



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **OCT 15 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a restaurant and hotel. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition.¹ 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 and 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 April 27, 2009 denial, the single 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment

¹ ETA Form 9089 was filed by an entity which is not the petitioner. This matter will be addressed later in the decision.

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 ETA Form 9089 was accepted on November 7, 2005. The proffered wage as stated on the ETA Form 9089 is \$13.15 per hour (\$27,352 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel submits a brief; copies of the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2006, 2007 and 2008; a copy of the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2008; copies of two IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 2008; copies of pay statements and one IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 2007; a copy of Form IRS W-2 which was issued to the beneficiary by [REDACTED] in 2006; an organizational chart for [REDACTED], a copy of the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2005; copies of IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 2005 and 2006; and information about the [REDACTED] from the company's web site.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.³ On the petition, the petitioner claimed to have been established in 2006 and currently to employ 90 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on May 9, 2006, the beneficiary did not claim to have worked for the petitioner.

² 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).

³ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. 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 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 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 referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

On appeal, counsel asserts that the director erred in his determination of the petitioner's ability to pay because, counsel asserts, the petitioner, [REDACTED] "was treated as being 100% owned by [REDACTED] in 2006 and 2007." Counsel asserts that the tax returns for [REDACTED] reflect the income generated by [REDACTED]. Counsel also asserts that since the labor certification was filed, ownership of the [REDACTED] has changed at least twice. Further, counsel asserts that maintenance on the 100-year-old facility is a major expense which is a capital expenditure and that such expenses are only paid when the need arises. Counsel asserts that these expenses are deducted over many years. On this basis, counsel asserts that the depreciation expense should be added back to the net income for purposes of increasing the amount of capital available to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner, [REDACTED], provided copies of IRS Form W-2 which it issued to the beneficiary in 2006, 2007 and 2008. In 2008, the petitioner issued two separate W-2s to the beneficiary, each with separate wage amounts and each with separate social security numbers for the beneficiary. The petitioner also provided copies of an IRS Form W-2 which were issued to the beneficiary by [REDACTED] in 2005 and 2006.

The social security number which appears on all copies of IRS Form W-2 from 2005 through 2007 is registered to an individual who is not the beneficiary. This same social security number appears on one of the copies of IRS Form W-2 issued to the beneficiary by the petitioner in 2008.⁴ However,

⁴ Misuse of another individual's SSN is a violation of Federal law and may lead to fines 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 Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

the other IRS Form W-2 which the petitioner issued to the beneficiary in 2008 bears a social security number registered to the beneficiary. We will not consider wages paid using a stolen social security number in determining a petitioner's ability to pay. Therefore, the only wages which may be considered are those paid in 2008 using the social security number which is registered to the beneficiary. Therefore, the beneficiary's IRS Form W-2 shows compensation received from the petitioner, as shown in the table below.

- For 2005, the petitioner has not provided bona fide evidence of wages paid to the beneficiary.
- For 2006, the petitioner has not provided bona fide evidence of wages paid to the beneficiary.
- For 2007, the petitioner has not provided bona fide evidence of wages paid to the beneficiary.
- In 2008, the Form W-2 stated compensation of \$10,077.72.

Therefore, in the instant circumstance, the petitioner has not demonstrated that it paid the beneficiary the proffered wage in 2005, 2006 or 2007 since it provided no bona fide evidence of wages paid during those years. For 2008, the petitioner demonstrates that it paid the beneficiary a portion of the proffered wage but not the full proffered wage. Therefore, while the petitioner must still

• **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 (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.

demonstrate the ability to pay the full proffered wage for 2005, 2006 and 2007, it must only demonstrate the ability to pay the difference between wages already paid and the full proffered wage for 2008, that difference being \$17,274.28.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

In *K.C.P. Food*, 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 the Service 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 the petitioner's initial petition submission, as evidence of its ability to pay, the petitioner submitted a copy of an Application for Automatic 6-month Extension of Time to File Certain Business Income Tax, Information, and Other Returns (IRS Form 7004) for [REDACTED]; a copy of an Application for Extension of Time to File Fiduciary, Partnership or Corporate Tax Return (Form M-8736) for the State of Massachusetts for [REDACTED] for 2006; and copies of checking account statements for [REDACTED] for 2007. In his February 19, 2009 request for evidence (RFE), the director requested that the petitioner and "predecessor" submit evidence of their ability to pay for 2005, 2006 and 2007, in the form of federal income tax returns, annual reports or audited financial statements for those years. In its response, the petitioner submitted the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2005; and copies of the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2006 and 2007.

