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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

[Redacted]

B6

DATE: JUN 18 2012 Office: NEBRASKA SERVICE CENTER

[Redacted]

IN RE:

[Redacted]

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:

[Redacted]

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a nursery/pre-school. It seeks to employ the beneficiary permanently in the United States as a pre-school teacher. 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 failed to establish its ability to pay the proffered wage. 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 March 20, 2009 denial, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on August 23, 2004. The proffered wage as stated on the Form ETA 750 is \$15,000.00 per year. The Form ETA 750 states that the position requires 4 years of college, a bachelor's degree in education, and two years of experience in the job offered.

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, at the time of filing the labor certification and the Form I-140 petitioner, was an S corporation. The petitioner indicated on its corporate tax returns that it was incorporated in 1991, and, on the petition, that it employed 29 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on August 13, 2004, the beneficiary claims to have been employed by the petitioner since August 2002.

During the adjudication of the appeal, evidence has come to light that in this matter the petitioning business' status is inactive. The Florida Division of Corporations [REDACTED] indicates that the petitioner, [REDACTED] was administratively dissolved on September 25, 2009, and that its current status is inactive. Counsel asserts on appeal that the petitioner merged into [REDACTED] in 2007; and therefore, the latter's assets should also be taken into consideration in determining the petitioner's ability to pay the proffered wage. The record shows that [REDACTED] has a Federal Employer Identification Number (EIN) of [REDACTED] but that [REDACTED] has an EIN number of [REDACTED]. The petitioner submitted a letter from [REDACTED] of [REDACTED] who stated that the business sold its building to [REDACTED] in the summer of 2007, and that its childcare facilities were merged into [REDACTED] at that time. On appeal, counsel asserts that [REDACTED] has merged with [REDACTED], whose address, functions and owner are the same, and that [REDACTED] is currently in active status.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application 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).

¹ 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).

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), and the generally accepted definition of successor-in-interest, a claimed successor 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. *See id.*, 19 I&N Dec. at 482. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. *See Matter of International Contractors, Inc.*, 89-INA-278 (BALCA Jun. 13, 1990). Third, the petitioning successor must prove that it is eligible for the immigrant visa in all respects. *See* 8 C.F.R. § 204.5(1)(3). The burden is on the petitioner to establish each of the three elements by a preponderance of the evidence. *See* 8 U.S.C. § 1361; *see also Matter of Chawathe*, 25 I&N Dec. 369, 374-76 (AAO 2010).

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 Repair Shop, Inc.*, 19 I&N Dec. at 482; *see also Matter of Horizon Science Academy*, 2006-INA-46 (BALCA Mar. 8, 2007).

In order to establish eligibility for the immigrant visa in all respects, the petitioning successor must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage. 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 Repair Shop, Inc.*, 19 I&N Dec. at 482.

A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. Black's Law Dictionary 1473 (8th ed. 2004); *see also 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. While 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, 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 in the same manner with regard to the assets sold. *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

The record in this case lacks sufficient evidence that [REDACTED] is a successor-in-interest to [REDACTED] having assumed the rights, duties, obligations and assets of the original employer [REDACTED]. There is no evidence of a bill of sale, formal merger agreement, or the original petitioner's dissolution/asset transfer filings. Furthermore, it appears from the record that the petitioner remained in active status until

September 25, 2009, when it was administratively dissolved, which is two years after the alleged merger. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO reviews appeals on a *de novo* basis).

The fact that [REDACTED] is owned and operated by the same shareholder is not sufficient alone to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the [REDACTED] is a successor-in-interest to the petitioner. Accordingly, the petitioner is no longer accompanied by a labor certification which pertains to the offered position. *See* 8 C.F.R. § 204.5 (1)(3); 20 C.F.R. § 656.30(c)(2).

