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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: Office: TEXAS SERVICE CENTER

**JUL 17 2012**

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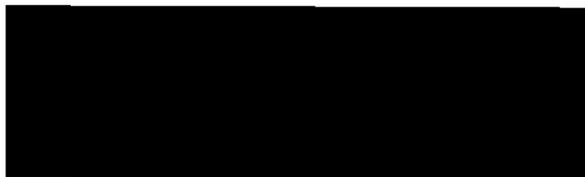


IN RE: Petitioner:  
Beneficiary:



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 was a subsurface excavating pipe installation business. It sought to employ the beneficiary permanently in the United States as an excavating supervisor. 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, 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 denial dated March 18, 2009, the primary 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.

As a threshold matter, the appeal must be dismissed as moot because the petitioner is no longer in business and the record is devoid of evidence establishing that a different business entity has become a successor-in-interest to the petitioner. Accordingly, it has not been established that the petition is still accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). The original employer identified in the Form ETA 750 and Form I-140 is [REDACTED] which was dissolved as of October 26, 2011. The only way for a different business entity, such as [REDACTED], to be able to use a Form ETA 750 approved for a different employer (and the Form I-140) is if [REDACTED] establishes that it is a successor-in-interest to [REDACTED]. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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 that 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 id.* 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 proffered wage to the beneficiary. 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 successor must establish its 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 Repair Shop, Inc.*, 19 I&N Dec. at 482.

In this matter, the record is devoid of evidence establishing that [REDACTED] is a successor-in-interest to [REDACTED] which filed the labor certification application. In response to the AAO's Notice of Intent to Dismiss, the petitioner provided two statements from the petitioner's president who indicated that the petitioning business was dissolved and a successor-in-interest was created therefrom. The petitioner also submitted as evidence a copy of [REDACTED] Certificate of Incorporation dated October 7, 2009 and the NYS Department of State corporate status print-out for [REDACTED] which indicates its status as "active." The petitioner submitted copies of [REDACTED]'s utility bills and a letter concerning its agreement with Payroll Services Plus to pay wages to [REDACTED]'s employees. However, the record does not contain any evidence detailing the transaction, such as an agreement of sale, bill of sale, or any other record documenting the transaction in detail. Although counsel claims that the petitioner's owners dissolved the petitioner's business and one of the owners created a new successor-in-interest corporation, and that all aspects of the business remain the same referencing job location, employees, equipment, telephone number, etc., there is no evidence in the record to substantiate such claim. Rather, it appears that the new business was formed in 2009 but that the petitioner was not formally dissolved until 2011. Furthermore, while counsel claims that the petitioner's assets, liabilities, employees, clients and location were transferred to [REDACTED], the record contains no evidence substantiating this claim. Shutting down one business and then forming a new one does not establish a successor-in-interest relationship absent evidence of a transfer of essential assets and liabilities.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The record also does not establish the purported successor's continuing ability to pay the proffered wage subsequent to its claimed successorship. Therefore, as the petitioner is no longer in business and it has not been established that [REDACTED] is a successor-in-interest the appeal will be dismissed for this additional reason. 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 (9<sup>th</sup> 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).

Regardless, even if the AAO were to take into consideration the evidence of wages paid by the petitioner and the alleged successor-in-interest relationship, it would be insufficient to establish the petitioner's ability to pay the proffered wage.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on February 11, 2005. The proffered wage as stated on the Form ETA 750 is \$908.00 per week (\$47,216.00 per year). The Form ETA 750 at part 14 states that the position requires two years of experience in the job offered or two years of experience in a related occupation, heavy machine operator.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145. 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 an S corporation. On the petition, the petitioner claimed to have been established in 1997, and that it currently employs 20 plus workers. According to the tax returns in the record, the petitioner's fiscal year was based on a calendar year. On the Form ETA 750B, signed by the beneficiary on February 3, 2005, the beneficiary claims to have been employed by the petitioner since January 2004.

