

(b)(6)

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



DATE: **NOV 21 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on 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,

*Rachel Martino*  
for  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a retail lighting store. It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 11, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the 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 20, 2001. The proffered wage as stated on the Form ETA 750 is \$23.43 per hour (\$48,734.40 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of electrician or two years in the related occupation of electrical wire installer.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ 16 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 2, 2001, the beneficiary claims to have worked for the petitioner's predecessor which filed the Form ETA 750, [REDACTED] under the ownership of two different individuals starting in April 1998.

The approved labor certification lists the prospective employer of the beneficiary as [REDACTED] located at [REDACTED]. The Form I-140 was filed by the petitioner, [REDACTED] dba [REDACTED] located at [REDACTED]. The director did not address the issue of whether the petitioner is the successor-in-interest to the employer which filed the labor certification. The following analysis refers to evidence regarding both entities' ability to pay the proffered wage. Issues regarding a successor-in-interest will be discussed below.

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

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

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, neither the petitioner nor the prior employer has established that either entity employed and paid the beneficiary the full proffered wage from the priority date in 2001 onwards. Evidence including Forms W-2 was submitted indicating that the beneficiary was paid wages according to the table below.

- In 2001, a Form W-2 from [REDACTED] stated wages paid of \$7,056.00.
- In 2001, a Form W-2 from [REDACTED] stated wages paid of \$13,523.00.
- In 2002, a Form W-2 from [REDACTED] stated wages paid of \$27,604.00.
- In 2003, a Form W-2 from [REDACTED] stated wages paid of \$30,694.50.
- In 2004, a Form W-2 from [REDACTED] stated wages paid of \$32,643.75.00.
- In 2005, a Form W-2 from [REDACTED] stated wages paid of \$20,762.26.
- In 2007, a Form W-2 from [REDACTED] stated wages paid of \$37,053.52.
- In 2008, a Form W-2 from [REDACTED] stated wages paid of \$41,326.19.
- In 2009, a pay stub for the period ending March 24, 2009 stated year-to-date wages paid to the beneficiary of \$9,348.16.

However, the AAO notes that according to the Forms W-2 submitted into the record, the beneficiary used several different Social Security numbers. The beneficiary's Forms W-2 reflected a Social Security Number (SSN) ending in [REDACTED] in 2001; an SSN ending in [REDACTED] in 2002, 2003, 2004, 2005, and 2007; and an SSN ending in [REDACTED] in 2008. The beneficiary's Forms 1040 submitted into the record reflect that an SSN ending in [REDACTED] was used. The petitioner has provided evidence of its payments to the beneficiary under two different SSNs on the Forms W-2 in 2007 and 2008, yet the record does not contain an explanation for this inconsistency. Furthermore, research conducted in all available databases revealed that the SSNs ending in [REDACTED] and [REDACTED] used by the beneficiary have been linked to other individuals. No evidence was submitted into the record to explain why the beneficiary used multiple SSNs.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In addition, *Matter of Ho* states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

Therefore, absent evidence in the record of proceeding which explains why multiple SSNs were used, the AAO will not consider the above Forms W-2 in calculating the amount of wages paid by the petitioner. Misuse of another individual's SSN is a violation of federal law and may lead to fines

[REDACTED]

and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.<sup>2</sup>

The AAO further notes that [REDACTED] which paid the beneficiary \$7,056.00 in 2001 appears to be a different business entity than the employer which filed the labor certification. [REDACTED] listed its federal employer identification number (FEIN) on its Form W-2 as [REDACTED] while the employer which filed the labor certification, [REDACTED], listed its FEIN as [REDACTED]. In addition, [REDACTED] listed its address on its Form W-2 as [REDACTED] while the employer which filed the labor certification, [REDACTED] listed its address as [REDACTED]. Further, the petitioner submitted copies of Schedules C without the rest of the complete tax returns for 2002, 2003, and 2004 from [REDACTED] thus indicating that the prior employer was a sole proprietor. The petitioner has submitted no evidence as to the ownership of the corporation known as [REDACTED] or evidence that this entity was related to the employer which filed the labor certification.

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<sup>2</sup> The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at [http://www.ssa.gov/OP\\_Home/ssact/title02/0208.htm](http://www.ssa.gov/OP_Home/ssact/title02/0208.htm) (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures

should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 29, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s second request for evidence (RFE). As of that date, the petitioner’s 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner submitted a declaration dated April 8, 2009 from [REDACTED] the owner of the petitioner’s business, stating that the petitioner purchased the business known as [REDACTED] from [REDACTED] in May or June of 2006. The petitioner also submitted a declaration from [REDACTED] dated April 8, 2008, the previous owner of [REDACTED] stating that he sold the business to [REDACTED] dba [REDACTED] in May or June of 2006.

Therefore, the continuing ability to pay the beneficiary the proffered wage of \$48,734.40 must be demonstrated by [REDACTED] which was operated by [REDACTED] as a sole proprietor, from the priority date of April 20, 2001 until the purchase of the business in 2006, and then demonstrated by the petitioner from the date of the purchase of the business until the beneficiary obtains permanent residence status.

The petitioner did not submit copies of the tax returns or any other regulatory-prescribed evidence of the ability to pay the proffered wage from the prior employer, [REDACTED] or its owner [REDACTED] for any years. Copies of Schedules C without the related tax returns were submitted for 2002, 2003, and 2004. Beginning in the year in which the petitioner claims to have purchased the business, the petitioner’s tax returns demonstrate its net income for 2006, 2007, and 2008, as shown in the table below.

