and 2007, and then on Form 1120S in 2008. On the petition, the petitioner claimed to have been established in 1987 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on April 7, 2001, the beneficiary claimed to work for the petitioner since June 2000.

⁴ 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).

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Forms W-2 were submitted indicating that the beneficiary was paid wages according to the table below.

- In 2001, the Form W-2 from [REDACTED] stated wages of \$11,280.00.
- In 2002, the Form W-2 from [REDACTED] stated wages of \$10,860.00.
- In 2003, the Form W-2 from [REDACTED] stated wages of \$5,280.00.
- In 2003, the Form W-2 from [REDACTED] wages of \$11,220.00.
- In 2004, the Form W-2 from [REDACTED] wages of \$20,550.00.
- In 2005, the Form W-2 from [REDACTED] of \$10,920.00.
- In 2005, the Form W-2 from [REDACTED] stated wages of \$10,920.00.

Although no Forms W-2 were submitted for 2006, 2007, or 2008, the petitioner submitted copies of quarterly wage reports for each quarter of 2008 in which the beneficiary was paid a total of \$26,100.00.

Therefore, as the proffered wage was \$54,246.40 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 but would be obligated to demonstrate its ability to pay the difference between wages actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Total Wages Paid	Balance
2001	\$54,246.40	\$11,280.00	\$42,966.40
2002	\$54,246.40	\$10,860.00	\$43,386.40

2003	\$54,246.40	\$16,500.00	\$37,746.40
2004	\$54,246.40	\$20,550.00	\$33,696.40
2005	\$54,246.40	\$21,840.00	\$32,406.40
2006	\$54,246.40	\$0	\$54,246.40
2007	\$54,246.40	\$0	\$54,246.40
2008	\$54,246.40	\$26,100.00	\$28,146.40

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).

The record before the director closed on March 31, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. However, the 2008 tax return was submitted in response to the RFE. Therefore, the petitioner's income tax return for 2008 is the most recent return available. The employer began as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supports a family of three. The proprietor's tax returns reflect the following information for the following years:

- Proprietor's adjusted gross income in 2001 (Form 1040, line 33) \$39,306.00
- Proprietor's adjusted gross income in 2002 (Form 1040, line 35) \$13,096.00

In 2001 and 2002, the sole proprietor's adjusted gross income fails to cover the difference between wages actually paid to the beneficiary and the proffered wage. It is improbable that the sole proprietor could support himself and his family on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Further, no listing of the sole proprietor's household expenses was provided.

In 2003, 2004, and part of 2005, the petitioner claims that it operated the business as a partnership.⁵ In the remainder of 2005, as well as in all of 2006 and 2007, the petitioner claims that it operated the business as a C corporation. 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. In 2008, the petitioner filed Form 1120S indicating operation as an S corporation. The tax returns demonstrate net income for 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

- In 2003, the Form 1065 stated net income of \$42,628.00.
- In 2004, the Form 1065 stated net income of \$0.
- In 2005, the Form 1065 stated net income of \$0.
- In 2005, the Form 1120 stated net income of -\$1,695.00.
- In 2006, the Form 1120 stated net income of \$105,844.00.
- In 2007, the Form 1120 stated net income of \$122,076.00.
- In 2008, the Form 1120S stated net income⁶ of \$187,462.00.

⁵ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed May 23, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the petitioner's Schedules K for 2004 and 2005 have relevant entries for additional Section 179 deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns.

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 23, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits,

Therefore, for the years 2004 and 2005, the tax returns above did not show sufficient net income to pay the balance of the proffered wage. The tax returns above had sufficient net income to pay the balance of the proffered wage in 2003, 2006, 2007, and 2008; however, as discussed above, the petitioner has not demonstrated that a successor-in-interest relationship exists between the proposed employer who filed the labor certification and the petitioner.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ Both a partnership's and a corporation's year-end current assets are shown on Schedule L, lines 1 through 6. A partnership's year-end current liabilities are shown on lines 15 through 17, while a corporation's year-end current liabilities are shown on lines 16 through 18. If the total of a partnership's or a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns submitted demonstrate end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1065 stated net current assets of \$39,278.00.
- In 2005, the Form 1065 stated net current assets of -\$35,620.00.
- In 2005, the Form 1120 stated net current assets of -\$9,545.00.

No Schedule L for 2003 was submitted.⁸ In addition, as the net income figures discussed above were sufficient to pay the proffered wage, no analysis of the net current assets for 2003, 2006, 2007, and 2008 is necessary. In 2004, the tax return had sufficient net current assets to pay the balance of the proffered wage. For 2005, the tax return did not have sufficient net current assets to pay the proffered wage.

etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2008, the petitioner's net income is found on Schedule K of its tax returns.

