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



U.S. Citizenship  
and Immigration  
Services

DATE: **SEP 06 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 market. It seeks to employ the beneficiary permanently in the United States as a baker. 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 the entity which filed Form I-140 and the entity which filed Form ETA 750 are one and the same or that the I-140 petitioner is the successor-in-interest to the employer which filed Form ETA 750 and, consequently that the petitioner 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 June 5, 2009 denial, the single issue in this case is whether or not the petitioner on Form I-140 is the same entity as the employer which filed Form ETA 750 and, if not, is the successor-in-interest to that employer and, consequently whether the petitioner had the continuing ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtains lawful permanent residence.

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

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

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

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

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour (\$24,024 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 as a baker.

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

On appeal, counsel submits a brief; a copy of a Statement of Information for a Limited Liability Company filed for [REDACTED] with the California Secretary of State on March 11, 2009; a copy of the Articles of Organization for [REDACTED] filed with the California Secretary of State on March 10, 2005; copies of two stock certificates issued by [REDACTED] on June 15, 2005; copies of IRS Forms W-2 issued to the beneficiary by [REDACTED] for 2001, 2002, 2003 and 2004; a copy of IRS Form W-2 issued to the beneficiary by [REDACTED] in 2008; copies of the U.S. Individual Income Tax Return (Forms 1040) for [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008; copies of the U.S. Return of Partnership Income (Forms 1065) for [REDACTED] [REDACTED] for 2006, 2007 and 2008; copies of the U.S. Return of Partnership Income (Forms 1065) for [REDACTED] for 2001, 2002, 2003, 2004 and 2005; and a copy of a letter dated April 21, 2009 from [REDACTED] [REDACTED]<sup>2</sup> attesting to his annual household expenses.

Based on the evidence in the record of proceeding, the petitioner has not demonstrated the business structure of the petitioning entity. The statements of counsel suggest that the petitioner is structured as a single-member limited liability company (LLC).<sup>3</sup> However, for reasons explained below, the

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

<sup>2</sup> The name is spelled [REDACTED] on this document and [REDACTED] on the tax returns.

<sup>3</sup> A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company 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 single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

structure of the petitioning entity has not been established. On the petition, the petitioner claimed to have been established in 1997 and currently to employ 48 workers. All of the tax returns in the record report income based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claimed to have worked for the employer which filed Form ETA 750 since November 2000.<sup>4</sup>

On appeal, counsel asserts that the petitioner's existence and identity is clearly established by the evidence provided on appeal. Counsel asserts that from 2001 through 2005, the petitioner operated as [REDACTED] using the Employer Identification Number (EIN) [REDACTED]. Counsel further asserts that in 2006, the petitioner operated as [REDACTED]. Counsel asserts that the petitioner changed "its form of business on March 8, 2005 to a limited liability company." With specific reference to the petitioner's ability to pay, counsel asserts that the evidence shows that the petitioner demonstrated such ability through a combination of wages paid to the beneficiary, the petitioner's net profit, and the petitioner's "partnership share in an additional business."

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 filing the instant I-140 petition, the petitioner identified itself, in Part 1 of Form I-140, as simply [REDACTED] and used the EIN [REDACTED]. With its initial petition submission, as evidence of its ability to pay the proffered wage, the petitioner provided copies of the U.S. Return of Partnership Income (Form 1065) for [REDACTED] for 2001, 2002, 2003, 2004, 2005 and 2006. The EIN on the tax returns is [REDACTED]. Additionally, the name of the employer as set forth on Form ETA 750 is simply [REDACTED]. No EIN was indicated on the labor certification.

