

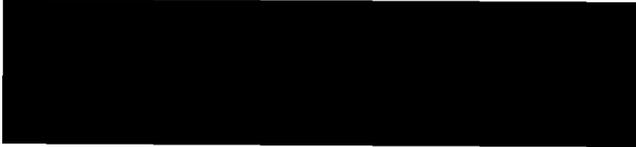
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: **MAY 11 2012**

OFFICE: TEXAS SERVICE CENTER

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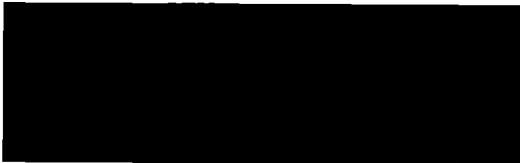
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a provider of Microsoft business software. It seeks to permanently employ the beneficiary in the United States as a project director pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).¹ 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).

On July 7, 2010, the Director denied the petition on three grounds: (1) the petitioner failed to establish that it is the successor-in-interest to the company that filed the labor certification application, which rendered the certified Form ETA 750 invalid for use by the petitioner; (2) the evidence of record failed to establish that the beneficiary satisfied all of the experience and other requirements specified on the labor certification; and (3) the petitioner failed to establish its continuing ability to pay the proffered wage of the job from the priority date up to the present.

The petitioner filed a timely appeal, supplemented by a brief from counsel and documentation addressing the grounds for denial in the Director's decision. The appeal was forwarded to the AAO, which issued a Notice of Intent to Dismiss (NOID) on December 21, 2011. The petitioner responded to the NOID with an additional brief from counsel and supporting documentation.

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.² The procedural history of this case is documented in the record and incorporated into the instant decision.

For the reasons discussed hereinafter, the AAO will affirm the Director's decision, and dismiss the appeal, on three grounds:

(1) The petitioner has failed to establish that it is the successor-in-interest to the business entity that filed the labor certification application, which means that the instant petition is not accompanied by a labor certification that applies to the offered job. *See* 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c)(2).

¹ Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to "[q]ualified immigrants who hold baccalaureate degrees and are members of the professions."

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

(2) The petitioner has failed to establish that the beneficiary had the requisite experience, as specified on the labor certification, to qualify for the proffered position.

(3) The petitioner has failed to establish its continuing ability to pay the offered wage for the position from the priority date up to the present – in particular, the years 2003 and 2004.

Successor-in-Interest

The labor certification application (Form ETA 750) underlying the instant petition was filed with the DOL on June 3, 2003, by [REDACTED]. This company had been incorporated in the State of Nevada on September 26, 2002, and was wholly owned by [REDACTED]. The mailing address of [REDACTED]. According to [REDACTED] ceased doing business within a year of its incorporation, and the company lapsed when he did not renew its registration. The Nevada Secretary of State's official website confirms the status of [REDACTED] as "permanently revoked." Nevertheless, the DOL certified the Form ETA 750 in the name of [REDACTED] on September 6, 2007.

On April 30, 2003, Articles of Organization were filed in the State of Rhode Island for [REDACTED] "A Rhode Island Limited Liability Company" – was co-signed by [REDACTED] the beneficiary. As stated in Schedule A of the Operating Agreement, [REDACTED] and [REDACTED] were the company's two initial members, each with a capital contribution of \$100,000 and a 50% ownership interest. According to [REDACTED] assumed all the business activities of [REDACTED] by August of 2003. The instant employment-based immigrant petition, Form I-140, was filed by [REDACTED] on February 26, 2008.

U.S. Citizenship and Immigration Services (USCIS) has issued no regulations governing immigrant visa petitions filed by successor-in-interest employers. 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. The case involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) 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-interest to [REDACTED]. The part of the Commissioner's decision relating to the successor-in-interest issue reads as follows:

Additionally, the representations made by the petitioner concerning the relationship between [REDACTED] and itself are issues which have not been resolved. In

order to determine whether the petitioner was a true successor to [REDACTED] 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).

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.³ *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.⁴

³ 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).