With its response, the petitioner supplied a letter explaining that the petitioner, [REDACTED] is the successor-in-interest to [REDACTED] the entity which filed ETA Form 9089. As evidence of the succession, the petitioner supplied solely a liquor license which identifies [REDACTED] as the former Licensee and [REDACTED] as the current Licensee. The petitioner also provided a letter dated July 21, 2007 from [REDACTED] purporting to represent [REDACTED]. In his letter Mr. [REDACTED] stated that [REDACTED] sold the [REDACTED] to [REDACTED] in 2006. The petitioner also provided a letter dated June 26, 2007 from [REDACTED] Accountant. Ms. [REDACTED] states that [REDACTED] purchased the [REDACTED] from [REDACTED] on May 25, 2006. Ms. [REDACTED] further explains that the name '[REDACTED]' was included in the purchase. It should be noted that neither Mr. [REDACTED] nor Ms. [REDACTED] mentioned [REDACTED] in the letter which each supplied. Further, though counsel for the petitioner mentions [REDACTED] in his letter, the extent of his reference was "[REDACTED] which is doing business as [REDACTED]' in 2006 and 2007.

It should also be mentioned that the petitioner did not provide any documentary evidence of the actual purchase or transfer or ownership of the [REDACTED] from [REDACTED] to [REDACTED].

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)).

Further, neither the statements of counsel nor those of individuals purporting to represent the petitioner constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Since the petitioner did not provide documentary evidence substantiating the claim that [REDACTED] purchased the [REDACTED] from [REDACTED] the director should not have accepted the claim. Further, the liquor license provided as evidence does not substantiate a purchase or transfer of ownership. We will address this matter further below.

In his decision, the director determined that the petitioner had not demonstrated that [REDACTED] and [REDACTED] were one and the same entity. Therefore, in his analysis of the petitioner's ability to pay, the director did not include the figures reported on the tax returns for [REDACTED].

The AAO concurs with the director's findings. In his response to the director's RFE, counsel for the petitioner provided no explanation for the purported relationship between [REDACTED] and [REDACTED]. Further, counsel supplied no documentary evidence which would have clarified the nature of the purported relationship.

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)).

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The tax returns for [REDACTED] were provided on their own without any context within which to evaluate them. On its own, such documentation does not serve to demonstrate the *petitioner's* ability to pay. Further, without explanation or substantiation, the provision of tax returns from a different entity casts doubt upon the petitioner's ability to pay in the instant circumstance.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, the record before the director closed on March 6, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return would have been the most recent return available. However, that document was not supplied either in its initial petition submission or on appeal. However, on appeal, the petitioner provided its federal income tax return for 2008 only while again providing tax returns for [REDACTED]. The petitioner's own tax returns stated its net income as detailed in the table below.

- In 2005, the petitioner's Form 1065⁵ stated net loss of \$417,287.00.⁶
- For 2006, the petitioner did not provide any regulatory prescribed evidence of its net income.
- For 2007, the petitioner did not provide any regulatory prescribed evidence of its net income.
- In 2008, the petitioner's Form 1065 stated a net loss of \$369,681.⁷

Therefore, for the years 2005, 2006 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage. For 2008, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A partnership's year-end

⁵ For 2005, the U.S. Return of Partnership Income (Form 1065) belongs to [REDACTED] which is the entity which filed ETA Form 9089. This entity, however, is not the petitioner in the instant circumstance. The relationship between [REDACTED] and the petitioner will be discussed later in the decision.

⁶ For an LLC taxed as a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) or page 5 (2008-2010) of IRS 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 July 26, 2012) (indicating that Schedule K is a summary schedule of all partners' shares of the partnership's income, deductions, credits, etc.). In the instant case, the Schedule K for 2005 and 2008 has relevant entries for additional income, deductions and other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K of its tax returns for those years.

⁷ Based upon statements made by counsel on appeal, the tax return for 2008 might actually belong to an entity which is different that the entity which filed Form I-140. This matter will be addressed below.

⁸ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities,

(b)(6)

current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2005, the Form 1065 for [REDACTED] stated net current assets of \$417,368.00.
- For 2006, the petitioner did not provide regulatory prescribed evidence of its net current assets.
- For 2007, the petitioner did not provide regulatory prescribed evidence of its net current assets.
- In 2008, the petitioner's Form 1065 stated net current assets of \$408,126.00.

Therefore, if the petitioner were able to demonstrate that it is the bona fide successor-in-interest to [REDACTED] it would have demonstrated sufficient net current assets to pay the full proffered wage for 2005. However, the petitioner has not demonstrated such successorship. Further, the petitioner demonstrated sufficient net current assets to pay the proffered wage for 2008. However, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage for either 2006 or 2007 since it did not provide regulatory prescribed evidence of its net current assets for those years.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for 2008 which was the only year in which financial documentation was provided for the petitioning entity, [REDACTED]

On appeal, counsel asserts that the employer is "[REDACTED]" regardless of which company has owned or currently owns this property. Counsel asserts that the property, after passing through the hands of many prior owners, was sold in 2006 to [REDACTED]"⁹ Counsel asserts:

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.