⁷According 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.

⁸Partnerships with total receipts less than \$250,000; total assets at the end of the tax year less than \$600,000; and Schedules K-1 filed with the return and furnished to the partners on or before the due date (including extensions) for the partnership return are not required to complete Schedule L in 2003. See <http://www.irs.gov/pub/irs-prior/i1065--2003.pdf> (accessed May 23, 2012).

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Therefore, even if the petitioner was able to demonstrate a successor-in-interest relationship existed between itself and the proposed employer who filed the labor certification, it is clear that from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that the tax returns submitted reflected 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 in 2001, 2002, and 2005.

On appeal, counsel asserts that: 1) the petitioner is the successor-in-interest to the employer who filed the labor certification as it assumed the rights, duties, obligations, and assets of the original company; 2) the petitioner has the ability to pay the proffered wage beginning on the priority date; 3) USCIS should consider that the petitioner's business has increased and there are expectations of a continued increase in profits similar to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967); 4) USCIS should consider the value of the petitioner's assets such as real estate and funds in bank accounts; and 5) USCIS should consider the petitioner's gross receipts, profits, and growth of the business over the years. In support of these assertions, the counsel has submitted a written statement from [REDACTED] written statements from the petitioner; copies of two Forms 1099-S from 2003 indicating gross proceeds paid to [REDACTED] in the amounts of \$735,000.00 and \$1,850,000.00, respectively; copies of bank statements for a business checking account at [REDACTED] for 2001 and 2002; and copies of the Mr. [REDACTED] Forms 1040 for 2001 and 2002.

As previously discussed, the petitioner did not submit additional probative evidence such as a contract, a bill of sale, an agreement, or other partnership or corporate documents reflecting the transactions through which it assumed the rights, duties, obligations, and assets of the original employer. Thus, it is not clear if the purchase of the entity involved merely the transfer of assets or also involved the assumption of the essential rights, duties, and obligations to carry on the business.

The AAO also notes that real estate owned by the proprietor is not a readily liquefiable asset. Further, it is unlikely that a sole proprietor would sell or encumber such a significant personal asset to pay the beneficiary's wage, especially considering the fact that the tax returns show that the proprietor's rental real estate is being used to generate income. In addition, the 2003 Forms 1099-S submitted were not accompanied by other sales and loan documents establishing the actual amount received as well as any amounts due to other parties or of loans possibly encumbering the properties. Counsel does not provide whether the sole proprietor kept the profit realized in the form of liquefiable assets. Further, both Forms 1099-S were dated after April 1, 2003, the date by which the former owner of the business claimed to have ended the sole proprietorship and established the partnership with the owner of the petitioner. The record does not contain evidence that these claimed personal funds of one partner would have been used to pay the beneficiary's salary, which in 2003 would have been an expense of the partnership. 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 *Anetekhail 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).

The AAO also notes that counsel's reliance on the balances in the proprietor's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R.

(b)(6)

§ 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions). Fourth, the average monthly balances for the business checking account in 2001 and 2002 were \$5,017.69 and \$13,011.57, respectively, and thus would not have been sufficient to pay the balance of the proffered wage. Further, the funds in the [REDACTED] are located in the sole proprietorship's business checking account (account number [REDACTED] prior to 2003), the partnership's business checking account (account number [REDACTED] in 2003 through part of 2005), and the corporation's business checking account (account number [REDACTED] in 2005). Therefore, these funds are likely shown on Schedule C of the sole proprietor's tax returns, page 1 of the partnership's tax returns, and page 1 of the corporation's tax returns as gross receipts and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel's assertion that the proprietor's interest earned in 2001 and 2002 reflects available funds equal to five times as much as the interest are not corroborated by probative evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

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 business did not provide the sole proprietor a substantial income. The proprietor's statement dated June 10, 2009, states that the construction industry was at a standstill in 2001 and 2002 and that he purchased large expensive iron machinery in both years to stay competitive; however, the depreciation entries on the tax returns for 2001 and 2002 do not indicate that any capital assets as described by the proprietor were purchased, instead indicating only the purchase of an Isuzu Trooper vehicle in 2001.

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."

Further, gross receipts and wages paid varied greatly between the sole proprietorship and the other entities. The petitioner indicated on the Form I-140 that it employs five people, which is not substantial. While the petitioner claims to have been in business for over twenty-four years, it has not been established that the petitioner is a successor-in-interest. The petitioner was incorporated in 2003. No officer compensation was paid, and it is not clear that the owner of the petitioner would forego compensation in order to pay the beneficiary's salary. In addition, business bank statements were submitted which failed to show substantial balances. Further, there is inadequate evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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.