

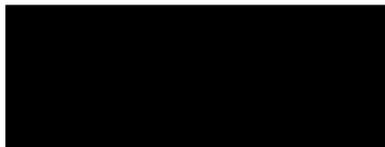
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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 26 2012**

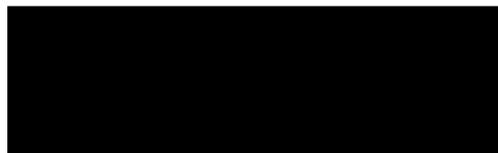
Office: TEXAS SERVICE CENTER

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:

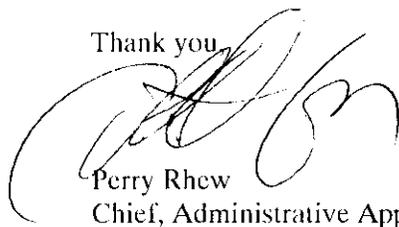


INSTRUCTIONS:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gas station/convenience store. It seeks to employ the beneficiary permanently in the United States as a gas station manager. As required by statute, the petition is accompanied by a Form ETA 750,¹ 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 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 October 6, 2008 denial, 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). 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).

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$500 per week (\$26,000 per year based on 40 hours per week). The Form ETA 750 states that the position requires completion of high school and two years of experience in the position offered, as a gas station manager, or two years of experience as manager, retail consumer business.

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

From the record, the petitioner's corporate structure is unclear. On the petition, the petitioner claimed to have been established in 2006.³ The petitioner did not complete the I-140 petition with respect to its gross or net annual income. The petitioner claims to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary did not claim to have worked for the petitioner.⁴

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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).

³ The priority date as noted above is April 30, 2001.

⁴ On Form ETA 750B, the beneficiary claims to have been employed by [REDACTED] from January 2001 to the date the Form ETA 750B was signed (April 27, 2001). Prior to that, he states he was employed with [REDACTED], located at the same address as the petitioner, from August 1994 to December 2000. Although federal tax returns (Forms 1120) for [REDACTED] were submitted by the petitioner in support of the instant petition, the petitioner on the labor certification and the Form I-140 is listed as [REDACTED], and not [REDACTED].

petitioner's ability to pay the proffered wage. In the instant case, although the beneficiary did not claim employment with the petitioner on Form ETA 750B, the stated I-140 petitioner submitted W-2 forms, which suggest that it, or a predecessor entity, has employed the beneficiary in 2003, 2004 and 2005.⁵ The beneficiary's Forms W-2 demonstrate wage payments as shown in the table below.

- 2001 - no Form W-2 submitted.
- 2002 - no Form W-2 submitted.
- In 2003, the Form W-2 stated compensation in the amount of \$10,712 from [REDACTED] EIN [REDACTED]
- In 2004, the Form W-2 stated compensation in the amount of \$10,712 from EIN [REDACTED]
- In 2005, the Form W-2 stated compensation in the amount of \$12,480 from EIN [REDACTED]
- 2006 – no Form W-2 submitted.
- 2007 – no Form W-2 submitted.⁶

The petitioner on Form I-140, Rock & S Corp., listed its federal employer identification number (EIN) on Form I-140 as [REDACTED]. The original Form ETA 750A shows that a correction was made to the name of the employer. The old name was covered with correction fluid and the name [REDACTED] was written in over the correction fluid. The correction was authorized by the DOL and is dated April 11, 2007. The Form ETA 750A also shows the following hand written in Block 4: "Tax ID #." The original tax identification number was also covered with correction fluid and the number [REDACTED] was written in over the correction fluid. The record does not include any details regarding the change in employer name, the original employer listed on Form ETA 750, or the relationship, if any, between [REDACTED] and any previous applicant listed on the labor certification.

On October 19, 2011, this office notified the petitioner with a Notice of Derogatory Information (NDI) that according to the records at the New York State Division of Corporations website, the petitioner was dissolved on April 27, 2011. On November 18, 2011, the petitioner responded to the notice advising that it was unaware of the dissolution. In letters provided by counsel, the petitioner, and the petitioner's accountant, it was advised that the petitioner was inadvertently dissolved by New York State on April 27, 2011, but that the petitioner continued to do business as a sole proprietor during this time. The letters further advise that the petitioner reincorporated as a new entity, [REDACTED], on November 4, 2011 and that this entity should be treated as the successor corporate petitioner for the instant petition.

⁵ W-2 forms issued to the beneficiary by the asserted petitioner, or a potential predecessor entity, and/or the petitioner's representative have been provided for these years.

