

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

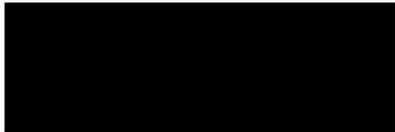
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

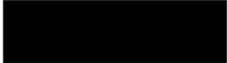
**PUBLIC COPY**

B6



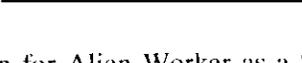
Date: JAN 11 2012

Office: NEBRASKA SERVICE CENTER

File: 

IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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. The petitioner subsequently filed a motion to reopen and reconsider the decision, which the Director granted and affirmed the previous denial. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automobile repair shop. It seeks to employ the beneficiary permanently in the United States as a manager. 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. The director denied the petition accordingly. The petitioner then filed a motion to reopen and reconsider the director's decision. The director reopened the decision and again denied the petition finding that the petitioner had not established its ability to pay the proffered wage.

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 2, 2008 and July 17, 2008 denials, the 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). USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,

406 (Comm. 1986). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 31, 2003. The proffered wage as stated on the Form ETA 750 is \$43,056 per year. The Form ETA 750 states that the position requires two years of experience in the position offered as a manager.

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

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2003 and at some point later re-structured as an S corporation.<sup>2</sup> On the petition, the

---

<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

<sup>2</sup> The petitioner as listed on the Form I-140 is [REDACTED] located at [REDACTED] [REDACTED] and a Federal Employer Identification Number of [REDACTED]. The same address and EIN is listed on the 2003, 2004, and 2006 Forms 1040, Schedules C. The 2005, 2006, and 2007 Forms W-2 issued to the beneficiary and Form 1040, Schedule C, the 2007 Employer's Annual Federal Unemployment Tax Return, and the 2008 Quarterly Tax Return state the employer as [REDACTED] with an address of [REDACTED] and an EIN of [REDACTED]. No evidence was presented to demonstrate the relationship between the two companies.

The petitioner submitted an affidavit stating that it was incorporated in 2007. The director pointed out that the petitioner has a 2005 incorporation date with [REDACTED]. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 1981) ("*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).

*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. *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.

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.

petitioner stated that it was established in 2000 and states that it currently employs four workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on May 19, 2006, the beneficiary claimed to work for the petitioner beginning in June 2001.

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.

---

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

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

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

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

While the change in corporate structure may have resulted in a change in FEIN, the petitioner must address this issue in any further filings and demonstrate the basis for the change, whether it be based on corporate formation or whether the change represents a successor-in-interest.

Comm. 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. Comm. 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.

- The petitioner failed to submit a 2003 Form W-2.<sup>3</sup>
- The 2004 Form W-2 stated that the petitioner paid the beneficiary \$26,000.
- The 2005 Form W-2 stated that the petitioner paid the beneficiary \$26,000.<sup>4</sup>
- The 2006 Form W-2 stated that the petitioner paid the beneficiary \$30,000.
- The 2007 Form W-2 stated that the petitioner paid the beneficiary \$30,000.

As the above amounts are less than the proffered wage, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2004 and 2005 is \$17,056 and in 2006 and 2007 is \$13,056. The petitioner must demonstrate its ability to pay the full proffered wage in 2003, the year of the priority date, and onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (E.D. Mich. 2010). 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) (*quoting Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced.

---

<sup>3</sup> As noted above, the beneficiary stated on Form ETA 750B that he has been employed with the petitioner since June 2001, however, the petitioner did not submit a Form W-2 for 2003.

<sup>4</sup> As set forth above, the Form W-2s for [REDACTED] contain one tax identification number, and the Form W-2s for [REDACTED] contain a separate tax identification number. The conflict in the tax identification numbers must be resolved before we can accept that all of the W-2s represent payment from the instant petitioner to the beneficiary to be attributed to the petitioner's ability to pay the proffered wage.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial*, 696 F. Supp. 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*, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed with the petitioner's initial submission on December 11, 2006. As of that date, the most current tax return available was the petitioner's 2005 federal tax return.<sup>5</sup>

In 2003, the petitioner was organized 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

---

<sup>5</sup> The petitioner submitted later tax returns and W-2 statements with its motion to reopen and on appeal.