⁹ If [REDACTED] purchased [REDACTED] rather than [REDACTED] as claimed on the I-140, then the petition should have been filed by [REDACTED]. However, neither in its initial petition submission nor in response to the director's request for evidence did the petitioner ever make the claim that [REDACTED] was the owner of the petitioning entity. Further, the petitioner provided no documentary evidence to demonstrate that such is the case. Moreover, this statement of counsel directly contradicts statements made in a letter submitted in support of the petitioner's ownership of the [REDACTED] which were submitted in

(b)(6)

It appears that the ability to pay the proffered wage was clouded by various entities that have been in title to [REDACTED], under its different ownerships, can certainly pay the proffered wage, and this ability has existed since the date of filing.

The regulation 20 C.F.R. § 656.3 defines the term “employer,” stating:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an “authorized representative” means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification cannot be granted for an *Application for Permanent Employment Certification* filed on behalf of an independent contractor.

At counsel’s own admission, [REDACTED] is a “landmark property,” and as such cannot be an employer. The employer is the actual company, whether a partnership or a corporation, which owns and operates the property which is in this case a hotel and restaurant and which intends to employ the beneficiary.

In this case, Form I-140 was filed by [REDACTED] which does business as (DBA) The [REDACTED] uses the Federal Employer Identification Number (FEIN) [REDACTED]. Therefore, [REDACTED] is the prospective employer in this matter and eligibility in this matter is determined based upon an analysis of the job offer made by [REDACTED] and its ability to pay the beneficiary the proffered wage. Since ETA Form 9089 was filed by [REDACTED] in order to determine whether the petitioner is eligible to use this labor certification, evidence would have to be provided demonstrating that [REDACTED] is the successor-in-interest to [REDACTED]. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). No such evidence has been provided.

response to the director’s RFE (for e.g., letters from [REDACTED] and [REDACTED] which specifically state that [REDACTED] purchased the [REDACTED] from [REDACTED].

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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)).

On appeal, counsel further asserts, "in 2006 and 2007 [redacted] was treated as being 100% owned by [redacted]. As it was a disregarded entity for tax purposes, it did not file a separate tax return and all of its activity was reported on the [redacted] return for years 2006 and 2007."

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled.

Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The petitioner supplied copies of the U.S. Return of Partnership Income (Form 1065) for [redacted] for 2006, 2007 and 2008. Nowhere on any of the schedules included with these returns does [redacted] identify [redacted] as a subsidiary. These returns do include Form 8825, Rental Real Estate Income and Expenses of a Partnership or an S Corporation. The return for 2006 indicates that [redacted] owns a property in [redacted], New Jersey and received rental income from said property. However, Form 8825 contains no more identifying information regarding this property such as a name or street address. Further, Form 8825 identifies rental income and does not indicate income generated by a business which [redacted] might own. Form 8825 for 2007 and 2008 do not contain any real estate locations in [redacted] New Jersey. Neither do the

returns for 2007 and 2008 contain any other schedules which identify subsidiaries which are owned by [REDACTED]

Not only do the federal income tax returns for [REDACTED] contain no evidence, indicating that this entity owned [REDACTED] but the petitioner provided no other documentation, such as an operating agreement, demonstrating a relationship between these two entities.

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)).

On appeal, counsel further asserts that [REDACTED] owns several other investments but that [REDACTED] tax returns for 2006 and 2007 contain depreciation and amortization schedules (Form 4562) which reflect the depreciation and amortization of the assets held by the [REDACTED]

Form 4562 for the U.S. Return of Partnership Income (Form 1065) filed by [REDACTED] for 2006 identifies the business associated with the activity to which this form relates as "[REDACTED] This document does not identify the name of a business or other company or partnership. Form 4562 for 2007, however, identifies the business for which this form relates as [REDACTED]

If, however, as counsel for the petitioner asserts, [REDACTED] owns "several other investments," which it also reports on the same return, the claim that the net income reflected on Form 1065 pertains to the petitioner cannot be maintained or at least the income reported on Form 1065 would not reflect solely the income generated by [REDACTED] If Form 1065 contains income generated by all of the investments owned by [REDACTED], the petitioner would be asking the AAO to pierce the corporate veil and consider income generated by other separate entities for purposes of demonstrating [REDACTED] ability to pay the beneficiary the proffered wage.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Nevertheless, this single reference to the [REDACTED] on the single 2007 federal income tax return does not demonstrate [REDACTED] ownership of this entity and does not corroborate a relationship between itself and [REDACTED]

(b)(6)

On appeal, counsel goes on to delineate how ownership in the [REDACTED] has changed over the course of several years while asserting that, notwithstanding the change in ownership, "[REDACTED] [REDACTED] has always existed.

