

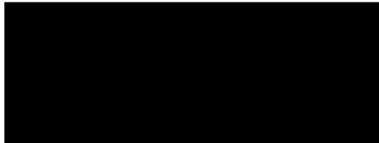
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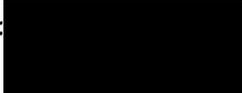
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

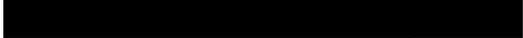


U.S. Citizenship
and Immigration
Services



B6

DATE: JUL 13 2012 OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

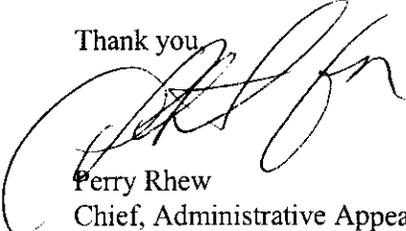
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a "Specialty Cook/Japanese." 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 record shows that the appeal is properly filed and 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 March 26, 2009 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 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 26, 2001. The proffered wage as stated on the Form ETA 750 is \$10.25 per hour (\$21,320 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 2000 and to currently employ four workers. On the Form ETA 750B, signed by the beneficiary on April 18, 2001, the beneficiary did not claim to have worked for the petitioner.

The Form ETA 750 was filed by [REDACTED], with an Employer Identification Number (EIN) of [REDACTED]. The Form I-140 was filed by [REDACTED] EIN [REDACTED] listing the same address as the Form ETA 750 applicant. The petitioner submits no documentation specifically claiming to be the successor-in-interest to the labor certification applicant. The labor certification applicant, however, submitted a letter dated March 3, 2009 stating that he was the past owner of [REDACTED] restaurant “which processed a Labor Certification Application on behalf of the above-referenced individual [the beneficiary]. This restaurant was a healthy business and supported myself well. Unfortunately, due to health reasons, I had to sell it.” The labor certification applicant further stated that “[t]hroughout my period of ownership, I continued in the desire to process the case for [the beneficiary]. The owner who purchased my business, James Song, has, to my knowledge continued in the support.” Additional documentation was provided in the form of past tax returns of the labor certification applicant.

The documentation submitted does not establish that the Form I-140 petitioner is the successor-in-interest to the entity who filed the Form ETA 750. 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-

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 past, some USCIS Service Center Directors 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.² *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.³

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁴ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three

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

³ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

⁴ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

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.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. With the exception of a statement from the labor certification applicant stating that it sold its business to the petitioner, there is no documentation which fully describes and documents a transaction transferring ownership of all, or a relevant part of, the initial labor certification applicant's business. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, and as hereinafter discussed, the petitioner has failed to prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. The petitioner should address the successor-in-interest deficiencies in any future filings with respect to the purchase of all the predecessor's assets and liabilities, and submit relevant evidence in support of any such claim.

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. The petitioner did submit, however, copies of W-2 Forms showing that the beneficiary was paid wages as follows:

- 2008 - \$15,960 (Form I-140 petitioner, [REDACTED] employer, Employer Identification Number (EIN) [REDACTED])
- 2007 - \$15,540 [REDACTED]
- 2006 - Not Provided
- 2005 - \$5,500 [REDACTED]
- 2005 - [REDACTED], the employer listed on the labor certification,
- 2004 - [REDACTED] the employer listed on the labor certification,
- 2003 - [REDACTED] the employer listed on the labor certification,
- 2002 - [REDACTED]
- 2001 - [REDACTED] the employer listed on the labor certification,

The above indicates that the beneficiary was paid wages by the asserted successor petitioner and initial labor certification applicant, but less than the full proffered wage. As such, it will be

⁵ The 2008 W-2 Form lists the beneficiary's social security number as beginning with 610. The Form I-140 does not state a social security number for the beneficiary and the section in Part 3 asking for that information was left blank. The W-2 Forms submitted for 2007, 2005, 2004, 2003 and 2001 state the beneficiary's social security number as beginning with 657. The discrepancy in the social security numbers provided is not explained in the record and should be addressed by the petitioner in any future filings as the discrepancies call into question the validity of the Forms W-2. 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. 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. 582, 591 (BIA 1988).

necessary for the petitioner to establish that it (and the initial labor certification applicant until the date of transfer) has the ability to pay the difference between the proffered wage and the wages paid to the beneficiary. Those sums are as follows:

- 2008 - \$5,360.
- 2007 - \$5,780.
- 2006 - \$21,320 (Full proffered wage, proof of wages not provided).
- 2005 - \$15,820 (Based on wages paid by the present Form I-140 petitioner).
- 2005 - \$12,220 (Based on wages paid by the labor certification applicant).
- 2004 - \$4,631.56 (Based on wages paid by the labor certification applicant).
- 2003 - \$4,652.49 (Based on wages paid by the labor certification applicant).
- 2002 - \$21,320 (Full proffered wage, proof of wages not provided).
- 2001 - \$6,222.50 (Based on wages paid by the labor certification applicant).