On March 18, 2009, the director issued a request for evidence (RFE), noting that the EIN associated with the petitioner on Form I-140 is different than the EIN on the tax returns provided as evidence. The director indicated that the I-140 petitioner must demonstrate its ability to pay the beneficiary and that the I-140 petitioner must be the same entity as the employer which filed the labor certification. In his RFE, the director asked the petitioner to explain the current status of the labor certification employer. The director also indicated that if the I-140 petitioner is not the same entity as the labor certification

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<sup>4</sup> Form ETA 750 was filed by an entity which is not the petitioner on Form I-140. This matter will be addressed below.

employer, the petitioner would have to demonstrate that the I-140 petitioner is the successor-in-interest to the labor certification employer. To that end, the director indicated that the petitioner must provide full documentation demonstrating the successorship. Additionally, the director specifically requested that the petitioner supply evidence of the continuing ability to pay the proffered wage for the I-140 petitioner which uses the [REDACTED] in the form of annual reports, audited financial statements, or complete federal tax returns for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The director also requested evidence of any compensation paid to the beneficiary by the petitioning employer in the form of either IRS Forms W-2 or 1099 for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008.

In its April 29, 2009 response, counsel for the petitioner submitted no explanation for the difference between the EIN used by the I-140 petitioner and the EIN which appeared on the copies of the U.S. Return of Partnership Income (Forms 1065) which were initially submitted as evidence. Further, counsel for the petitioner did not address the issue of whether or not the I-140 petitioner and the labor certification employer were one and the same entity or whether the I-140 petitioner is the successor-in-interest to the labor certification employer and provided no documentary evidence which clarified the relationship. Rather, counsel supplied a copy of a document entitled, "Limited Liability Company Articles of Organization," which was filed with the California Secretary of State on March 10, 2005. This document identifies the name of the filing entity as [REDACTED]. Counsel also supplied a copy of a Statement of Information filed with the California Secretary of State dated March 11, 2009, this document appears to register the addition of two new managers for [REDACTED]. Counsel also supplied a copy of a stock certificate bearing the issuing name of [REDACTED] issued to [REDACTED] on April 11, 2005. The last three documents were supplied without explanation. Further, none of the three documents bears an EIN and none contain the name [REDACTED]. Therefore, there is no evidence that these documents relate to the I-140 petitioner.

Moreover, counsel provided none of the financial documents for the I-140 petitioner requested by the director. Rather, counsel supplied copies of the U.S. Return of Partnership Income (Forms 1065) for [REDACTED] for 2001, 2002, 2003, 2004 and 2005; and copies of the U.S. Return of Partnership Income (Forms 1065) for [REDACTED] for 2006, 2007 and 2008. Counsel also supplied a list of assets and liabilities for Daniel Rubalcava which purports that [REDACTED] owns 100 percent of [REDACTED] 50 percent of [REDACTED] 100 percent interest in [REDACTED] and 50 percent interest in [REDACTED]. No evidence was provided which identifies any of these entities with the I-140 petitioner or the labor certification employer.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide any explanation regarding the nature of the relationship between the I-140 petitioner and the employer which filed the labor certification, whether the I-140 petitioner and the labor certification employer are one and the same entity or whether the I-140 petitioner is the successor-in-interest to the labor certification employer. The petitioner also declined to explain and document the current status of the labor certification employer. The petitioner also declined to explain the reason for the difference

between the EINs on Form I-140 and on the copies of the U.S. Return of Partnership Income (Forms 1065) for [REDACTED] which were initially submitted as evidence of the ability to pay. Further, the petitioner declined to provide the specific forms of evidence (e.g. annual reports, audited financial statements or complete federal income tax returns and evidence of compensation to the beneficiary) which the director requested as evidence of the I-140 petitioner's (EIN [REDACTED]) ability to pay. All of these documents would have demonstrated the identity of the petitioner with relation to the other evidence in the record, its continuing business operations, its relationship, if any, to the labor certification employer (e.g. whether it is the same entity or the successor-in-interest), the amount of taxable income the petitioner reported to the IRS, and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On June 5, 2009, the director denied the I-140 petition, finding that the petitioner had not provided any information regarding the I-140 petitioner [REDACTED] not provided any explanation or documentation substantiating the relationship between the I-140 petitioner and the labor certification employer or the relationship between the I-140 petitioner and any of the entities represented on the various tax returns supplied as evidence.

