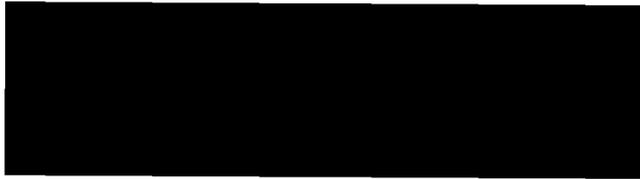


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prevent clearly unwarranted
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC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



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B6

Date: **MAY 04 2012**

Office: TEXAS SERVICE CENTER

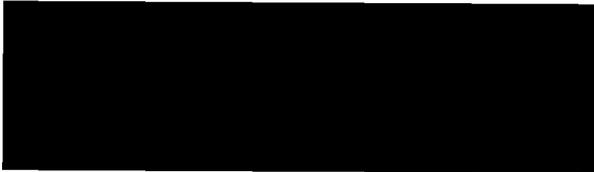
File: 

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,
Elizabeth McCormack

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 rejected.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook, a skilled worker, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of 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 who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

On February 23, 2009, the director denied the petition because the petitioner failed to submit evidence that it had the ability to pay the proffered wage from the priority date onwards and failed to submit evidence that the beneficiary has the education and experience required by the terms of the labor certification. On appeal, the AAO identified additional issues concerning the viability of the petitioner and whether the petitioning entity had a successor-in-interest as the party filing the appeal was different than the petitioning entity.

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 record shows that the appeal is 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.

On appeal, an issue arose as to whether the petitioning entity was in good standing and an active business capable of sponsoring a worker. An application or petition that fails to comply with the

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

technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On January 5, 2012, the AAO sent a Notice of Derogatory Information noting that the records for more than one entity appear in the record and requesting information concerning any relationship between the companies. No response has been received.

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 1981) ("*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 [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

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

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

In *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).

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

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.² *Id.* at 1569 (defining “successor”). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.³

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

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

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

predecessor necessary to carry on the business.⁴ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. In this case, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the 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, in this case the claimed successor on appeal must support its claim with all necessary evidence, including evidence of ability to pay. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its own ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the appealing party has not established a valid successor relationship with the petitioner, [REDACTED]. The Form I-140 was filed by [REDACTED] with an address of [REDACTED]. The Form ETA 750 was filed by [REDACTED] at the same address. Neither document contains the IRS Tax Number. The Form I-290B was filed by [REDACTED] with the same address. The tax returns in the record are for [REDACTED] with two different addresses and an Employer Identification Number (EIN) of [REDACTED] for 2001, 2002, and 2003; for 2004, 2005, 2006, and 2007, the tax returns of record are for [REDACTED], with two different addresses, neither of which is the same as the address of [REDACTED] and with an EIN of [REDACTED].

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

The tax returns of [REDACTED] indicate that it was incorporated on September 1, 1978⁵ and that it was organized as an S corporation on January 1, 1998. The 2001 through 2003 tax returns of [REDACTED] are incomplete and its ownership structure cannot be determined. The 2005 to 2007 tax returns of [REDACTED] indicate that it was incorporated on November 1, 2004 and also was organized as an S corporation. [REDACTED] the 100% shareholder of [REDACTED] from 2005 through 2007.

[REDACTED], the appellant, has not described or documented any transfer of ownership of all or part of the petitioner's assets or liabilities. Instead, [REDACTED] was formed on August 20, 2003⁶ and existed at the same time as [REDACTED] for close to two years until [REDACTED] forfeiture in 2005. In response to the AAO's RFE, counsel states:

[REDACTED] is the sole owner of the petitioner and the only successor-in-interest of [REDACTED] . . . [and] [REDACTED] was one of the original owners of three partner owners of [REDACTED]. One passed away in 1991 and in July 2003, [REDACTED] and the other owner [REDACTED] parted ways. [REDACTED] kept the restaurant interest inherited the debt and preserved the right to keep the name (which he re-named The Original Ambrosia Restaurant . . .) He then crossed the street to the present address and continued the restaurant.

In support of these assertions, counsel submitted a letter from [REDACTED] Inc. who states that [REDACTED] is the accounting firm for [REDACTED] and that [REDACTED] a successor-in-interest of [REDACTED] and is now sole owner of [REDACTED]. [REDACTED] also states that [REDACTED] is "an operating entity and an ongoing concern." This letter does not evidence the transfer of assets and liabilities from [REDACTED] stated in counsel's response. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, even if the entities have a common owner, such commonality does not establish a successor relationship without more. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to

⁵ The Maryland Department of Assessments and Taxation indicates that the company was registered on June 29, 1978. The status of the company was forfeited on October 7, 2005. See http://sdatcert3.resiusa.org/ucc_charter/CharterSearch_f.asp (accessed February 24, 2012).