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).

The petitioner's 2003 Form 1040 showed adjusted gross income of -\$5,950.<sup>6</sup> Although the Certification of Account Status from the Texas Comptroller of Public Accounts states that the petitioner was incorporated on April 15, 2004, the petitioner's tax returns reflect that its income was still reported as a sole proprietorship in 2004. The sole proprietor's adjusted gross income in 2004 was \$17,733. The petitioner submitted no statement concerning its sole proprietor's personal or household expenses; the tax returns reflect that he has four dependents. On appeal, the sole proprietor submitted an affidavit that stated that in 2003 he "drew \$15,000.00 from the profit of the company as compensation simply because it was there and [he] had no business use for it. In 2004, [he] took out \$7,096.00. . . ." He further stated that he does "not have to draw money from the company in order to support [himself] and family." It is unclear how the sole proprietor would support himself and his dependents on a negative adjusted gross income in 2003 or on \$677, the difference between the adjusted gross income and the difference between the actual wage paid and the proffered wage to the beneficiary, in 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Despite being notified by the director of the need to resolve this discrepancy in his decision, the petitioner presented no evidence to demonstrate how the sole proprietor could support himself and his dependents on the above stated figures. In the motion to reopen, counsel states that the sole proprietor could have diverted the \$15,000 he took out in 2003, the \$7,096 in 2004, and the \$28,000 in 2005 to pay the beneficiary's proffered wage as necessary. A sole proprietor must demonstrate that he can pay the proffered wage and his personal expenses. The sole proprietor had a negative adjusted gross income in 2003 and a minimal adjusted gross income in 2004. The sole proprietor did not submit evidence of either personal expenses or cash assets to demonstrate that he could support himself and his family in these years. Again, in the absence of personal expenses, and resolution of the tax identification, corporate status issue, we cannot conclude that the petitioner can pay the proffered wage in any year.

The petitioner incorporated on April 15, 2004. After the petitioner incorporated, however, the petitioner's net income was still reported income on Schedule C, Line 31 of the owner's individual IRS Form 1040 in 2004 as a sole proprietor, not as an incorporated entity.

---

<sup>6</sup> The Adjusted Gross Income can be found on line 22 of the Form 1040.

- The petitioner did not submit a Schedule C or Form 1120S for 2005.<sup>7</sup>
- In 2006, the Form 1040 stated an adjusted gross income of \$76,592.<sup>8</sup>
- The petitioner did not submit a Schedule C or Form 1120S for 2007.<sup>9</sup>

It is unclear whether the petitioner's adjusted gross income in 2006 would be sufficient in combination with the wages paid to establish its ability to pay in that year as no statement of the usual household expenses was submitted. The petitioner must also resolve the issue related to its tax identification number as well as the issue related to its incorporation, whether personal expenses and assets would be applicable in that year before we can definitively conclude that the petitioner has the ability to pay in this year. As the petitioner did not submit a Schedule C for its 2005 or 2007 tax return or resolve whether Form 1120S should have been filed.

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.<sup>10</sup> The Form 1040, Schedule

---

<sup>7</sup> The petitioner submitted a partial Form 1040 for 2005 which includes a Schedule E to report income or loss from any partnership or S corporation. The petitioner listed an income of \$3,858 on that Line 41 "Total income or (loss)" for 2005. The Schedule E reflects that the petitioner's owner received income from the S Corporation, [REDACTED] in that year. As the director notes, the petitioner incorporated, but still filed as a sole proprietor. No Form 1120S was submitted for 2005 or thereafter. The petitioner's tax identification number changed in 2005, which would appear to reflect a change in corporate status and that a Form 1120S should have been submitted. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

<sup>8</sup> As noted above, however, it appears that the petitioner should have submitted Form 1120S for this year.

<sup>9</sup> The petitioner submitted Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2007. In doing so, it checked a box stating that the return was "Final: Business closed or stopped paying wages." It then submitted Quarterly Tax Returns for the first quarter of 2008 indicating that it has not ceased operations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In any further filings, the petitioner should submit evidence to resolve this discrepancy. The petitioner did not, however, submit a federal tax return for the year 2007 on appeal or with its motion to reopen.

