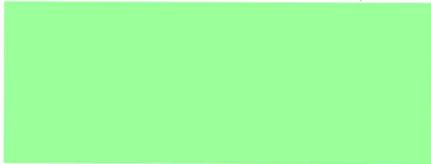
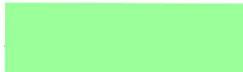


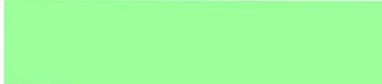
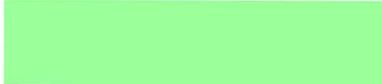


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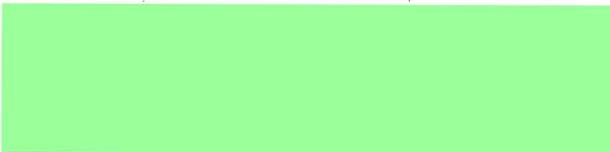


DATE: **SEP 06 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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,

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 beauty salon. It seeks to employ the beneficiary permanently in the United States as a cosmetologist. 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 April 21, 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 December 2, 1997. The proffered wage as stated on the Form ETA 750 is \$10.07 per hour (\$20,945.60 per year based on forty hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered.

We note that the case involves the substitution of a beneficiary on the labor certification.¹ Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

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 but no new evidence.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation.³ On the petition, the petitioner claimed to have been established in 1982 and currently to employ 8

¹ The petitioner filed [REDACTED] for the beneficiary identified on the certified ETA Form 750 which was submitted with the instant petition. [REDACTED] was approved on September 17, 2003 but was revoked on February 11, 2004. [REDACTED] was filed on November 1, 2002 for the instant beneficiary with an ETA Form 750 which was filed on behalf of the instant beneficiary. [REDACTED] was denied on December 5, 2003. Since USCIS revoked [REDACTED], the petitioner is now substituting the original beneficiary with the instant beneficiary.

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).

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 May 23, 2007, the beneficiary did not claim to have worked for the petitioner.⁴

On appeal, counsel asserts that the tax returns submitted as evidence demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage for every year, either through consideration of wages paid to the beneficiary, or net income or net current assets.

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 Sonegawa*, 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 provided a copy of IRS Form W-2 which it issued to the beneficiary in 2008. The petitioner neither claims to have employed nor provided evidence of wages paid to the beneficiary prior to 2008. The beneficiary's IRS Form W-2, Wage and Tax Statement, for 2008 shows compensation received from the petitioner, as shown in the table below.

- In 2008, the Form W-2 stated compensation of \$14,840.00.

³ For the years 1997 through 2001, as evidence of its ability to pay, the petitioner submitted copies of U.S. Individual Income Tax Return (Form 1040) for [REDACTED] with no explanation regarding the structure of the petitioner's business and no explanation for the apparent change in structure. In its response to the director's February 19, 2009 request for evidence, the petitioner made passing reference to the fact that the petitioner began operating as an S corporation in 2001 but said nothing else regarding this matter and failed to provide documentation to substantiate the statement. In his decision, the director erroneously accepted the claim. This has not been demonstrated and will be addressed below.

⁴ On the ETA Form 750B, the beneficiary claimed to have been self-employed and renting a station in the petitioner's beauty salon since February 1996.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 1997 through 2007. However, the petitioner demonstrated that it paid the beneficiary a portion of the proffered wage in 2008. Therefore, while the petitioner must still demonstrate the ability to pay the beneficiary the full proffered wage from 1997 through 2007, it must only demonstrate the ability to pay the difference between the full proffered wage and wages already paid for 2008, that difference being \$6,095.60.

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

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

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

We find that the AAO has a rational explanation for its policy of not adding

depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts 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).