As noted above, proof of wages was submitted showing wages paid by the petitioner and the initial labor certification applicant [REDACTED]. In order to accept all the wages paid, as properly attributable to the petitioner's ability to pay the proffered wage, the petitioner must establish that it is the proper successor-in-interest to the initial labor certification applicant and resolve the issue related to the social security number listed on the beneficiary's W-2 Forms.

For the purpose of the ability to pay the proffered wage analysis, the AAO shall discuss the tax returns of the labor certification applicant, although the petitioner must establish that it is the successor-in-interest to the labor certification applicant to continue processing under the labor certification.

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 petitioner is 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, in a Request for Evidence (RFE) dated January 29, 2009, the director specifically asked the petitioner to provide his personal household expenses and those of any dependents. Despite the request, the petitioner did not provide those expenses. Thus, it cannot be determined that the petitioner had the ability to pay the proffered wage in any year. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The director also noted this deficiency in his decision, but the petitioner failed to submit any documentation on appeal. Further, had a successor relationship been established between the petitioner and the initial labor certification applicant, and it has not been so established, the personal household expenses of the predecessor employer (also a sole proprietor) and any dependents would also be required in an ability to pay analysis and those expenses were not provided either.

The proprietor's tax returns reflect the following information for the following years:

- Proprietor's 2007 adjusted gross income (Form 1040, line 37) is \$212,465.
- Proprietor's 2006 adjusted gross income (Form 1040, line 37) is \$279,416.
- Proprietor's 2005 adjusted gross income (Form 1040, line 37) is \$93,583.

- The initial labor certification applicant's owner stated a 2005 adjusted gross income (Form 1040, line 37) of \$40,613.
- The initial labor certification applicant's owner stated a 2004 adjusted gross income (Form 1040, line 36) of \$14,460.
- The initial labor certification applicant's owner stated a 2003 adjusted gross income (Form 1040, line 34) of \$6,370.
- The initial labor certification applicant's owner stated a 2002 adjusted gross income (Form 1040, line 35) of \$6,108.
- The initial labor certification applicant's owner stated a 2001 adjusted gross income (Form 1040, line 33) of \$2,613.

In 2005, 2006 and 2007, the sole proprietor's tax returns appear to state sufficient adjusted gross income to pay the proffered wage, or the difference between the proffered wage and wages actually

paid to the beneficiary upon resolution of the issue of successorship, the beneficiary's social security number and the sole proprietor's personal expenses. The initial labor certification applicant's tax returns would state sufficient adjusted gross income to pay the difference between the proffered wage and wages paid to the beneficiary in 2001, 2003 and 2004 upon resolution of the issues related to the beneficiary's social security number. However, the sole proprietor must establish that it can pay his personal expenses as well. These amounts appear to be insufficient to pay both the remainder of the wage and the sole proprietor's personal expenses. Additionally, the labor certification applicant's adjusted gross income does not state sufficient adjusted gross income to pay the full proffered wage in 2002, a year in which no proof of wages paid to the beneficiary was submitted. Additionally, as previously noted, however, neither the present petitioner or the labor certification applicant submitted proof of their family household expenses. Again, as noted above, the petitioner and the labor certification applicant must establish not only the ability to pay the proffered wage or difference between the proffered wage and wages paid to the beneficiary, but their own personal expenses and those of any dependents. Those personal expenses were not submitted for consideration and the AAO cannot conclude that either sole proprietor can pay his personal expenses without those figures. Thus, neither the petitioner nor the labor certification applicant has established the ability to pay the required wages during any year from 2001 through 2007.

On appeal, counsel asserts that the petitioner's business is flourishing, that the petitioner has complied with all legal obligations and debt throughout its history, and that its continued existence establishes its ability to pay the proffered wage. Counsel stated that additional documentation establishing the petitioner's ability to pay required wages would be submitted. To date, no additional documentation has been submitted.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not submitted sufficient documentation to establish its ability to pay the proffered wage from the 2001 priority date onward. The petitioner submitted its tax records for 2005, 2006 and 2007. The petitioner did not establish that it was the successor-in-interest to the initial labor certification applicant. The petitioner did not submit his personal living expenses and those of his dependents, even though requested by the director in a RFE and noted in the director's decision that those expenses were lacking. The petitioner must not only establish the ability to pay the proffered wage from his adjusted gross income but his normal living expenses and those of any dependents as well. The failure to present these expenses for consideration prohibits a determination of the petitioner's ability to pay the required wages, and lacking such evidence, a determination on *Sonegawa* also cannot be reached. 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 from the priority date onward.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.