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<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 at 8 C.F.R. § 103.2(a)(1).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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. 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 and/or its claimed successor submitted copies of Forms W-2 and other evidence of wages paid to the beneficiary as shown in the table below:

- In 2005, the payroll statements issued by the petitioner stated total wages of \$14,259.00 (a deficiency of \$32,957.00).
- In 2006, the payroll statements issued by the petitioner stated total wages of \$29,661.00 (a deficiency of \$17,555.00).
- In 2007, the payroll statements issued to the petitioner stated total wages of \$29,010.00 (a deficiency of \$18,206.00).
- In 2008, the IRS Form W-2 issued by Payroll [REDACTED], on behalf of the petitioner, stated total wages of \$50,868.00.
- In 2009, the IRS Form W-2 issued by Payroll [REDACTED] on behalf of the petitioner, stated total wages of \$36,900.00 (a deficiency of \$10,316.00).
- In 2010, the petitioner did not submit any wage statements for the beneficiary.
- In 2011, the IRS Form W-2 issued by [REDACTED] on behalf of [REDACTED] stated total wages of \$34,366.00 (a deficiency of \$12,850.00).
- In 2012, the payroll statements issued for [REDACTED], year-to-date payroll amount as of June 15, 2012 of \$6,307.00.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage in 2005, 2006, 2007, 2009, and 2011 or that the petitioner paid wages to the beneficiary in 2010.

If, as in this case, 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's 2006 federal income tax return is the most recent return in the record. The petitioner did not submit a 2007 tax return even though counsel's cover letter with the appeal indicated it was enclosed. The petitioner also did not submit a 2008 tax return even though counsel indicated on April 17, 2009 that it would be submitted. The proffered wage is \$47,216.00.

The petitioner's 1120S<sup>2</sup> tax returns demonstrate its net income as shown in the table below:

- In 2005, the Form 1120S stated net income of \$5,091.00.
- In 2006, the Form 1120S stated net income of -\$344,110.00.

Therefore, for the years 2005, 2006, 2007, 2009, 2010, and 2011, the petitioner did not have sufficient net income to pay the proffered wage or to pay the difference between the wages paid and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 petitioner's tax return demonstrates its net current assets as shown in the table below:

- In 2005, the Form 1120S stated net current assets of -\$427,049.00.
- In 2006, the Form 1120S stated net current assets of -\$26,023.00.

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<sup>2</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2012) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

<sup>3</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 salaries). *Id.* at 118.

Therefore, for the years 2005, 2006, 2007, 2009, 2010, and 2011, the petitioner did not have sufficient net current assets to pay the proffered wage or to pay the difference between the wages paid and the proffered wage.

Accordingly, from the date the labor certification 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 the director failed to consider all of the facts and evidence in the case in order to obtain an accurate account of the petitioner's financial ability to pay the proffered wage.

Counsel asserts that USCIS should add back depreciation to the petitioner's net income. However, as noted above, both USCIS and the federal courts have concluded that adding back depreciation to net income overstates the petitioner's ability to pay the proffered wage. Depreciation is a real expense. *See, e.g., River Street Donuts, LLC.*

Counsel asserts that the petitioner's line of credit should be taken into consideration in determining the petitioner's ability to pay the proffered wage. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See John Downes and Jordan Elliot Goodman, Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Counsel asserts that the petitioner's bank balances should be taken into consideration in determining his ability to pay the proffered wage. The petitioner submits a copy of its bank statements for periods in 2005 through 2009. Reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Although counsel claims that the petitioner's gross receipts have increased over time and that its wage expenses have always been met, reliance on the petitioner's gross receipts and wage expenses to establish the petitioner's ability to pay the proffered wage is misplaced. As noted above, USCIS properly relies on the petitioner's net income, as stated on the petitioner's corporate tax returns. *River Street Donuts, LLC v. Napolitano*, 558 F.3d at 116; *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Furthermore, inventory amounts are taken into consideration in assessing the net current asset amounts, which in the petitioner's case is negative and below the proffered wage amount. Finally, although counsel and the petitioner's CPA indicated in its letter dated July 18, 2007 that the petitioner's gross sales and gross profit for 2007 and 2008 were in excess of the proffered wage amount, this statement does not consider the expenses and costs of setting these amounts.

The evidence presented on appeal cannot be concluded to outweigh the evidence of record 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. 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 *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 assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. Finally, as noted above, the petitioner no longer exists, and it has not been established that it has been succeeded by another entity. Overall, given the record as a whole, the petitioner has not established that the job offer was credible in 2005 and thereafter.

Accordingly, 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, the petitioner has failed to establish that the beneficiary has two years of experience in the job offered or in a related occupation. On the Form ETA 750 and Form I-140, the petitioner described the specific job duties to be performed by the beneficiary as an excavating supervisor. The petitioner submitted a letter from a representative of [REDACTED] who stated that the company employed the beneficiary as a heavy machinery and excavation operator from May 18, 1998 through August 14, 2001. Here, the declarant does not provide a specific description of the beneficiary's job duties. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is February 11, 2005. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner has failed to establish the beneficiary's qualifications as of the priority date. For this additional reason, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.