With its initial petition submission, the petitioner provided no documentary evidence of its ability to pay the beneficiary. However, the petitioner had previously filed [REDACTED] for the beneficiary of the instant petition. With the earlier I-140, the petitioner submitted copies of its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2001 and 2002. On February 19, 2009, the director issued an RFE, asking the petitioner to supply its federal income tax returns for 1997, 1998, 1999, 2000, 2003, 2004, 2005, 2006, 2007 and 2008, if the 2008 return was then available. In its response, the petitioner supplied copies of the U.S. Individual Income Tax Return (Form 1040) for [REDACTED] for 1997, 1998, 1999, 2000 and 2001. The petitioner also supplied copies of the petitioner’s U.S. Income Tax Return for an S Corporation (Form 1120S) for 2002, 2003, 2004, 2005, 2006 and 2007. The petitioner provided no documentary evidence to substantiate a corporate restructuring or a transfer of ownership, but merely stated in its response, “Starting in 2001 the employer became an S Corporation...”

The director did not address this issue in his decision but simply accepted the petitioner’s statement.

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, counsel’s assertion does not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Even though the petitioner made passing reference to a change in corporate structure, the evidence indicates that the company which filed Form I-140 is different than the company which filed ETA Form 750. The ETA Form 750 was filed on December 2, 1997. The copy of the U.S. Individual Income Tax Return (Form 1040) for 1997 for [REDACTED] contains Schedule C for [REDACTED]. This entity utilizes the Employer Identification Number (EIN) [REDACTED]. The petitioner on Form I-140 utilizes the name [REDACTED] and the EIN [REDACTED].

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

corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a *bona fide* successor-in-interest.

Therefore, the petitioner should have provided evidence substantiating a successorship-in-interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*").

Since the director accepted counsel's statement, the AAO will not address the issue of whether or not the petitioner demonstrated that it is a *bona fide* successor-in-interest to the entity which filed Form ETA 750 here. However, we will come back to this issue later in the decision. At this point, the AAO will analyze the documents as presented.

The director accepted that the petitioner operated as a sole proprietor from at least 1997, the year in which the priority date was established, until sometime in 2001.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

From sometime in 2001, the petitioner claims to have begun operating as a Sub-chapter S corporation and to have continued utilizing this structure through the present.

The record before the director closed on March 31, 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 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. The sole proprietor's tax returns (Forms 1040) demonstrate its net income for 1997, 1998, 1999, 2000, 2001 and the petitioner's tax returns (Forms 1120S) demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006 and 2007, as shown in the tables below.

In the instant case, the sole proprietor supports a family of one. The proprietor's tax returns reflect the following information for the following years:

- In 1997, the proprietor's IRS Form 1040, line 32, stated adjusted gross income of \$46,507.00.
- In 1998, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$35,574.00.
- In 1999, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$53,957.00.
- In 2000, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$52,267.00.
- In 2001, the proprietor's IRS Form 1040, line 33, stated adjusted gross income of \$76,903.00.
- In 2001, the Form 1120S stated net income⁵ of \$17,487.00.⁶
- In 2002, the Form 1120S stated net income of \$33,392.00.
- In 2003, the Form 1120S stated net income of \$30,136.00.
- In 2004, the Form 1120S stated net income of \$25,328.00.
- In 2005, the Form 1120S stated net income of \$13,180.00.
- In 2006, the Form 1120S stated net income of \$18,044.00.
- In 2007, the Form 1120S stated net income of \$19,513.00.

A sole proprietor must be able to demonstrate not only the ability to pay the proffered wage to the beneficiaries of all pending petitions but it must also demonstrate the ability to support his or her household. Such a determination would require the sole proprietor to submit an itemized list of all of his or her recurring, monthly, household expenses with documentary evidence to substantiate such expenses. In this case, the petitioner has not provided evidence of such expenses. Thus, for the years 1997, 1999, 2000 and 2001, the petitioner has not demonstrated that the sole proprietor had sufficient adjusted gross income to pay the beneficiary and support her household. For 1998, the sole proprietor has not demonstrated sufficient adjusted gross income even to pay the beneficiary.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 10, 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, deductions and other adjustments shown on its Schedule K for 2001, 2002, 2003, 2004, 2005 and 2006, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁶ In identifying the petitioner's net income for each of the years from 2001 through 2006, the director did not consider Schedule K.