⁴ 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

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.⁵ *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, 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 the instant case, ██████████ stated in declarations he submitted on appeal (May 14, 2010) and in response to the NOID (January 19, 2012), that he brought the beneficiary into his new business entity – ██████████ – because of his need for someone with expertise in software development, especially ██████████ ██████████ indicates that he negotiated two contracts in the name of ██████████ in May and June 2003 before allegedly switching all business over to ██████████ Both of these contracts are in the record. ██████████ states that ██████████ never received any income, that all payments received on the two contracts executed in the name of ██████████ Inc. (and subsequent contracts executed in the name of ██████████ were deposited into the account of

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.

⁵ 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).

and that no tax returns or financial documents of any kind were filed on behalf of [REDACTED]. "There was no formal sale of assets [o]r transfer of assets from [REDACTED] stated in his earlier declaration, "since I controlled both businesses." [REDACTED] went on to say that "as of August 2003 [REDACTED] effectively took control of all the business and assets of [REDACTED] did not do any further business. . . . However, if it would have been necessary . . . to conduct business through [REDACTED] that would have been done. Because I controlled both [companies], it was my decision which company to use to conduct the business."

Counsel asserts that no written documentation of a transfer of assets from [REDACTED] was necessary because both entities were "controlled" by [REDACTED]. But the Operating Agreement of [REDACTED] casts doubt on that claim. Article 7.1 of the Operating Agreement provides that "[t]he business and affairs of the Company shall be managed by the Members in proportion to their capital contributions Each member has the power, on behalf of the Company, to do all things necessary or convenient to carry out the business and affairs of the Company" [REDACTED] states that it was his understanding the beneficiary would be a co-owner and share in the profits of [REDACTED] but would not be involved in managing the company. According to the terms of the Operating Agreement, however, the beneficiary had just as much right as [REDACTED] to manage the company. Since the beneficiary's proportion of the capital contribution to [REDACTED] was equal to [REDACTED] the latter did not "control" the company by himself, the way he did [REDACTED].

As indicated above, the record includes copies of two contracts signed by [REDACTED] in the name of [REDACTED] before all further contracting was allegedly switched to [REDACTED]. The second of the [REDACTED] contracts, dated June 23, 2003, was with [REDACTED]. On the date of the contract [REDACTED] wrote a check to [REDACTED] (without specifying which entity – Inc. or LLC) in the amount of \$263,633.00 as an initial payment on the contract. Three days later, on June 26, 2003, the check was deposited in the business account of [REDACTED] as a bank statement in the record duly records. This deposit corroborates [REDACTED] claim that at least some of the business technically generated in the name of [REDACTED] before the close of its operations was absorbed by [REDACTED]. Furthermore, given the closeness in time between the execution of the agreement by [REDACTED] and the acceptance of payment by [REDACTED] (only three days), it appears that [REDACTED] viewed [REDACTED] as the real party in interest for the purposes of its contract. The petitioner does not point to any evidence in the record indicating what became of the earnings generated by the other contract negotiated in the name of [REDACTED] – with [REDACTED] dated May 15, 2003. If the funds were deposited in the [REDACTED] account, the beneficiary – as co-owner with a 50% interest in the company – would obviously have benefitted. On the other hand, he would have gained nothing if they were deposited into an [REDACTED] account that was wholly owned by [REDACTED].

As the above scenario demonstrates, it is not exactly clear what assets and liabilities were transferred from [REDACTED] in 2003. There was no contract or agreement between the two entities

⁶ See *cf.* 8 C.F.R. § 214.2(l)(1)(ii)(K) (50% ownership interest in a subsidiary generally constitutes control of the entity).

whereby the assets, rights, duties, and obligations of [REDACTED] were formally transferred to [REDACTED]. Considering the different ownership and management structures of [REDACTED] and [REDACTED] document of that sort would certainly have been in order. In all of the corporate documentation submitted in response to the Director's RFE, with the appeal, and in response to the AAO's NOID, not one refers to both [REDACTED] in the same document.

Moreover, it appears that the ownership structure of [REDACTED] changed again in subsequent years, based on the federal tax returns and Form W-2, Wage and Tax Statements, in the record. As previously discussed, the petitioner is an LLC that was organized in Rhode Island on April 30, 2003. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election is made using IRS Form 8832, Entity Classification Election.