Even if the AAO were to consider [REDACTED] as a successor-in-interest, the petitioner has failed to demonstrate its ability to pay the proffered wage, as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 record of proceeding contains copies of IRS Forms W-2, Wage and Tax Statements prepared by [REDACTED] (formally known as [REDACTED]) whose EIN number is [REDACTED] [REDACTED] which differs from the petitioner's EIN number. In a letter dated November 27, 2007, counsel for [REDACTED] stated that the company entered into a contractual relationship with [REDACTED] on May 1, 2003, whereby the company agreed to provide payroll services and workers' compensation coverage for the leased employees from [REDACTED] [REDACTED]

The proffered annual wage in this case is \$15,000.00. The petitioner submitted copies of Forms W-2 issued by [REDACTED] as shown in the table below:

- In 2004, the IRS Form W-2 stated total wages of \$11,860.00.
- In 2005, the IRS Form W-2 stated total wages of \$12,196.52.
- In 2006, the IRS Form W-2 stated total wages of \$7,592.00.
- In 2007, the IRS Form W-2 stated total wages of \$13,100.39.
- In 2008, the IRS Form W-2 stated total wages of \$14,345.25.

- In 2009, [REDACTED] issued a pay stub for January 2009, with a year-to-date amount of \$522.00.

Contrary to the petitioner's claim, the record of proceeding does not contain sufficient documentation to establish that the payments to the beneficiary from [REDACTED] are as a result of the beneficiary being employed by the petitioner, [REDACTED], or, just as important, that the wages paid to the beneficiary represents funds originating with the petitioning S corporation. 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). The petitioner has failed to provide evidence to demonstrate that [REDACTED] serves as its payroll company and not as the beneficiary's employer; therefore, the W-2, Wage and Tax Statements, submitted by the petitioner for the 2004, 2005, 2006, 2007, and 2008 tax years cannot be considered as evidence of the petitioner's ability to pay the proffered wage. Regardless, even assuming that the Forms W-2 were persuasive evidence, in subtracting the total claimed wage amounts from the proffered wage, it is determined that the petitioner has failed to demonstrate its ability to pay the proffered wage since the priority date. Although counsel asserts that the wage amount received by the beneficiary in 2008 exceeds the proffered wage amount, the Form W-2 for 2008 submitted as evidence does not substantiate counsel's claim.

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 (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 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 available. The proffered wage is \$15,000.00.²

The petitioner’s 1120S³ tax returns demonstrate its net income as shown in the table below:

- In 2004, the Form 1120S stated net income of \$7,301.00.
- In 2005, the Form 1120S stated net income of \$64,868.00.
- In 2006, the Form 1120S stated net income of -\$76,324.00.

² As noted above, the petitioner submitted copies of [REDACTED] tax returns for 2006 and 2007; however, the AAO will not consider these documents as evidence of the petitioner’s ability to pay the proffered wage in those years because it has not been established that a successor-in-interest relationship existed.

³ 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) of Schedule K. *See* Instructions for Form 1120S, at [REDACTED] (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

Therefore, for the years 2004 and 2006 the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net income.

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.⁴ 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 2004, the Form 1120S stated net current assets of \$18,125.00.
- In 2006, the Form 1120S stated net current assets of -\$21,140.00.

Therefore, for the year 2006, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net current assets. The petitioner has also failed to establish its ability to pay the wage in the first half of 2007 (before the alleged merger) because the record does not contain the petitioner's 2007 tax return. 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)).

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 for 2006, 2007, 2008, and 2009.

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.

The assertions 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

⁴According 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.

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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2006, 2007, 2008, and 2009. There are no facts paralleling those found 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. Counsel asserts on appeal that the beneficiary was on medical leave for part of 2006 and that this absence affected her wage amounts for that year. The petitioner has not submitted evidence to demonstrate the occurrence of any uncharacteristic business expenditures or losses in 2006 or to substantiate counsel claim. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750. Crucially, the petitioner is no longer in business and the record does not establish that a bona fide successor-in-interest relationship has been formed. The certified job opportunity no longer exists.

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

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.