⁶ The Maryland Department of Assessments and Taxation indicates that Pamm Ltd was incorporated on August 20, 2003 and that its status was forfeited on October 3, 2011. See http://sdatcert3.resiusa.org/ucc_charter/CharterSearch_f.asp (accessed February 24, 2012).

consider the financial resources of individuals or entities who have no legal obligation to pay the wage.” There is no evidence of a transfer of ownership from the former partners of [REDACTED] to [REDACTED] or that [REDACTED] acquired the rights and obligations of the petitioner. As a result, [REDACTED] has not established that it is the successor-in-interest to the petitioner. As no successor-in-interest has been established, the affected party did not file the appeal. Thus, the appeal will be rejected.

In addition to the successor-in-interest issue, the AAO noted in its RFE that both [REDACTED] and [REDACTED] are in forfeited status in the State of Maryland. On January 5, 2012, the AAO issued an RFE to the petitioner informing it of the forfeited status and the fact that such forfeiture renders the petition moot. Although counsel stated in response to the AAO’s RFE that additional information would be submitted to demonstrate that [REDACTED] was in active status, to date, no additional information has been received and the State of Maryland Department of Assessments and Taxation shows both entities to be forfeited. In Maryland, a forfeited company may not conduct business and the state criminalizes an entity conducting business while in forfeited status.

The Maryland Corporations and Associations Code Annotated §3–514, prohibits an entity from doing business after forfeiture:

- (a) *Prohibition.* Any person who transacts business in the name or for the account of a corporation knowing that its charter has been forfeited and has not been revived is guilty of a misdemeanor and on conviction is subject to a fine of not more than \$500.
- (b) *Presumption.* For the purpose of this section, unless there is clear evidence to the contrary, a person who was an officer or director of a corporation at the time its charter was forfeited is presumed to know of the forfeiture.
- (c) *Limitation.* A prosecution for violation of the provisions of this section may not be instituted after the date articles of revival of the corporation are filed.

Forfeiture is the process that allows the Maryland State Department of Assessments and Taxation (Department) to remove inactive entities that have not legally terminated their authority to do business or to notify active entities of an existing oversight in meeting legal filing requirements. A Maryland corporation can avoid forfeiture by filing a Form 1 (annual report/personal property return). If the Department declares the corporate charter to be forfeited, as it did in this case, the corporation becomes a non-entity. All powers of the corporation become null and void. Md. Corp. & Assns. Code Ann. §3–503(d). *See, e.g., Dual Inc. v. Lockheed Martin Corp.*, 857 A.2d 1095, 1101 (Md. 2004) (“A corporation, the charter for which is forfeit, is a legal non-entity; all powers granted to Dual, Inc. by law, including the power to sue or be sued, were extinguished generally as of and during the forfeiture period”); *Kroop & Kurland, P.A. v. Lambros*, 703 A.2d 1287 (Md. 1998) (“[w]hen a corporation’s charter is forfeited for non-payment of taxes or failure to file an annual report, the corporation is dissolved by operation of law and ceases to exist as a legal entity”).

The charter of any corporation which is forfeited may be revived by filing articles of revival; filing all annual reports required to be filed by the corporation or which would have been required if the charter had not been forfeited; and paying all unemployment insurance contributions, or reimbursement payments, all State and local taxes, except taxes on real estate, and all interest and penalties due by the corporation or which would have become due if the charter had not been forfeited. The revival of a corporation's charter has the following effects: all contracts or other acts done in the name of the corporation while the charter was void are validated, and the corporation is liable for them; and all the assets and rights of the corporation, except those sold or those of which it was otherwise divested while the charter was void, are restored to the corporation to the same extent that they were held by the corporation before the expiration or forfeiture of the charter. However, corporate action taken during a period when a corporation's charter is forfeited is null and void, and actions taken after its charter has been revived do not relate back to cure the loss of a right divested during the time the charter was forfeited. *Hill Constr. v. Sunrise Beach, LLC*, 952 A.2d 357 (Md. 2008).

In this matter, the petitioner's Maryland corporate charter was forfeited on October 7, 2005 and Pamm Ltd's corporate charter was forfeited on October 3, 2011. Accordingly, the petitioner was a legal non-entity at the time the petition and appeal were filed. An entity which is a legal non-entity – an entity which has been dissolved by operation of law – cannot be said to be in business. For this additional reason, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation due to the "termination of the employer's business." 8 C.F.R. § 205.1(a)(3)(iii)(D), and the petition would be moot.

Concerning the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The director found that the petitioner had not established that it had the ability to pay as of the priority date and continuing to the present. The AAO will adjudicate this issue as if the petitioner had established that [REDACTED] is its successor-in-interest. In any further filings, the petitioner must successfully resolve concerns about whether [REDACTED] is the successor-in-interest to the petitioner before addressing the ability to pay issue.