For the years 2003, 2004, and 2005, LBS LLC filed a Form 1065, U.S. Return of Partnership Income, on which [REDACTED] and the beneficiary were identified (in Schedule K-1) as members, each with 50% share in the company's profit or loss. In 2005, for the first time, the beneficiary also received a Form W-2, Wage and Tax Statement, from the petitioner, indicating that his status with [REDACTED] had changed from a member to an employee. Judging by the small amount of "wages, tips, other compensation" recorded on the beneficiary's Form W-2 for 2005, it would appear that his change of status within the company occurred late that year. Beginning in 2006, [REDACTED] filed Form 1040, U.S. Individual Income Tax Returns, in which he recorded his business earnings on Schedule C. For the years 2006-2009 the beneficiary continued to receive W-2 forms as an employee of [REDACTED]. From 2006 onward, there is no record of any Form 1065 income tax return filing from the petitioner. Thus, it appears that the co-ownership arrangement ended in late 2005, [REDACTED] became solely owned by [REDACTED], and the beneficiary became an employee of [REDACTED].

The result of this chain of events is that [REDACTED] appears to be wholly owned by [REDACTED] just like the original company [REDACTED]. The petitioner has neither acknowledged nor explained its convoluted ownership history. Though undocumented by any contract or agreement, the business entities involved in this proceeding have progressed from a corporation owned by [REDACTED] in 2002, to an LLC co-owned by [REDACTED] and the beneficiary in 2003, to a single-member LLC owned by [REDACTED] by 2005-06. The lack of documentation casts doubt over exactly what rights and obligations were transferred from one entity to the next. In visa petition proceedings, the petitioner bears the burden of proving eligibility in all respects. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). That burden has not met in this case.

The AAO agrees with the Director, therefore, that the evidence of record fails to establish that [REDACTED] is the successor-in-interest to [REDACTED]. Accordingly, the labor certification application filed by [REDACTED] – and approved by the DOL in the name of [REDACTED] – is not valid for the immigrant visa petition filed by [REDACTED]. See 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i); 20 C.F.R. §§ 656.30(c)(2). Thus, the petition cannot be approved.⁷

Requirements for the Job

To be eligible for approval under section 203(b)(3) of the Act, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date is the date

⁷ It is further noted that the beneficiary's ownership interest in the petitioner, which appears to have been the real party in interest with regards to the Design Works contract, casts doubt on the *bona fides* of the job offer. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986), discussed a beneficiary's 50% ownership of the petitioning entity. The decision quoted an advisory opinion from the Chief of the DOL's Division of Foreign Labor Certification as follows:

The regulations require a "job opportunity" to be "clearly open." Requiring the job opportunity to be bona fide adds no substance to the regulations, but simply clarifies that the job must truly exist and not merely exist on paper. The administrative interpretation thus advances the purpose of regulation 656.20(c)(8). Likewise requiring the job opportunity to be bona fide clarifies that a true opening must exist, and not merely the functional equivalent of self-employment. Thus, the administrative construction advances the purpose of regulations 656.20.

Id. at 405. Accordingly, where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc). A relationship invalidating a *bona fide* job offer may also arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). In determining whether the job is subject to the alien's influence and control, the adjudicator will look to the totality of the circumstances. See *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (en banc).

In this matter, the beneficiary did not technically own any shares in [REDACTED] c. However, given the chain of events, it appears more likely than not that the beneficiary exercised significant control and influence over the job offer and that [REDACTED] c. may have been a shell formed in attempt to legitimize what amounts to self-employment. Therefore, the AAO would further conclude that the petitioner failed to establish that the job offer was *bona fide* and open to all qualified U.S. workers if the appeal were not already being dismissed for the reasons set forth herein.

the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).⁸ In this case, the priority date is June 3, 2003.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834.

The requirements for the subject position (called "Director of Development" on the labor certification) are found in Part A of the Form ETA 750. In block 13 the job duties are described as follows:

Analyze customers' business requirements and application objectives; present findings and make recommendations or implement solutions. Complete senior-level ERP Full Life Cycle development and delivery; estimate time frames, quality and quantity of resources required to successfully complete project. Develop single or multiple product project plans incorporating project variables; conduct periodic status checks with customer(s) and team to assess progress against plans and re-forecast project variables, as necessary. Ensure appropriate company resources are assigned to complete project tasks according to plan and establish criteria concerning deliverability, performance, maintenance, design and costs.

