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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: **JUN 01 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 with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a Programmer Analyst. 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 a successor-in-interest relationship exists between the petitioner on Form I-140 and AIT Technologies, Inc., the entity listed on Form ETA 750. Additionally, the director determined that the petitioner did not demonstrate that AIT Technologies had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition until the date of merger on June 2, 2006. Additionally, the director determined that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position. 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.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On December 13, 2004, [REDACTED] filed the labor certification with the DOL for the occupation of programmer analyst.¹ The DOL certified the labor certification on August 21, 2006. Prior to that date, on June 2, 2006, the petitioner merged with [REDACTED] and the petitioner became the surviving corporation.

On July 11, 2007, the petitioner filed the Form I-140, Immigrant Petition for Alien Worker, with USCIS. The petitioner, [REDACTED], merged with [REDACTED] and claims it is therefore a successor-in-interest for the purposes of the petition. The petitioner submitted the following

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

documentation in support of its claim:

1. Certificate of Merger of [REDACTED] and [REDACTED], stamped "filed" on June 2, 2006 by the State Treasurer.;
2. Plan of Merger of [REDACTED] and [REDACTED] signed by the petitioner's President and [REDACTED] President.

On October 16, 2008, the director denied the petition in part after finding that the petitioner failed to establish that it is entitled to use the labor certification as a "successor-in-interest" to [REDACTED]. In the context of general corporate law, a successor is a business organization that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of a predecessor business organization. *See Black's Law Dictionary* 1569 (9th ed. 2009).

The petitioner subsequently appealed the decision to the AAO. The record shows that the appeal was properly filed, timely, and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a de novo basis. *See Soltane v. United States Dept. of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

The director concluded that that the petitioner is not a successor-in-interest to [REDACTED] because the petitioner did not assume "all of the rights, duties, obligations and assets of the original employer."

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 the relevant parts 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 can establish eligibility for the immigrant visa in all respects.

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 or asset transaction, 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.

Here, the petitioner has demonstrated that it is the surviving corporation of a merger with [REDACTED]. In support of the appeal, the petitioner submits a copy of New Jersey Business Law 14A:10-6, which describes the effect of a merger on a surviving corporation. Specifically, the law

states: "such surviving or new corporation shall...possess all the rights, privileges, powers, immunities, purposes and franchises...of the merging or consolidating corporations." The law also states that, "all real property and personal property tangible and intangible, of every kind . . . belonging to each of the corporations so merged or consolidated shall be vested in the surviving or new corporation without further act or deed." The law further states: "the surviving corporation shall be liable for all the obligations and liabilities of each of the corporations so merged." Therefore, the AAO finds that the petitioner acquired all the rights, duties, assets and liabilities of the predecessor petitioner.

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 successor's essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482. Here, the I-140 petition filed by the petitioner on July 11, 2007, shows that the job opportunity offered by the petitioner remains identical to the job offer as stated on Form ETA 750, which was filed by [REDACTED]. However, a search of the Minnesota Business and Lien System, Office of the Minnesota Secretary of State (<http://mblsportal.sos.state.mn.us/>, last accessed February 23, 2012), does not indicate that the petitioner holds, or has ever held, a license to conduct business in the state of Minnesota, the location of the certified job offer.² It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the claim to successorship fails on this aspect as it is unclear that the job offer in Minnesota, the stated work location on the labor certification, remains valid. This issue must be addressed in any further filings.

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.

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

² The Minnesota website reflects that [REDACTED] foreign corporate status was revoked as of [REDACTED] 2006, and that its current status is "inactive." *See* <http://mblsportal.sos.state.mn.us/Business/> [REDACTED] (accessed May 25, 2012).

Even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

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.

Both the predecessor and the petitioning successor 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 December 13, 2004. The proffered wage as stated on the Form ETA 750 is \$81,058 per year.³ The Form ETA 750 states that the position requires a Bachelor's degree in Computers, MIS, or Engineering and two years of experience in the job offered or two years of experience in the related occupation of System Analyst, Programmer, Consultant, Software Engineer, or Associate Member.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

The evidence in the record of proceeding shows that the predecessor is structured as a C corporation. According to the tax returns in the record, the predecessor's fiscal year is August 1 to July 31. On the Form ETA 750B, signed by the beneficiary on June 22, 2007, the beneficiary claimed to have worked for the predecessor petitioner from June 2003 to February 2005. The predecessor merged with the petitioner on June 2, 2006. The petitioner is structured as an S corporation and its fiscal year is based on the calendar year.