⁶ The petitioner, [REDACTED], EIN [REDACTED], has submitted its quarterly wage reports (Forms NYS-45) for the first three quarters of 2011. Those forms show wages paid to the beneficiary of \$3,770.00 for each quarter, totaling \$11,310.00 through October 29, 2011. No evidence of any wages paid by the petitioner to the beneficiary was provided for the years 2008, 2009 or 2010.

When the present Form ETA 750 was filed and accepted by the DOL, the DOL would permit the substitution of a successor employer⁷ if it occurred before a final determination where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.30(c)(2). *See Horizon Science Academy*, 06-INA-46 (BALCA Mar.8, 2007) [when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages]; *See also American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991) [substitution made before final rebuttal to CO]; *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June 13, 1990). DOL would also allow a new employer to substitute where it was the same job opportunity in the same area of intended employment.

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. 1986), 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.

⁷ Substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although the regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." 20 C.F.R. § 656.11(b).

19 I&N Dec. at 482-83 (emphasis added).

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.⁸ *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.⁹

⁸ 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).

⁹ 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

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.¹⁰

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

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.

¹⁰ 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).

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.

From the record it is unclear whether a labor certification substitution took place between the petitioner and [REDACTED], or whether a successorship occurred between the petitioner and a prior company of the petitioner's owner. The petitioner must resolve this issue in any further filings. The initial entity must establish its ability to pay the proffered wage from the priority date until successorship or substitution. *Id.* at 482. Therefore, it is not clear that all of the W-2 statements submitted can be accepted in support of the petitioner's ability to pay the proffered wage.

It is also unclear whether a successorship occurred between [REDACTED] and the new entity, [REDACTED]. Although this is claimed by counsel, the petitioner and the petitioner's accountant in the response to the NDI, no evidence was provided to support this claim.¹¹

With the initial filing, the petitioner has submitted the federal income tax return (Form 1120) for the years 2002 through 2005. The Forms 1120 for each of these years lists the business name as [REDACTED] with EIN [REDACTED]. From the record, the basis for submitting another company's tax returns is unclear and without clarification, we cannot consider the W-2 statements¹² or the tax returns submitted in all the foregoing years as wages paid by the petitioner to

¹¹ In response to the NDI, in addition to letters from counsel and its accountant, the petitioner provided an unaudited financial statement for [REDACTED] for a ten-month period ending October 31, 2011, printouts from the New York State Division of Corporations website evidencing the active status of the new entity, its state quarterly wage reports for the first three quarters of 2011, and its payroll journal detailing payments made to the beneficiary from March 31, 2011 to November 4, 2011. This evidence does not establish that [REDACTED] purchased assets from [REDACTED] or its essential rights and obligations necessary to carry on the business. Nor does it establish that the job opportunity remains the same as originally certified, that [REDACTED] continues to operate the same type of business as [REDACTED], or that the essential business functions remain substantially the same as before the ownership transfer. Rather, the evidence indicates that a new entity was formed and that the beneficiary continued in his employment with the petitioner after it was dissolved. No evidence other than the petitioner's letter was provided to demonstrate that the beneficiary is now employed with [REDACTED] in the same or substantially similar position. Additionally, we note that the unaudited financial statement would not be in compliance with 8 C.F.R. § 204.5(g)(2). As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

¹² Additionally, it is unclear that we can consider all the tax returns and Forms 1120 submitted as attributable to the petitioner as set forth above. Because a corporation is a separate and distinct legal

the beneficiary, or income from tax returns in support of the petitioner's ability to pay the proffered wage. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

This evidence does not establish that the beneficiary was paid the full proffered wage during the relevant timeframe, including the period from the priority date in 2001 to the present.

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). 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. 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

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).

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).¹³

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 March 21, 2008 with the receipt by the director of the petitioner’s Form I-140 filing. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available on that date.¹⁴ The tax returns provided by the petitioner demonstrate its net income for 2001 through 2005, as shown in the table below.

- 2001 – no tax return submitted.¹⁵

¹³ Counsel asserts on appeal that depreciation should be considered in addition to net income. However, as set forth above, courts have considered and rejected this argument. *River Street Donuts* at 118.

¹⁴ As noted above, the petitioner did not submit any federal tax returns for the petitioner stated on Form I-140 and Form ETA 750, [REDACTED]. Rather, the petitioner submitted tax returns for the years 2002 through 2005 for [REDACTED]. There is nothing in the record that explains the nature of the relationship, if any, of these two entities. The tax returns for [REDACTED] Inc. will be discussed herein, but will not be considered evidence of the petitioner’s ability to pay the proffered wage without resolution of the issues mentioned above.