The minimum education, training, and experience required to perform the job duties are set forth in Part A, block 14, as follows:

Education

Four years of college and a Bachelor of Science degree in Engineering, Computer Science, or Mathematics.

⁸ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

Experience

Four years in the "job offered" or in a related occupation such as software design and business application processes and/or software development including Navision consulting.

Alternatively, the minimum educational and experience requirements could be met with

A Master of Science degree in Engineering, Computer Science, or Mathematics, and

Two years of experience in the "job offered" or one of the related occupations identified above.

In addition, "Other Special Requirements" are set forth in Part A, block 15, including:

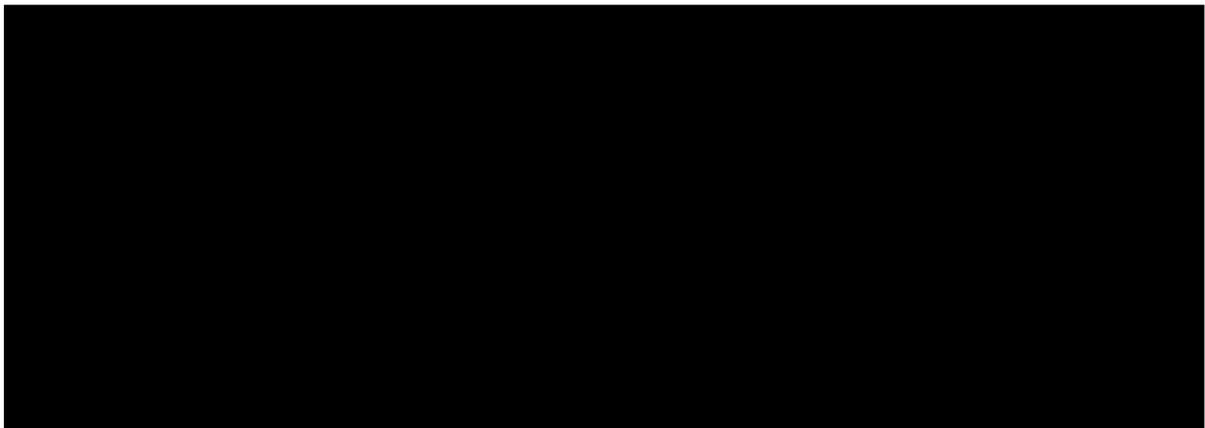
Demonstrated expertise in Microsoft Navision Development and Microsoft Navision Manufacturing (certifications required).

Demonstrated expertise in software design and development including databases of Oracle, MS SQL, Navision RDBMS and the languages of PL SQL, Visual Basic and Pascal.

Demonstrated expertise with whole cycle ERP implementation.

In Part B, box 11, of the labor certification the beneficiary's highest educational credential is identified as a Diploma in Engineering and Mathematics from the Academy of the Russian Ministry of National Security in Moscow culminating from a five-year course of study from June 1993 to September 1998. These dates are incorrect, as discussed below, though the length of the program is accurate.

In Part B, box 15 – work experience – the beneficiary listed the following jobs between June 1996 and May 2003:



The documentation of record shows that the beneficiary has the educational credential he claims from the Academy of the Ministry of National Security in Russia. The diploma – which certified the beneficiary as an "engineering mathematician" – was actually awarded on July 21, 1993, after completion of a five-year course of study that began in 1988. Based on information gleaned from the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), as well as academic equivalency evaluations in the record, the AAO concludes that the beneficiary's diploma is comparable to a bachelor's degree in engineering or mathematics from a U.S. college or university. Accordingly, the beneficiary meets the educational requirement of the labor certification.

Documentation submitted on appeal and in response to the NOID issued by the AAO also establishes that the beneficiary fulfilled the "other special requirements" listed in the labor certification. In particular, the beneficiary has the two Microsoft Navision certifications, which were awarded after the beneficiary passed the requisite examinations on January 4, 2003 (Manufacturing), and April 26, 2003 (Development) – both of which preceded the priority date (June 3, 2003).