As evidence of his assertions, counsel references an organizational chart which purports to show "the interrelationships between and among the various entities." It must be noted that this document appears to have been created for purposes of the instant appeal rather than for inter-corporate purposes or for purposes of relating corporate or partnership information to entities involved in the business identified on the document.

The organizational chart, therefore, is self-serving and does not provide independent, objective evidence of the ownership of the petitioning entity or of its relationship to [REDACTED]. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

In his explanation, counsel states:

...the Inn was reported on [REDACTED], which in turn is owned 95% by [REDACTED] and 5% by [REDACTED]

[REDACTED] is owned 10% by [REDACTED] and 90% by [REDACTED]

[REDACTED] and [REDACTED] are owned 1/2 each by [REDACTED] and [REDACTED] 1/3 each.

In 2008 there was another change in the organization, deciding to remove the layers of ownership. Effective January 1, 2008, the [REDACTED] was distributed out of [REDACTED] through the various tiers of ownership. As of that date it is owned by the three individuals set forth above.

It must again be noted that while counsel makes the above assertions, he has provided no objective, independent, documentary evidence such as operating agreements, contracts, articles of incorporation, stock certificates or stock ledgers which substantiate and clearly set forth the ownership or change in ownership of any of the entities named above.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel also asserts that maintenance on the 100-year-old facility is a major expense which is a capital expenditure and that such expenses are only paid when the need arises. Counsel asserts that these expenses are deducted over many years. On this basis, counsel asserts that the depreciation expense should be added back to the net income for purposes of increasing the amount of capital available to pay the proffered wage.

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

Further, adding the deduction for depreciation back to the petitioner’s net income is not a financial remedy which would rectify the deficiency in this matter. In 2005, the tax return filed by [REDACTED] shows sufficient net current assets to pay the proffered wage. In 2006 and 2007, the tax returns filed by [REDACTED] show sufficient net current assets to pay the proffered wage. In 2008, the tax returns filed by the petitioner show sufficient net current assets to pay the proffered wage. The issue, however, is that the petitioner must demonstrate that it is the successor-in-interest to [REDACTED] for USCIS to consider the figures reflected on the tax return for 2005 and the evidence supplied does not demonstrate that such is the case. Further, while the petitioner maintains that there exists a parent-subsidiary relationship between [REDACTED] and the petitioner, to facilitate the use of the tax figures for 2006 and 2007, it has provided no documentary evidence which demonstrates that such is the case.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years, and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner, [REDACTED] only claims to have been doing business for one year at the time the instant petition was filed. Therefore, the petitioner has not demonstrated any historical growth for its business and cannot show the occurrence of any uncharacteristic business expenditures or losses since no pattern has been established. If the petitioner had demonstrated a bona fide successorship to [REDACTED] and had either provided its own tax documentation for 2006 and 2007, it could establish an ongoing business concern with an established reputation. However, the petitioner had not made such a demonstration. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner, [REDACTED] with FEIN [REDACTED] is a different entity from the employer listed on the labor certification, [REDACTED]

with FEIN [REDACTED] 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.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. In its initial petition submission, the petitioner merely makes the assertion that it purchased the [REDACTED] from [REDACTED] and supplied a liquor license as evidence. The liquor license merely identified [REDACTED] as the prior licensee and [REDACTED] as the current licensee. Such a document is not sufficient evidence to demonstrate the sale of a business and the conditions associated with that sale.

Further, the record does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. While [REDACTED] claims to be the successor-in-interest to [REDACTED] [REDACTED] has not provided documentary evidence of its ability to pay for all of the years since the transfer of ownership was supposed to have taken place (May 2006). [REDACTED] provided tax documentation for 2008 but not for 2006 or 2007. While it provided tax returns for an entity called [REDACTED] for those years, the petitioner had not demonstrated that it and [REDACTED] are one and the same.

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 appellant also failed to establish that it is a successor-in-interest to the entity that filed the petition and 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 appellant is a different entity than the petitioner/labor certification employer, 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).

An appellant 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.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. On appeal, for the first time, the appellant states:

In 2008 there was another change in the organization, deciding to remove the layers of ownership. Effective January 1, 2008, the [REDACTED] was distributed out of [REDACTED] through the various tiers of ownership. As of that date it is owned by the three individuals set forth above [REDACTED]

However, while making this assertion, the appellant provided no documentary evidence to substantiate the claimed transfer of ownership.

Additionally, the record does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Since the petitioner never provided objective, independent evidence of [REDACTED]'s relationship to [REDACTED], it did not demonstrate the ability to pay for either 2006 or 2007. Further, the ability to pay was not established in 2005 since [REDACTED] did not demonstrate that it was the successor-in-interest to [REDACTED].

Accordingly, the petition must also be denied because the appellant has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer.

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.