On appeal, counsel still does not explain the nature of the relationship between the I-140 petitioner and the labor certification employer. Counsel still does not explain the nature of the relationship between the I-140 petitioner and the entities associated with the various federal income tax returns submitted with the initial petition submission and with the petitioner's response to the director's RFE. Counsel merely states:

Petitioner's tax returns for the years 2001, 2002, 2003, 2004 and 2005 indicate its existence as [REDACTED]

For 2006, 2007, and 2008, Petitioner's tax returns indicate [REDACTED]

[REDACTED] This change is due to the petitioner's change in its form of business on March 8, 2005 to a limited liability company (LLC), as shown by the attached articles of organization (Exhibit 1). Thus, Petitioner's existence has been clearly established.

On appeal, counsel provided the same Statement of Information, Articles of Organization and Stock Certificate which were previously submitted in response to the director's RFE. On appeal, however, counsel also submits copies of the U.S. Individual Income Tax Return (Forms 1040) for [REDACTED] and [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2006, 2007 and 2008. The tax returns for 2005, 2006, 2007 and 2008 contain Schedule C for [REDACTED] (the entity on the Articles of Organization) bearing the [REDACTED]. This EIN is similar, but not identical, to the

<sup>5</sup> Neither of these EINs corresponds with the EINs of any of the documents submitted with the initial petition submission or in response to the director's RFE.

<sup>6</sup> These dates do not correspond with counsel's assertion. Counsel asserts that the petitioner existed as [REDACTED] in 2005. However, on appeal,

EIN which appears on Form I-140 [REDACTED]. On appeal, counsel states that [REDACTED] is the petitioner, having organized itself as an LLC in March 2005. However, the EIN associated with [REDACTED] is not the same as the EIN for the I-140 petitioner [REDACTED] and the I-140 petitioner being [REDACTED]. Counsel provided no further explanation regarding the differences between the EINs.

Therefore, none of the evidence submitted on appeal serves to demonstrate the I-140 petitioner's ability to pay.

Even if the tax returns (Schedule C) submitted on appeal for [REDACTED] related to the I-140 petitioner, the AAO could not consider such evidence in our assessment of the I-140 petitioner's ability to pay because such evidence was specifically requested in the director's RFE but was not provided in the petitioner's response and no explanation was provided for the failure to supply such evidence.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Again, this evidence does not contain an EIN which corresponds identically with the EIN used on the I-140 petition. However, were it demonstrated to pertain to the I-140 petitioner, it could not be considered because the director issued an RFE specifically requesting such documentation and the petitioner declined to provide it in responding to the director's request.

The tax returns supplied on appeal for 2002, 2003 and 2004 contain a Schedule C for an entity by the name of [REDACTED]. Counsel asserts that the petitioner was operating as this entity until 2005. However, the EIN associated with this entity did not belong to any of the entities represented on the tax returns previously submitted. Further, the tax return for 2001 does not contain Schedule C. However, the petitioner did provide a copy of IRS Form W-2 which was issued to the beneficiary by [REDACTED] for 2001. Thus, the evidence would indicate that this entity was operating in 2001.

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counsel provided the Schedule C for 2005 which bears the name [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).

However, the petitioner has still not demonstrated which entity filed Form ETA 750:

In his RFE, the director specifically requested evidence explaining the status of the labor certification employer and evidence explaining the relationship between the I-140 petitioner and the labor certification employer. In addition, the director requested evidence of the I-140 petitioner's ability to pay and any evidence of a successorship-in-interest. In its response, the petitioner provided tax returns for [REDACTED] for each year from 2001 through 2005. The petitioner also provided tax returns for [REDACTED] for 2006, 2007 and 2008. The evidence was submitted in response to specific requests made by the director and, thereby, suggest that the petitioner intended to lead the director to believe that [REDACTED] was the initial employer (labor certification employer/successor) and that [REDACTED] was the successor and I-140 petitioner.