With regard to the work experience claimed by the beneficiary between 1996 and 2003, the Director noted in his decision of July 7, 2010, that the only evidence thereof in the record was a letter (undated) from the former Chief Financial Officer (CFO) of [REDACTED] confirming that the beneficiary was employed there from April 2002 to June 2003, at which time he was hired by the petitioner. [REDACTED] stated that he was the beneficiary's direct supervisor, and that the beneficiary was hired by [REDACTED] because of his "excellent knowledge of Microsoft Navision product and extensive development experience" as well as his "extensive knowledge of the jewelry business." According to [REDACTED] the beneficiary worked partly in supply chain management, had an expert understanding of business problems, and provided programming solutions within the Microsoft Navision system. The employment at [REDACTED] however, covered just 14 months. Thus, the record did not establish that the beneficiary had the requisite four years of experience to qualify for the proffered position.

On appeal the petitioner submitted photocopies of the following additional documentation as evidence of the beneficiary's alleged employment:

- (1) A letter from [REDACTED] director general of Impact-Soft in Moscow, dated September 2, 2010, stating that the beneficiary "was employed by [the company] from 1997 to 1999 on a full-time basis, ... was involved in many Navision implementations and bec[a]me advanced consultant for the Navision ERP System."
- (2) An employment and confidentiality agreement between BMI and the beneficiary, dated November 24, 1999.
- (3) A letter from [REDACTED] dated October 25, 2000, stating that the beneficiary "is employed by [the company] as a Computer Software Consultant, Analyst, and Developer."

- (4) A statement dated August 30, 2009 by [REDACTED] who states that he was [REDACTED] confirming that the beneficiary was hired by the company in April 2002.

In the NOID it issued on December 21, 2011, the AAO advised the petitioner that the documentation in the record was insufficient to establish that the beneficiary had the requisite four years of experience, as specified in the labor certification, to qualify for the proffered position. The AAO referred the petitioner to the regulation at 8 C.F.R. § 204.5(g)(1), which sets forth the substantive requirements of letters from former employers. The regulation states, in pertinent part, as follows:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

8 C.F.R. § 204.5(g)(1).

In response to the NOID, the petitioner submitted three additional documents as evidence of the beneficiary's alleged employment:

- (1) A declaration of [REDACTED] dated January 12, 2012, stating that he had an ownership interest in [REDACTED] serving as its CFO during the last two years of that period, and that [REDACTED] worked for the company as a software developer from April 2002 to July 2003 on an H-1B visa.
- (2) A memorandum to the beneficiary from [REDACTED], dated February 8, 2002, confirming the company's offer of employment for the job of Director, Supply Chain, and describing the job's duties and responsibilities.
- (3) A letter to the legacy Immigration and Naturalization Service (INS) from [REDACTED] attorney, dated February 21, 2002, requesting permission for the beneficiary to work for [REDACTED] as a Supply Chain consultant in H-1B status, and describing the duties and responsibilities of the job.

Reviewing this new evidence, the AAO determines that the last four documents from [REDACTED] in conjunction with the previously submitted letter from [REDACTED] are sufficient to establish that the beneficiary completed approximately 14 months of qualifying experience at [REDACTED] from April 2002 until around June 2003.

As for the letter from Impact Soft, however, it does not describe the beneficiary's job duties in detail. The letter provides only a vague outline of the beneficiary's work, stating that he "was involved in many Navision implementations" and became an "advanced consultant for the Navision ERP System" without describing any other particular implementations or the specific tasks the beneficiary

performed in the course of his job. Furthermore, the letter is vague as to how long the beneficiary worked for Impact Soft, stating that his employment lasted from 1997 to 1999 without providing any precise dates. The time frame indicated in the letter could have been little more than a year, and certainly does not confirm the dates claimed in the labor certification – June 1996 to November 1999. The letter from BMI has the same shortcomings. While stating that the beneficiary was employed as a "computer software consultant, analyst, and developer," it provides no information about the specific duties of the job or any particular tasks and projects completed by the beneficiary. Nor does the letter provide any information about how long the beneficiary worked for BMI. It simply indicated that the beneficiary was employed by BMI on the date of the letter (October 25, 2000) without stating when his employment began or (obviously) when it ended. The AAO also notes that the job title indicated in the BMI letter is not the same as the job title indicated in the labor certification – which stated that the beneficiary was working for BMI as a "project manager" on October 25, 2000.