In considering the petitioner as an S corporation, for 2001, 2002, 2003 and 2004, the petitioner has demonstrated sufficient net income to pay the proffered wage. For 2005, 2006 and 2007, the petitioner has not demonstrated sufficient net income to pay the beneficiary of the instant petition the full proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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.

For 1997 through 2001, the director erroneously identified the net profit from line 31 on Schedule C of the sole proprietor's tax returns as the sole proprietor's net current assets. This figure does not represent the sole proprietor's net current assets. Rather, it represents the profit/income from the sole proprietor's business which is then reported on line 12 of the U.S. Individual Income Tax Return (Form 1040) as business income. USCIS would consider a sole proprietor's personal, unencumbered and liquefiable assets that could reasonably be applied towards paying employee wages. However, in this instance, the petitioner has provided no documentary evidence of the sole proprietor's personal assets.

For the S Corporation, the petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2001, the Form 1120S, Schedule L stated net current assets of \$32,615.00.
- In 2002, the Form 1120S, Schedule L stated net current assets of \$28,396.00.
- In 2003, the Form 1120S, Schedule L stated net current assets of \$44,702.00.
- In 2004, the Form 1120S, Schedule L stated net current assets of \$65,634.00.
- In 2005, the Form 1120S, Schedule L stated net current assets of \$55,412.00.
- In 2006, the Form 1120S, Schedule L stated net current assets of \$104,602.00.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$34,677.00.

Therefore, for the years 2001 through 2007, the petitioner has demonstrated sufficient net current assets to pay the beneficiary of the instant petition the full proffered wage.

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, with the exception of 2001 through 2007.

On appeal, counsel asserts that the tax returns submitted as evidence demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage for every year, either through consideration of wages paid to the beneficiary, or net income or net current assets.

As articulated above, the AAO has reviewed the tax returns submitted as evidence for each year from 1997 through 2007 and the IRS Form W-2 which the petitioner issued to the beneficiary in 2008. The petitioner provided evidence of having paid the beneficiary in only 2008 and in that year only paid the beneficiary a portion of the proffered wage. Further, the petitioner provided no federal income tax return or audited financial statement for 2008 to demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage. The AAO notes, however, that at the time the petitioner responded to the director's RFE, its federal income tax return for 2008 was not yet due to be filed with the Internal Revenue Service. It will also be noted, however, that this document should have been available at the time the petitioner filed the instant appeal.

With respect to consideration of the petitioner's net income and net current assets, the AAO reviewed the tax returns to determine if the petitioner demonstrated either sufficient net income or sufficient net current assets to pay the beneficiaries of the two pending I-140 petitions from 1997 through 2004 and the ability to pay the beneficiary of the instant petition from 2005 through 2007. Our findings are detailed above.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has provided financial documentation to account for its business activities from 2001 through 2007. The petitioner has not demonstrated that it is the same entity as the entity which filed ETA Form 750 or that it is a successor-in-interest to that entity, so therefore, has not demonstrated ongoing business operations prior to 2001. Since that time, the petitioner's gross receipts, officer compensation and payroll have all been consistent. The petitioner's net income has been consistent and marginal. The petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or outsourced service. 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 in 1997.

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 is a different entity from the employer listed on 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).

Form ETA 750 was filed on December 2, 1997 by [REDACTED]. As evidence of the ability to pay for 1997, the record contains a copy of a U.S. Individual Income Tax Return for [REDACTED] with a Schedule C for [REDACTED]. The entity which appears on Schedule C uses the Employer Identification Number (EIN) [REDACTED]. Form I-140 was filed by [REDACTED] using the EIN [REDACTED]. This is the same EIN which appears on the U.S. Income Tax Returns for an S Corporation (Form 1120S) for [REDACTED]. Further, in the petitioner's response to the director's RFE, counsel for the petitioner stated in his letter, "Starting in 2001 the employer became an S Corporation..."

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.⁸ *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.⁹

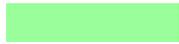
A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that 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; and it 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. 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.

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.

⁸ 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).

⁹ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm’r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.



(b)(6)

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ORDER: The appeal is dismissed.