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 predecessor and the petitioner's ability to pay the proffered wage is an

³ The petition states that the beneficiary will be paid \$86,000 per year.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 predecessor established that it employed and paid the beneficiary the partial wages from the priority date until the date of merger, June 2, 2006. Specifically, the predecessor demonstrated that it paid the beneficiary \$56,884.95 in 2004 and \$13,575.62 in 2005. The petitioner did not submit evidence that it paid the beneficiary any wages in 2006. Therefore, the petitioner must show that the predecessor had the ability to pay the remainder of the proffered wage of \$29,115.05 and \$72,424.38 for 2004 and 2005, respectively. The petitioner must show that it can pay the full proffered wage in 2006.

If the predecessor or 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). 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 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).

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 predecessor’s last tax return just before the merger closed was in 2005 for its fiscal year of August 1, 2005 to June 2, 2006. The predecessor’s tax returns demonstrate its net income for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120 stated net income of -\$12,376.
- In 2005, the Form 1120 stated net income of -\$10,373.

Therefore, for the years 2004 and 2005, the predecessor did not have sufficient net income to pay the proffered wage.

Additionally, the petitioner is an S Corporation. 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. The petitioner’s net income for 2006 was \$188,173.

However, according to USCIS records, the petitioner filed 661 I-129 and I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). The AAO also notes that the petitioner’s predecessor filed 53 I-129 and I-140 petitions and must establish that it can pay the proffered wage to all sponsored workers from their respective priority

dates until permanent residence is obtained. As the predecessor cannot establish its ability to pay the instant beneficiary in 2004 and 2005, it also cannot establish its ability to pay all of its sponsored workers in 2004 and 2005.

In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage. Here, the record contains no information as evidence that it has the ability to pay the proffered wage to the beneficiary after accounting for the 661 petitions it has filed on behalf of its employees, or the 53 petitions filed by its predecessor. Therefore, the petitioner did not demonstrate that it had sufficient net income to pay the proffered wage in 2006. The petitioner would need to address the issue of multiple sponsored workers for both the original entity and the present petitioner in any further filings.

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.⁵ 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 predecessor's tax returns demonstrate its end-of-year net current assets for 2004 and 2005, as shown in the table below.

- In 2004, the Form 1120 stated net current assets of \$7,857.
- In 2005, the Form 1120 stated net current assets of \$0.

Therefore, for the years 2004 and 2005, the predecessor did not have sufficient net current assets to pay the proffered wage, or the difference between the wages paid and the proffered wage.

⁵According 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.

Additionally, the petitioner's 2006 Form 1120S stated net assets of -\$101,335, demonstrating that it did not have any net assets to pay the proffered wage to this beneficiary, or any of its other sponsored workers.

Therefore, for 2004 and 2005, the petitioner had not established that the predecessor had the 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. For 2006, as set forth above, based on the other petitions that the petitioner filed, we cannot conclude that the petitioner can establish its ability to pay the proffered wage in 2006.

On appeal, counsel states that the predecessor's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed January 9, 2012). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.⁶ The amounts shown on the predecessor's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

Counsel also asserts that the AAO should consider the predecessor's bank statements from December 13, 2004 to June 2, 2006 as evidence of ability to pay the proffered wage for 2004 and 2005. Counsel's reliance on the monthly balances in the predecessor'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 predecessor. 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 predecessor's bank statements somehow reflect additional available funds that were not reflected on its tax return(s),

⁶ Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed January 10, 2012).

such as the predecessor's taxable income (income minus deductions) or the cash specified on Schedule L that have already been considered in determining the predecessor's net current assets.

Additionally, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. 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.

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 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 did not submit any evidence as to the predecessor's longevity or evidence of its number of employees. The tax returns reflect negative net income and low net current assets. The predecessor has sponsored multiple workers and must establish that it can pay all its sponsored workers. There is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. Thus, assessing the totality of

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

Additionally, as mentioned above, the petitioner has not demonstrated that it had the ability to pay the proffered wage as of the date of the merger due to the fact that it filed multiple petitions on behalf of other employees. The petitioner has not provided any documentation regarding its established historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The evidence submitted does not establish that the petitioner or the predecessor had the continuing ability to pay the proffered wage beginning on the priority date.

As noted above, as there is no evidence that the petitioner is registered to do business in Minnesota, it is not clear that the petitioner can establish that the job offer remains the same and, therefore, the petitioner has failed to definitively establish successorship to continue processing under the same labor certification.⁷

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.

⁷ The director also found that the petitioner failed to establish that the beneficiary had the two years of experience required by the labor certification. The petitioner submitted two additional experience letters on appeal consistent with experience listed on Form ETA 750. The three letters in the record collectively are sufficient to overcome this issue on appeal. See 8 C.F.R. § 204.5(l)(3)(ii)(A). However, as noted above, the petitioner has failed to establish its ability to pay the proffered wage, or that the new entity can continue processing under the same labor certification based on successorship.