For the reasons discussed above, the AAO concludes that the letters from Impact Soft and BMI do not comply with the substantive requirements of 8 C.F.R. § 204.5(g)(1), or 8 C.F.R. § 204.5(l)(3)(ii)(A), and fail to establish that the beneficiary has the qualifying employment claimed in the labor certification either at Impact Soft (from June 1996 to November 1999) or at BMI (from November 1999 to April 2002).

The beneficiary's employment agreement with BMI in November 1999 does not identify his job title and describes his "duties and services" in vague terms – "Employee shall be engaged in General Office Functions, Technical Support, Consulting and other services" – without providing specific details about his daily duties.

Thus, the record does not establish that the beneficiary had at least four years of qualifying experience in the "job offered" or a related occupation as of the priority date (June 3, 2003). Since the beneficiary did not meet this requirement of the labor certification, the petition is deniable on this ground as well. *See Matter of Wing's Tea House.*

Ability to Pay the Proffered Wage

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application was accepted for processing by any

office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application was received by the DOL on June 3, 2003. At Part A, box 12 of the Form ETA 750, the "rate of pay" for the proffered position is stated as \$180,000 per year.⁹

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, 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, 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 his denial decision of July 7, 2010, the Director found that the petitioner's ability to pay the proffered wage was established for the years 2005-2009 based on a combination of federal income tax returns (Forms 1065) filed by [REDACTED] and/or Forms W-2, Wage and Tax Statements, issued to the beneficiary for those years. The Director also found, however, that the evidence of record failed to establish the petitioner's ability to pay the proffered wage in the years 2003 and 2004.

As previously discussed, in 2003 and 2004 the petitioner was a two-member LLC whose income tax returns were filed on a Form 1065, U.S. Return of Partnership Income. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.¹⁰ An investor's liability is limited to his or her initial investment. As the owners are only liable to the extent of their initial investment, the total income and assets of the owners and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Counsel claims that the petitioner does not have to establish its ability to pay \$180,000 per year in 2003 and 2004, but only the prevailing wage for the proffered position – which was \$75,400 per year at the time the labor certification application was filed in 2003. Counsel's claim is based on correspondence between the DOL and the petitioner in the spring of 2007, in which the DOL advised that the "rate of pay" entered on the Form ETA 750 – \$60,000 per year – was below the

⁹ The rate of pay was originally entered as \$60,000 per year. That amount was corrected to \$180,000 on May 22, 2007, as indicated by a stamp reading "Corrections Approved by DOL Regional Office."

¹⁰ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

prevailing wage of \$75,400, and the petitioner responded by correcting the "rate of pay" on the Form ETA 750 to \$180,000 per year.¹¹ That and one other correction were made on the Form ETA 750 with an official stamp stating that the "corrections [were] approved by [the] DOL Regional Office." According to counsel, the new figure of \$180,000 per year did not take effect until May 22, 2007, the date the DOL stamp was affixed to the Form ETA 750. The AAO does not agree. The "corrected" figure was retroactive to the date the labor certification application was received by the DOL – June 3, 2003. The petitioner changed the wage prior to certification and the change would require that the petitioner demonstrate that it could pay the proffered wage as certified from priority date onward. The petitioner would have had the opportunity to contest the wage or the DOL classification prior to certification or prior to initialing its acceptance of the wage while the labor certification was before the DOL. The petitioner cannot change the wage or classification now to reduce the wage and show that it can pay the proffered wage. The regulation is clear that the petitioner must be able to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(g)(2). Since the proffered wage is \$180,000 per year, that is the rate of pay the petitioner must satisfy from 2003 up to the present.

Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 682 (D.D.C. 1990), *remanded* in 875 F.2d 898 (D.C. Cir. 1989), in support of its contention that the petitioner need not pay the proffered wage if it paid the prevailing wage. That holding is not binding outside the District of Columbia. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Thus, the AAO is not bound by the federal district court ruling in *Masonry Masters, Inc. v. Thornburgh*.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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 this case, the record indicates that the beneficiary, whose employment with the petitioner began in June 2003, was a member of the LLC with a 50% ownership share in the years 2003 and 2004. Thus, he was not an employee of the petitioner and did not receive Form W-2, Wage and Tax Statements, for those years.