- In 2006, the Form 1120S stated net income<sup>3</sup> of \$523,294.00.
- In 2007, the Form 1120S stated net income of \$611,503.00.
- In 2008, the Form 1120S stated net income of \$421,808.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, and 2006, the evidence does not demonstrate that the prior employer, [REDACTED] owned by [REDACTED] had sufficient net income to pay the proffered wage. For the years 2006, 2007, and 2008, the petitioner did have sufficient net

<sup>3</sup> 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 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed October 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 additional income, credits, deductions, or other adjustments shown on its Schedules K for 2006, 2007, and 2008, the petitioner’s net income is found on Schedule K of its tax returns.

income to pay the proffered wage, but must still demonstrate that it is a successor-in-interest to the prior employer as discussed below.

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.<sup>4</sup> 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. As the prior employer's tax returns or other regulatory-prescribed evidence of the ability to pay the proffered wage were not submitted, the record does not include evidence of the prior employer's net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the prior employer which filed the labor certification had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner has demonstrated the ability to pay the proffered wage beginning on the priority date. Counsel also asserts that USCIS erred in not considering the amount of wages paid to the beneficiary and in looking to the income of the prior employer which filed the labor certification. Counsel asserts that as the petitioner is a successor-in-interest to the prior employer due to the purchase of the business in 2006, USCIS should consider only the continuing ability of the petitioner, not the prior employer which filed the labor certification, to pay the proffered wage beginning on the priority date of April 20, 2001. Counsel also asserts that USCIS is bound by its own regulations to approve the petition and cites *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (U.S. 1954).

The AAO has reviewed the evidence of payment to the beneficiary and noted the unresolved inconsistencies involved with the SSNs above. In addition, the AAO rejects counsel's assertion that USCIS should disregard the ability of the prospective employer at the time of the priority date to pay the proffered wage and instead consider a successor-in-interest's financial ability prior to its purchase or merger with the prospective employer. Counsel's assertion does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), which states in pertinent part that:

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

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<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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...

In addition, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Similarly, the prospective employer must be qualified at the priority date and cannot rely on a new petitioner to cure the defects which existed several years prior at the time of the priority date.

The AAO also notes that the petitioner has not demonstrated that a successor-in-interest relationship existed between the prior employer, [REDACTED] operated as a sole proprietorship by [REDACTED] using the FEIN [REDACTED] and [REDACTED] a corporation which operates under the FEIN [REDACTED]. The petitioner failed to provide an exact date for when the purchase occurred and failed to submit copies of contracts or sales agreements which provide the details of the transaction.

Counsel also asserts that according to *United States ex rel. Accardi v. Shaughnessy*, USCIS must approve the petition since the agency is required to adhere to its own internal operating procedures. The AAO notes that it 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, as well as Supreme Court decisions. However, counsel has failed to adequately articulate the internal operating procedures which would result in the instant case being approved in lieu of sufficient probative evidence that the prospective employer and its claimed successor-in-interest possessed the ability to pay the proffered wage beginning on the priority date.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the record as submitted by the petitioner which fails to demonstrate that the prior employer which filed the labor certification 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, Schedule C attachments without the complete tax returns were submitted for 2002, 2003, and 2004 for the sole proprietorship. Thus, the record does not include the adjusted gross income as of the priority date in 2001 or in any year thereafter of the sole proprietor who filed the labor certification. Evidence has been submitted that the beneficiary utilized several SSNs and that the current petitioner issued payments to the beneficiary under two different SSNs. Thus, assessing the totality of the circumstances in this individual case, it is concluded that prospective employer did not have the continuing ability to pay the proffered wage beginning on the priority date.

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

Beyond the decision of the director,<sup>5</sup> the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner in this case is a different entity from the sole proprietor who filed the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, 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.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. The record contains a declaration from the owner of the petitioner, dated April 8, 2009, stating that the petitioner purchased the

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<sup>5</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

business known as [REDACTED] from [REDACTED] in May or June of 2006. The record also contains a declaration from [REDACTED] the previous owner of [REDACTED] dated April 8, 2009, stating that he sold the business to [REDACTED] dba [REDACTED] in May or June of 2006. Both affidavits state that neither party put anything in writing regarding the transaction. [REDACTED] also states that the petitioner purchased all the assets owned by his company and hired some of the employees including himself. [REDACTED] also states that the petitioner purchased all the assets owned by [REDACTED] and hired some of the employees including [REDACTED]

The AAO notes that the petitioner has failed to submit probative evidence of the transfer of any assets or obligations of the predecessor. The statements from the owner of the petitioner and his employee, the former owner of the prior employer, do not carry the probative weight of objective evidence such as copies of contracts, settlement agreements, and other evidence, which demonstrate the details of a transaction. Moreover, the statements fail to provide the specific date on which the claimed transaction took place and fail to specify which if any liabilities or other obligations were also transferred.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, 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'r 1986). See also, *Madany 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered of electrician or two years of experience in the related occupation of electrical wire installer. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an electrician working 40 hours per week at [REDACTED] owned by [REDACTED] located at [REDACTED] from April 1998 to March 2001.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8

C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter of experience from [REDACTED] which states that the beneficiary worked for [REDACTED] located in Tustin, California from April 1998 to March 2001. However, the letter does not give the title of Mr. [REDACTED] nor does it state if the beneficiary's employment was full-time or part-time.

The evidence in the record does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), and thus does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.