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

qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.99 per hour (\$24,939 per year). The Form ETA 750 states that the position requires 8 years of grade school and two years of experience as a restaurant cook.

The evidence in the record of proceeding shows that LDD Ltd. is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1978 and to currently employ 10 workers. According to the tax returns in the record, LDD Ltd.'s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 29, 2001, the beneficiary claimed to have worked for the petitioner from July 2000 to December 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in April 2001 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.

Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).⁷

The record before the director closed on January 14, 2008 with the receipt by the director of the petitioner's Form I-140. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. [REDACTED] tax returns demonstrate its net income for 2001 through 2006, as shown in the table below.

⁷ On appeal, counsel states that depreciation should be added back in as a non-cash item deduction available to pay the proffered wage. Counsel provides no support for this assertion.

- In 2001, the Form 1120S for [REDACTED] stated net income⁸ of -\$2,355.
- In 2002, the Form 1120S for [REDACTED] stated net income of -\$10,898.
- In 2003, the Form 1120S for [REDACTED] stated net income of \$2,778.
- In 2004, the Form 1120S for [REDACTED] stated net income of -\$27,215.
- In 2005, the Form 1120S for [REDACTED] stated net income of -\$9,952.
- In 2006, the Form 1120S for [REDACTED] stated net income of -\$59,737.

Therefore, for all of the years, neither [REDACTED] had sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ 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. [REDACTED] tax returns demonstrate end-of-year net current assets for 2001 through 2006, as shown in the table below.

- In 2001, the Form 1120S for [REDACTED] stated net current assets of \$9,23x.¹⁰
- In 2002, the Form 1120S for [REDACTED] stated net current assets of \$6,991.
- In 2003, the Form 1120S for [REDACTED] stated net current assets of \$0.
- In 2004, the Form 1120S for [REDACTED] stated net current assets of \$8,133.
- In 2005, the Form 1120S for [REDACTED] stated net current assets of \$22,479.
- In 2006, the Form 1120S for [REDACTED] stated net current assets of -\$27,821.

⁸ 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 23 (2001-2003) line 17e (2004-2005) line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 15, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional adjustments on its Schedule K for any year, the petitioner's net income is found on line 21 of page one of its tax returns.

⁹ According 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.

¹⁰ The Form 1120S in the record is a copy. The copy cuts off the last digit of the Schedule L.

Therefore, for all of the years, neither [REDACTED] had sufficient net current assets to pay the proffered wage.

Even if [REDACTED] net income or net current assets exceeded the proffered wage for the instant beneficiary, as noted in the AAO's RFE, USCIS records indicate that the petitioner has filed at least 15 Form I-140 petitions since 1998. The petitioner would need to demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Despite the director's request that the petitioner establish its ability to pay multiple beneficiaries, the petitioner submitted no evidence concerning the amount of the proffered wage offered to each of the other sponsored workers, any wages paid to those sponsored workers, or whether those sponsored workers continue to be employed by the restaurant. As a result, even if the petitioner demonstrated sufficient net income or net current assets to pay the proffered wage to the instant beneficiary, it has failed to establish an ability to pay the proffered wages to the other 14 sponsored workers.

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 or the other sponsored workers from each of their priority dates onward through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the amount of salaries and wages paid to other workers demonstrates the petitioner's ability to meet its wage obligations to the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Counsel also states that certain "non-cash item deductions" should be considered in determining the petitioner's ability to pay the proffered wage such as depreciation, amortization of intangibles, and capital stock. As stated above, non-cash deductions represent actual costs 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. The courts have upheld the AAO's refusal to add these deductions back in and counsel has presented no argument to the contrary. *See River Street Donuts, LLC*, 558 F.3d 111; *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881. We also note that even if these non-cash deductions were considered, they are insufficient to demonstrate the ability to pay the proffered wage to all 15 sponsored workers. Counsel also states that the petitioner has "current cash reserve of \$311,698 as of December 31, 2001." The 2001 Form 1120S of LDD Ltd. does not reflect such a cash reserve. 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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, [REDACTED] has not established that it is a successor-in-interest to [REDACTED]. Furthermore, neither [REDACTED] is an active company in the State of Maryland. In addition, the petitioner has sponsored a total of 22 workers since 1998 and has not submitted evidence of its ability to pay any of these workers. In addition, although counsel claims that the restaurant is involved in the local community and enjoys a good reputation, no evidence was submitted to support these assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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 director also found that the petitioner failed to adequately document that the beneficiary has the required experience for the position offered. The AAO agrees. The petitioner must 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). USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K.*

Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The Form ETA 750 requires eight years of grade school education and two years of experience as a restaurant cook before the April 30, 2001 priority date. The petitioner submitted no letters or other evidence to document any education or previous employment of the beneficiary either before the director or on appeal. As a result, we are unable to conclude that he had the required education and experience before the priority date.

The petition will be rejected. Alternatively, the appeal is denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 rejected.