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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

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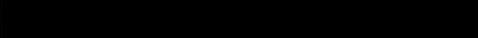


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Date: **MAR 14 2012**

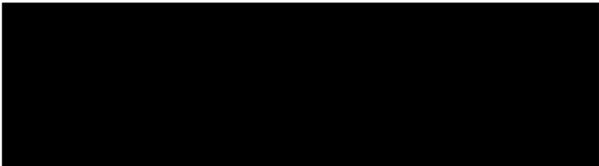
Office: NEBRASKA SERVICE CENTER

File: 

IN RE: Petitioner   
Beneficiary 

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Thank you,

*Elizabeth McCormack*

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. 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 denied the petition, stating that the record did not contain evidence of the petitioner's continuing ability to pay the beneficiary the proffered wage from the priority date onward. The director denied the petition accordingly.<sup>1</sup>

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 January 23, 2009 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary nature, for which qualified workers are not available in the United States.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

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<sup>1</sup> The director's decision cites to the requirement to submit initial evidence of the petitioner's ability to pay. The record contains such evidence. The decision states that the net income was less than the proffered wage, but that "USCIS was not given the Net Current Assets for 2001, 2002, 2003, 2004, and 2005" to fully determine the petitioner's ability to pay the proffered wage.

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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.52 per hour (\$19,801 per year). The Form ETA 750 states that the position requires one year of experience as a cook.

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a partnership and filed its tax returns on IRS Form 1065. On the petition, the petitioner claimed to have been established in 2006 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, the beneficiary stated that he began working for the petitioner in July 2000.

Form ETA 750 states the labor certification applicant is [REDACTED] Form I-140, filed October 12, 2007, states the petitioner's Employer Identification Number (EIN) as [REDACTED]. The petitioner submitted 2001 and 2002 tax returns for [REDACTED] located at [REDACTED], EIN [REDACTED]. The 2003, 2004, and 2005 tax returns state the partnership name as [REDACTED] with the same address and EIN as those appearing on the 2001 and 2002 returns. The 2006 and 2007 tax returns state the partnership name as [REDACTED] with an address of [REDACTED] and an EIN of [REDACTED], the same EIN listed on the petition.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other

assumption of interests.<sup>3</sup> *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.<sup>4</sup>

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>5</sup> *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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

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<sup>3</sup> Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

<sup>4</sup> For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

<sup>5</sup> The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

On appeal, the petitioner submitted evidence that it purchased all of the predecessor's assets. This evidence included a Notice to Creditors of Bulk Sale of all "furniture, fixtures and equipment, tradename, goodwill, lease, leasehold improvement, and covenant not to compete" from [REDACTED] dated August 23, 2006. The petitioner also submitted a Fictitious Business Name Statement stating that [REDACTED] would be doing business as [REDACTED] and a letter from the previous owner verifying the sale of [REDACTED]. With the Form I-140, the petitioner submitted a letter from [REDACTED], operator of [REDACTED] until it was sold to [REDACTED] stating that the beneficiary was a full time employee at [REDACTED] beginning in 2000 and continuing to the date of sale. The petitioner submitted an offer of employment from [REDACTED] to

the beneficiary stating that [REDACTED] “look[s] forward to your continued employment and success with our organization.” In response to the AAO’s Request for Evidence (RFE), the petitioner submitted a Bill of Sale which included the aforementioned Notice to Creditors of Bulk Sale.<sup>6</sup> This evidence is sufficient to establish that Café Sol is a successor-in-interest to [REDACTED]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 submitted the following evidence:

- In 2001, the Form W-2 demonstrated that the petitioner paid the beneficiary \$16,388.<sup>7</sup>
- In 2002, the Form W-2 demonstrated that the petitioner paid the beneficiary \$15,327.
- In 2003, the Form W-2 demonstrated that the petitioner paid the beneficiary \$15,696.
- In 2004, the Form W-2 demonstrated that the petitioner paid the beneficiary \$18,659.73.
- In 2005, the Form W-2 demonstrated that the petitioner paid the beneficiary \$20,825.88.
- In 2006, the Form W-2 demonstrated that the petitioner paid the beneficiary \$25,991.70.<sup>8</sup>
- In 2007, the Form W-2 demonstrated that the petitioner paid the beneficiary \$25,247.13.
- In 2008, the Form W-2 demonstrated that the petitioner paid the beneficiary \$24,975.
- In 2009, the Form W-2 demonstrated that the petitioner paid the beneficiary \$23,950.
- In 2010, the Form W-2 demonstrated that the petitioner paid the beneficiary \$22,675.

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<sup>6</sup> The petitioner also submitted the notice sent to DOL of the petitioner’s change in ownership.

<sup>7</sup> The Forms W-2 for 2001, 2002, 2003, 2004, 2005 were issued by [REDACTED]. The Forms W-2 for 2007 and 2008 were issued by [REDACTED]. In 2006, a Form W-2 was issued from each entity. As stated above [REDACTED] is a successor-in-interest to [REDACTED] and, therefore, the Forms W-2 from both entities will be considered.

<sup>8</sup> The director in his decision stated that the petitioner had not shown that it paid the proffered wage in 2006. That part of the decision is withdrawn as the total amount paid to the beneficiary on the two Forms W-2 is in excess of the proffered wage.

The wages paid in 2005, 2006, 2007, 2008, 2009, and 2010 are more than the proffered wage and are thus sufficient to establish the petitioner's ability to pay the proffered wage for those years alone. For 2001, 2002, 2003, and 2004, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which in 2001 is \$3,413; in 2002 is \$4,474; in 2003 is \$4,105; and in 2004 is \$1,141.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 881 (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*, 696 F. Supp. 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*, 558 F.3d at 116. “[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*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on December 29, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return is the most recent return available. The petitioner’s tax returns stated its net income as detailed in the table below.