In 2004 the beneficiary did receive \$65,697 in income as a 50% owner of the petitioner, as indicated on Schedule K of the petitioner's Form 1065. The AAO will accept this evidence of the petitioner's

¹¹ This "corrected" rate of pay was in line with the salary paid to the beneficiary in 2007 – \$190,000.

ability to pay at least \$65,697 to the beneficiary in 2004.¹² As this payment was made after the calculation of the petitioner's 2004 net income, however, the amount cannot be added to the petitioner's net income in evaluating the petitioner's financial strength that year. To do so would be a double counting of resources.

Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2003 and 2004 based on compensation paid to the beneficiary in those years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See 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. File 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. *See 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).

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 [sic]

¹² It is noted, however, that this evidence is accepted for sake of argument since it has not been established that the petitioner is a successor-in-interest to [REDACTED], the employer identified in the labor certification. *See supra*.

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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

For an LLC taxed as a partnership, where the partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on page 1, line 22, of the petitioner's Form 1065, U.S. Partnership Income Tax Return. If 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, credits, deductions, or other adjustments, net income is found (before 2008) on page 4 of the Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed April 13, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.).

The petitioner's Schedule K for 2003 has relevant entries for nondeductible expenses including meals and entertainment. Its Schedule K for 2004 has relevant entries for a variety of deductions, self-employment, credits and credit recapture, nondeductible expenses, and distributions of cash and marketable securities. Therefore, the petitioner's net income for 2003 and 2004 is found on line 1 of the Analysis of Net Income (Loss) of Schedule K. The respective figures were (\$13,635) for 2003 and \$107,753 for 2004. Thus, the petitioner incurred a net loss in 2003, and its net income in 2004 was far short of the proffered wage of \$180,000 per year.

The petitioner's net income (or loss) figures on Schedule K were distributed to the two partners, as reflected on their respective Schedules K-1. As a co-owner of the petitioner, the beneficiary was entitled to a 50% share of any revenue (or loss) it produced in 2003 and 2004. Those amounts – recorded on line 1 of the beneficiary's Schedule K-1 – were (\$6,817) in 2003 and \$65,697 in 2004. Thus, the beneficiary incurred a net loss in 2003, and his share of the petitioner's net income in 2004 was far below the proffered wage of \$180,000 per year.

Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2003 and 2004 based on its net income in those years.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS reviews the petitioner's net current assets as reflected on its federal income tax returns. Net current

assets are the difference between the petitioner's current assets and current liabilities.¹³ On the Form 1065 a taxpayer's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on Schedule L, lines 15 through 17. If the petitioner's end-of-year net current assets plus compensation 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 Form 1065 for 2003 lists current assets (cash) of \$128,541 and current liabilities (accounts payable and "other current liabilities") totaling \$170,250 – resulting in net current liabilities of (\$41,709) in 2003. The petitioner's Form 1065 for 2004 lists current assets (cash and trade notes and accounts receivable) totaling \$171,317 and current liabilities (accounts payable and "other current liabilities") totaling \$338,269 – resulting in net current liabilities of (\$166,952). Thus, the petitioner did not have any net current assets in 2003 and 2004, since its current liabilities exceeded its current assets both years.

Accordingly, the petitioner cannot establish its ability to pay the proffered wage in 2003 and 2004 based on its net current assets in those years.

Counsel asserts that the proffered wage for 2003 should be prorated for the portion of the year that occurred after the priority date, which would mean that the petitioner has to establish its ability to pay just under \$105,000 that year, rather than \$180,000. While the AAO would prorate the proffered wage if the record contained evidence of the petitioner's net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date – such as monthly income statements or pay stubs – no such evidence exists in this case. The beneficiary has no pay stubs from 2003 because he was not an employee of the petitioner at that time, but rather a half owner. Moreover, the petitioner (and the beneficiary, as a half owner) had no net income during the last seven months of 2003, but rather a net loss.