However, the address attributed to [REDACTED] on the tax returns is [REDACTED]. The labor certification employer, [REDACTED] uses the address [REDACTED]. The address associated with [REDACTED] as shown on Schedule C, is [REDACTED] which is the address which appears on Form I-140. However, given the fact that the petitioner had earlier suggested to the director that [REDACTED] was the labor certification employer but now, on appeal, would claim that [REDACTED] is the labor certification employer, the petitioner must provide some independent, objective, verifiable evidence demonstrating the true identity of the labor certification employer. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel provided no such evidence but merely made the statement, on appeal, that the petitioner was functioning as [REDACTED] in 2002, 2003, 2003, 2004 and 2005.

Counsel's assertions do 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).

None of the evidence in the record relates to the I-140 petitioner, [REDACTED]. Further, the identity of the labor certification employer has not been established. On appeal, counsel makes the assertion that the petitioner existed as [REDACTED] during the years 2001, 2002, 2003, 2004 and 2005 and then became [REDACTED] in March 2005. However, counsel failed to substantiate the assertion with independent, objective evidence. Nevertheless, if the AAO were to accept counsel's claim, this would still indicate that the I-140 petitioner and the labor certification employer were not the same entity because each has its own EIN and its own business structure. Thus, even if counsel's assertion on appeal were true, the petitioner would bear the burden of demonstrating that the I-140 petitioner is the successor-in-interest to the labor certification employer.

Yet, even if counsel's assertions were not proven to be true, the petitioner would still bear the burden of demonstrating the relationship between the I-140 petitioner and the labor certification employer. The petitioner's various attempts to supply evidence related to the entities indicates, by the variety of documents submitted and the pattern reflected in these submissions (e.g. some sort of change in the structure and nature of the company), that these are not the same entities.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

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

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

In the present matter, the USCIS Service Center Director requested evidence of the relationship between the I-140 petitioner and the labor certification employer. The director noted that if the I-140 petitioner and the labor certification employer were not one and the same entity, the petitioner would have to demonstrate that the I-140 petitioner is, in fact, the successor-in-interest to the labor certification employer. To that end, the director requested that the petitioner fully document the successorship. The petitioner failed to address the matter in its response and provided no explanation regarding the relationship between the I-140 petitioner and the labor certification employer. Therefore, the

petitioner's failure to address this matter, as specifically requested by the director, precluded the director's assessment of whether ownership was transferred from one entity to the other or whether the relationship between these two entities constitutes a successorship. The Commissioner's decision does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

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

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>7</sup> *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.<sup>8</sup>

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<sup>7</sup> 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).

<sup>8</sup> 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 merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>9</sup> *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

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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.

<sup>9</sup> The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes.

First, though asked to do so, the petitioner has not fully described or documented the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer (the labor certification employer). On appeal, counsel merely states that the petitioner "changed its form of business."

Counsel's statement that the change "is due to the petitioner's change in its form of business" 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 (BAI 1983).

Counsel also provided Articles of Organization filed in 2005 for [REDACTED] which purports to show that the petitioning entity organized in March 2005 and began its operations at that time. However, as discussed above, the petitioner has not demonstrated that the Articles of Organization for [REDACTED] relate to the I-140 petitioner because the EIN associated with [REDACTED] is not the same as the EIN used on the Form I-140. Further, the mere provision of Articles of Organization would not be sufficient to demonstrate a successorship. Such documentation would only serve to demonstrate the establishment of the LLC identified on the Articles. It does not demonstrate the transfer of ownership from one entity to another.

Further, the petitioning successor has not proven by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will normally 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 matter, the petitioner provided copies of IRS Forms W-2 which were issued to the beneficiary by [REDACTED] in 2001, 2002, 2003 and 2004; copies of IRS Forms W-2 which were issued to the beneficiary by [REDACTED] for 2006 and 2007; and a copy of IRS Form W-2 which was issued to the beneficiary by [REDACTED] in 2008.

The IRS Forms W-2 issued to the beneficiary by [REDACTED] has not been demonstrated to be the labor certification employer (predecessor), as asserted by counsel on

appeal. [REDACTED] has not been demonstrated to be either the labor certification employer (predecessor) or the I-140 petitioner. Further, the IRS Forms W-2 issued to the beneficiary for 2001, 2002, 2003, 2004, 2005, 2006 and 2007 all contain a social security number (SSN) which was issued to an individual who is not the beneficiary and, according to public records, has been used by three individuals, one of which is the beneficiary.<sup>10</sup> Thus, even if the petitioner had demonstrated that either of the companies which issued these IRS Forms W-2 was the labor certification employer or the I-140 petitioner, the AAO would not have considered the compensation reflected on such forms in a consideration of the ability to pay because the wages were paid using a stolen social security number.