- In 2001, the petitioner’s Form 1065 stated net income of -\$12,217.<sup>9</sup>
- In 2002, the petitioner’s Form 1065 stated net income of \$6,496.
- In 2003, the petitioner’s Form 1065 stated net income of -\$16,209.
- In 2004, the petitioner’s Form 1065 stated net income of \$22,459.

If the petitioner’s incomplete tax returns accurately reflect its net income from 2001 to 2004, the petitioner has not shown that it can pay the beneficiary the difference between the wage paid and its net income in 2001 or 2003. However, as Schedule K adjustments are critical to showing the petitioner’s entire financial status, we cannot accept the incomplete copies of its tax returns, which do not give the Schedule K adjustments. Thus, the petitioner has not established that it can make up the difference between the wages paid and its net income from 2001 to 2004.<sup>10</sup>

USCIS electronic records additionally show that the petitioner filed one other Form I-140 petition, with a priority date of July 28, 2003, which has been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries

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<sup>9</sup> For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner’s did not submit its Schedules K for 2001, 2002, 2003, and 2004, therefore, its net income is found on line 22.

<sup>10</sup> The petitioner submitted a complete tax return on appeal that confirms the net income for 2004 is \$22,459. Even if this return had been timely submitted, the petitioner has not established that its net income in 2004 covers both the remaining wage for the current beneficiary and the wage of the second sponsored worker discussed.

which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The other petition submitted by the petitioner in December 2007 was approved in February 2009. In response to the AAO's RFE, the petitioner submitted Forms W-2 for the other sponsored worker from 2003 to 2010. Despite being specifically requested, the petitioner did not submit evidence of the proffered wage to this second sponsored worker, so we are unable to determine whether the petitioner paid that worker the proffered wage. The petitioner would need to establish that it could pay both beneficiaries the respective proffered wage or the difference between the wages paid and the proffered wage in 2003 and 2004.

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 assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>11</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 returns were submitted without a Schedule L in 2001 and 2003. The AAO's RFE, dated April 13, 2011, specifically requested full and complete copies of the petitioner's tax returns for 2001 to 2005. In the petitioner's May 24, 2011 response, it indicated that it had requested the tax returns from the IRS. On July 25, 2011, the petitioner sent a second letter stating that it had made a mistake with the IRS submissions and requested an additional 60 days to submit the full and complete copy of its 2001 to 2005 tax returns.<sup>12</sup> The regulation at 8 C.F.R. § 103.2(b)(8) precludes a response period to a Request for Evidence longer than twelve weeks. Twelve weeks from the date of the AAO's RFE was July 6, 2011. Additional time may not be granted. As we do not have a full and

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<sup>11</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.

<sup>12</sup> On September 20, 2011, the petitioner submitted tax returns for 2004 and 2005. In 2004, the petitioner's net current assets were \$9,948. The petitioner could pay the beneficiary the remainder between the wages paid to the beneficiary and the petitioner's net income or net current assets in 2004. However, the petitioner submitted insufficient evidence of the second sponsored worker's proffered wage. Thus, the petitioner has not shown that it can pay both of the sponsored workers in 2004, even if we were to consider the tax returns submitted after the closing date of the Request for Evidence on appeal.

complete copy of the petitioner's tax returns, we are unable to determine whether the petitioner had sufficient net current assets to pay the difference between the actual wage paid and the proffered wage for this beneficiary or the proffered wage for the other beneficiary in those years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through its net income or net current assets.

The petitioner submitted bank statements for the petitioner covering January 11 through December 31, 2001, every month of 2003, September through December 2006 and every month of 2007. Counsel's reliance on the balance in the petitioner's bank account is misplaced.<sup>13</sup> 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. We note that the petitioner sustained overdraft charges on December 26, 2006; January 8 and 30, February 1, April 26, May 15, June 7, 12, and 26, November 14, 26, and 29, and December 27 and 28, 2007. 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, such as the petitioner's taxable income (income minus deductions) or the cash that is normally specified on Schedule L. As the petitioner failed to submit the Schedule Ls as a part of its tax returns, we are unable to determine whether sufficient cash (figured in the net current assets) is available.

In response to the AAO's RFE, the petitioner submitted a letter from [REDACTED] the former owner of the petitioning entity, accompanied by profit and loss statements for 2001 to 2005. 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 represent 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.

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 (BIA 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

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<sup>13</sup> The letter from [REDACTED] stated that he was unable to obtain copies of his bank statements for 2001 and 2003. The RFE did not request bank statements and, as stated above, they are insufficient to establish the petitioner's ability to pay the proffered wage.

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 the instant case, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. The petitioner did not submit complete copies of its tax returns for all of the relevant years so that we were unable to determine its net current assets nor did it provide sufficient information about the other sponsored worker. The tax returns in the record showed a decline in gross profits and wages paid from 2001 to 2004. On appeal, counsel states that this decline was due to the events of September 11, 2001. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, such as a statement from the petitioner showing a loss or claiming specific difficulty in doing business because of that event. A broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. We note that the petitioner's gross receipts in 2007 were less than those in 2001, only slightly more than in 2002, and slightly less than those in 2004, so any argument that the petitioner suffered an uncharacteristic decline from 2001 to 2004 is unsupported by the record. While the petitioner has paid the beneficiary partial wages from the time of the priority date onward, as noted by the director, the record lacked information to calculate evidence of the petitioner's net current assets. The petitioner did not send its full tax returns on appeal for 2001 through 2005. Accordingly, we are unable to assess the petitioner's full financial picture and conclude that under the totality of the circumstances the petitioner has the ability to pay both of the beneficiaries. 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 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.