Counsel asserts that the petitioner's total assets as listed in its federal income tax returns (Form 1065, page 1, Item F) – \$153,484 for 2003 and \$275,016 for 2004 – should be considered in determining its ability to pay the proffered wage. Counsel's claim has no merit. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Furthermore, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

¹³According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612.¹⁴ USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner was organized in 2003 and states that it had 12 employees at the time the instant petition was filed in 2008. Federal income tax statements for the years 2005 to 2007 show that the petitioner's net income was approximately a half million dollars in 2005 and a million dollars in the next two years. Nevertheless, the record shows that resources were thin in the first two years of operation, 2003 and 2004. Moreover, there is no evidence in the record showing where the necessary funds would have come from to pay the full proffered wage to the beneficiary.

Counsel asserts that one of the "other current liabilities" listed on its 2003 and 2004 Form 1065 was an accrued expense of \$100,000 to cover the cost of a future pension contribution. Counsel states that this reserve fund (which also appears on the Form 1065 for 2005) was never contributed to a pension plan, but rather "reabsorbed in a subsequent year" and taxes paid thereon. According to counsel, that \$100,000 could have been utilized to pay the proffered wage. Aside from the fact that the \$100,000 was not enough to pay the full proffered wage in 2003 and 2004, counsel ignores the fact that the petitioner's net current assets were far outweighed by its net current liabilities in both of those years. Removing the \$100,000 accrued expense from the petitioner's current assets would have exacerbated the petitioner's net current assets deficit in 2003 and 2004. The AAO concludes that the accrued expense cited by counsel cannot be considered separate and apart from the petitioner's net current assets as a whole in determining its ability to pay the proffered wage in 2003 and 2004.

¹⁴ 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.

The same reasoning applies to counsel's claim that the cash listed as a current asset on the petitioner's 2003 and 2004 federal income tax returns could have been utilized to pay the proffered wage. The cash on hand at the end of 2003 (\$128,541) and at the end of 2004 (\$92,257) was far outweighed by the petitioner's current liabilities at the end of 2003 (\$171,317) and at the end of 2004 (\$338,269). In addition to the fact that the amount of the cash was not enough to pay the full proffered wage in 2003 and 2004, removing the cash from the petitioner's current assets would have exacerbated the petitioner's net current assets deficit in each of those years. The AAO concludes that the cash on hand cannot be considered separate and apart from the petitioner's net current assets as a whole in determining its ability to pay the proffered wage in 2003 and 2004.

The record includes bank statements for LBS LLC from the summer of 2003, shortly after its creation, through the end of 2004. Counsel asserts that the monthly average balances over that time period, and the end-of-year balances for 2003 and 2004, demonstrate the petitioner's ability to pay the proffered wage. Reliance on these bank statements is misplaced. First, bank statements are not among the three types of required evidence, enumerated in 8 C.F.R. § 204.5(g)(2), to demonstrate a petitioner's ability to pay the proffered wage. While the regulation allows additional materials "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence has been submitted to demonstrate that the funds reported on the petitioner's bank statements constitute additional funds that were not reflected on its tax returns.

The record includes copies of numerous contracts the petitioner signed, and initial payments it received, in 2003 and 2004, which counsel cites as evidence of the petitioner's ability to pay the proffered wage. While these early deals were a promising start for the business and an encouraging sign of the petitioner's ability to pay the proffered wage in succeeding years, they do not demonstrate the petitioner's ability to pay the proffered wage in its first two years of operation, 2003 and 2004. The revenue generated through the contracts executed in 2003 and 2004 do not represent funds above and beyond those reflected on the petitioner's federal income tax returns, which have already been thoroughly discussed.

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates an ability to pay the proffered wage in the years 2003 and 2004.

For all of the reasons discussed above, the record fails to establish the petitioner's continuing ability to pay the proffered wage for the project director position from the priority date up to the present. For this reason as well, the petition cannot be approved.

Conclusion

The appeal will be dismissed on three grounds, with each of these grounds constituting an independent and alternative basis for denial:

- (1) The petitioner – [REDACTED] – has failed to establish that it is the successor-in-interest to the business entity that filed the labor certification application – [REDACTED]. Therefore, the labor certification approved by the DOL in the name of [REDACTED] is not valid for the instant petition filed by [REDACTED].
- (2) The petitioner has failed to establish that the beneficiary had at least four years of experience in the job offered or a related occupation by the priority date, as required on the labor certification to qualify for the proffered position.
- (3) The petitioner has failed to establish its ability to pay the proffered wage in the years 2003 and 2004.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.