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

C does not contain a place for a company to list assets and liabilities and the petitioner did not submit a Schedule C in 2005 or 2007, so that we are unable to calculate net current assets for 2005, 2006, and 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

On appeal, counsel asserts that the petitioner's owner's real property holdings and recent sale of a parcel of real property should be considered in determining the petitioner's ability to pay the proffered wage. First, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." As the sale of the real property occurred in July 2004 and the business was incorporated in April 2004, it would appear that any profits from the sale would be the assets of the petitioner's owner when the petitioner was an incorporated entity, not the sole proprietorship.<sup>11</sup> As a result, the petitioner's owner's real estate holdings cannot be considered when determining the petitioner's ability to pay the proffered wage.

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 (BIA 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

---

salaries). *Id.* at 118.

<sup>11</sup> In addition, no evidence was submitted to demonstrate the sole proprietor's liabilities or expenses so there is no indication that all of the proceeds would have been available to use even if the profits were available to the sole proprietor. In any event, the sale of property in 2004 would not resolve the petitioner's ability to pay the proffered wage in 2003. A petitioner must establish the elements for the approval of the petition at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Further, as noted above, the petitioner must additionally resolve the discrepancy in dates regarding its status as an incorporated entity compared to its status as a sole proprietorship to determine whether any of the sale proceeds could be used to support the petitioner's ability to pay.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, outside of the Forms W-2, the petitioner failed to submit sufficient evidence concerning its ability to pay the proffered wage for all of the years at issue and demonstrated only minimal income in 2003, 2004, and 2006. Without all of the required regulatory evidence of ability to pay from the priority date onward, we would be precluded from assessing the petitioner's ability to pay for the entire time period and could not make any full determination based on the totality of the circumstances without this evidence. In addition, despite the sole proprietor's statement to the contrary, the petitioner presented no evidence concerning the sole proprietor's ability to meet his household obligations on a negative or minimal adjusted gross income in 2003 and 2004. The sole proprietor's 2003 Form 1040 stated no wages paid and noted only \$9,488 in contract labor despite the petitioner's claim of four workers at that time. The 2004 Form 1040, Schedule C states total wages paid of \$29,500, which is only \$3,500 more than the salary reflected on the beneficiary's 2004 Form W-2. The petitioner must establish its ability to pay the proffered wage for each year beginning with the priority date, which in this case is 2003. The petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture to liken its situation to *Sonegawa*. 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.

Beyond the director's decision, the evidence does not establish that the beneficiary had the required experience as of the priority date, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). The regulation at 8 C.F.R. § 204.5(i)(3) provides:

(ii) *Other documentation*—

(A) *General*. 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petition is for a skilled worker and the job requires two years of experience in the proffered position of manager by the October 31, 2003 priority date. On the Form ETA 750B, the beneficiary lists his experience as from June 2001 to the date of signing, May 19, 2006, with the petitioner as a manager; from September 2000 to May 2001 with [REDACTED] as a Manager; and for [REDACTED] as a Manager from March 1996 to August 2000. The letter submitted from [REDACTED] owner of [REDACTED] stated that the beneficiary worked for that company as a manager from March 1, 1996 to August 15, 2000. The letter submitted from [REDACTED] stated that the beneficiary worked for that company from September 2000 to May 2001 as a manager. On the Form G-325 submitted by the beneficiary in support of his current I-485 Application to Register Permanent Residence or Adjust Status, he stated that he began working for the petitioner in January 2000. On the Form G-325 dated on April 28, 1997 and submitted with a previously filed Form I-485, the beneficiary lists his past experience as a manager with [REDACTED] from November 1995 to the date of signing and with [REDACTED] as a cashier from April 1993 to November 1995. The dates and employers on the letters submitted to demonstrate that the beneficiary meets the experience requirements for the instant petition conflict substantially with other claimed dates of employment and employers in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). "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." *Matter of Ho*, 19 I&N Dec. at 591. Because of the conflicts in the evidence submitted, neither letter can be accepted as proof of experience and the petitioner has failed to establish that the beneficiary had the required two years of experience as a manager at the time the labor certification was certified.

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.