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<sup>10</sup> 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:

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

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

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

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

On appeal, for the first time, counsel provided a copy of IRS Form W-2 which was issued to the beneficiary by [REDACTED] which, counsel asserts, is the I-140 petitioner. This, however, has not been demonstrated to be the case. Further, although in his RFE the director requested evidence specifically from the I-140 petitioner of any compensation paid to the beneficiary from 2001 through 2008 in the form of either IRS Forms W-2 or 1099, the petitioner declined to provide such evidence in its response.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The AAO, therefore, would not consider the IRS Form W-2 issued to the beneficiary by the petitioner (if [REDACTED] were the petitioner) since it was requested by the director but was not provided in response to the RFE.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Likewise, the petitioner has not demonstrated that a predecessor paid the beneficiary during the period in which it was supposed to have employed him. As noted above, the petitioner has not demonstrated, by objective evidence, the identity of the labor certification employer. Further, given the discrepancy in the beneficiaries SSN, the petitioner has not provided *bona fide* evidence of wages paid to the beneficiary by the entity which issued the IRS Forms W-2.

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

proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

*River Street Donuts* at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on April 29, 2009 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 would have been the most recent return available. However, the I-140 petitioner did not provide its tax returns either with the initial petition submission or in response to the director's RFE. Counsel provided documents for the first time on appeal, which he claims reflect the income from the I-140 petitioner for 2006, 2007 and 2008. However as discussed above, the petitioner has not demonstrated that the I-140 petitioner is [REDACTED]. If the petitioner had so demonstrated, the AAO would not consider these documents because the director requested them in his RFE and the petitioner declined to provide them. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, the petitioner has not demonstrated the identity of the labor certification employer.

Thus, in failing to demonstrate the identity of the labor certification employer, the petitioner has not demonstrated the labor certification employer's ability to pay. Moreover, the petitioner, in failing to demonstrate a valid successorship, has not demonstrated a continuing ability to pay.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>11</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. For the reasons explained in the analysis above, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage during any period from the establishment of the priority date in 2001 until the beneficiary obtains lawful permanent residence.

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.

On appeal, counsel asserts that the beneficiary has been working for the petitioner between 2001 and 2008 and has received an income during each of those years. On appeal, counsel further asserts that, when taking into consideration the wages paid to the beneficiary, in addition to the petitioner's net profit for each of those years, and the "petitioner's partnership share in an additional business as indicated in Form 1065 Schedule K-1," the combination of these three sources exceeds the proffered wage for each year under consideration.

However, the AAO has discussed above the reasons that the income reflected on the IRS Forms W-2 for each of the years cannot be considered. Further, the petitioner has not demonstrated which of the entities and the associated tax returns should be considered. The petitioner has not demonstrated which of multiple possible entities is the labor certification employer. Additionally, the petitioner has provided no tax documentation which bears the same EIN as that belonging to the I-140 petitioner. Therefore, the petitioner has not demonstrated any net profit which could be used to determine the ability to pay. Further, since the petitioner has not demonstrated the identity or the structure of the labor certification employer or the I-140 petitioner, it has not demonstrated that the petitioner would be able to utilize the personal resources of the petitioner's owner.

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<sup>11</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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."

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 related to at least four different entities and has not demonstrated which if any of these is the I-140 petitioner and which if any of these is the labor certification employer. Further, the petitioner has not demonstrated whether the I-140 petitioner and the labor certification employer are one and the same entity or whether the I-140 petitioner is the successor-in-interest to the labor certification employer. Therefore, the petitioner has not demonstrated 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 or whether the beneficiary would be replacing a former employee or an outsourced

(b)(6)

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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.

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

**ORDER:** The appeal is dismissed.