¹⁵ The tax returns for [REDACTED] indicate that the company’s fiscal year runs from November 1 through October 31. Although the earliest tax return provided is 2002, this tax return does not cover the priority date of April 30, 2001, but instead the time period November 1, 2002 to October 31, 2003. “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.” 8 C.F.R. § 204.5(g)(2). The petitioner would need to submit both its fiscal year 2000 and 2001 tax returns in any further filings to cover the time period from the priority date onward. As noted above,

- In 2002, the Form 1120 stated net income of -\$319.
- In 2003, the Form 1120 stated net income of -\$671.
- In 2004, the Form 1120 stated net income of -\$457.
- In 2005, the Form 1120 stated net income of -\$409.
- 2006 – no tax return submitted.
- 2007 – no tax return submitted.

Therefore, for the years 2002 through 2005, the tax returns provided by the petitioner do not demonstrate sufficient net income to pay the proffered wage. No information has been provided for the years 2001, 2006 and 2007, or any year subsequent from 2008 to 2010.

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.¹⁶ 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. The tax returns provided by the petitioner¹⁷ demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- 2001 – no tax return submitted.
- In 2002, the Form 1120 stated net current assets of \$23,090.
- In 2003, the Form 1120 stated net current assets of \$22,040.
- In 2004, the Form 1120 stated net current assets of \$16,792.
- In 2005, the Form 1120 stated net current assets of \$0.
- 2006 – no tax return submitted.
- 2007 – no tax return submitted.

the petitioner would also need to establish that tax returns for [REDACTED] could properly be used to show the petitioner's ability to pay the proffered wage for the tax returns to be accepted.

¹⁶According 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.

¹⁷ As noted above, the tax returns are for [REDACTED]. In any further filings, the petitioner would need to resolve the inconsistencies above to establish that these tax returns can be accepted as evidence of the petitioner's ability to pay the proffered wage.

Therefore, for the years 2002 through 2005, the tax returns provided by the petitioner do not demonstrate sufficient net current assets to pay the proffered wage. No information has been provided for the years 2001, 2006 and 2007, or any year subsequent from 2008 to 2010.

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.

On appeal, counsel asserts that it employed and paid the beneficiary wages during the years 2002, 2003, 2004, 2005 and 2007, and that the petitioner's net current assets do demonstrate its ability to pay the proffered wage for those years when added to the wages paid to the beneficiary for those years. As noted herein, the petitioner must resolve the discrepancy in the EIN and company name before the W-2 evidence of wages paid to the beneficiary will be considered.¹⁸ Further, no evidence of wages paid to the beneficiary (by any company) was provided for the years 2001, 2002, 2006, 2007, 2008, 2009 or 2010. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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

¹⁸ Even if the W-2s and the tax returns could be accepted as evidence of the petitioner's ability to pay the proffered wage, which has not been established, the W-2s in combination with the net current assets would only establish the ability to pay in two years: 2003 and 2004. The petitioner must establish its continuing ability to pay the proffered wage from the April 30, 2001 priority date onward.

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, it is not clear that the financial evidence submitted can be used to establish the petitioner's ability to pay the proffered wage. The tax returns submitted report a significant decrease in gross receipts from the business (by more than two-thirds). The total salaries and wages paid as reported on the tax return also decreased significantly (from \$36,556 in 2004 to \$13,650 in 2005). The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage from the priority date onward. The petitioner has not established a record of sustained growth and profitability during the petitioner's business history, or that unusual factors existed which adversely affected the petitioner's profitability. The petitioner must also resolve the inconsistencies in its federal EIN as discussed above and the issue of any successorship between the three entities, [REDACTED], and [REDACTED], if any.¹⁹ 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 beginning on the priority date of April 30, 2001.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director,²⁰ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red*

¹⁹ *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), "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."

²⁰ 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).

Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the position offered, as a gas station manager, or two years of experience in the related occupation of manager – retail consumer business. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a manager with [REDACTED] in the Ivory Coast, from September 1985 to December 1992.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [REDACTED] [REDACTED] claims to have been a cook at the [REDACTED] from 1980 to June 1995, while the beneficiary was the manager. Letters from co-workers are insufficient to establish that the beneficiary possessed the required two years of experience as stated on the labor certification.

Further, the record reflects that the beneficiary was in the U.S. for part of this time period, the exact length of time is unknown. However, that calls into question the veracity of the evidence. See *Matter of Ho*, 19 I&N Dec. at 591-592, which 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." Additionally, as noted above, "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." *Id.*

Absent independent, additional evidence of the beneficiary's experience, the letter from [REDACTED] [REDACTED] alone cannot be accepted to establish that the beneficiary possessed the required two years of experience set forth on the labor certification by the priority date.

The evidence in the record does not sufficiently establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date without resolution of the issues set forth above. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.