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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 24 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, who affirmed in part his decision on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. 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: 1) 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, 2) the petitioner had not demonstrated that the beneficiary met the minimum requirements as stated on the approved Form ETA 750, and 3) the petitioner had not established that a *bona fide* job offer existed since the original petitioning business had dissolved and the record lacked sufficient evidence of a successor-in-interest. The director denied the petition accordingly on March 23, 2009.

On April 24, 2009, the petitioner filed a motion to reopen and reconsider the director's decision. The director determined that: 1) the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and 2) the petitioner had not established that a *bona fide* job offer existed since the original petitioning business had dissolved and the record lacked sufficient evidence of a successor-in-interest. The director also concluded that the petitioner had sufficiently demonstrated that the beneficiary met the minimum requirements as stated on the approved Form ETA 750. On May 22, 2009, the director granted the motion and reaffirmed his decision to deny the petition.

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.

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.[1]

As set forth in the director's May 22, 2009 decision, an issue in this case is whether or not a *bona fide* job offer exists since the original petitioning business has dissolved. The director noted in his decision that according to the records maintained by the Illinois Secretary of State website, the petitioner, is currently dissolved. *See* http://www.ilsos.gov/corporatellc/ (accessed August 17, 2012). If a petitioner is currently dissolved, this is material to whether the job offer, as outlined on the immigrant petition filed by the organization, is a *bona fide* job offer.

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[1] 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).

On appeal, counsel asserts that ownership of the business was transferred three times and that the petitioner is able to prove the necessary successor-in-interest relationship. No additional brief or evidence was submitted on appeal, but the AAO notes that petitioner's brief submitted with the motion of April 24, 2009, states that the petitioner sold its physical assets and the franchise business it owned to in 2006. Counsel also states that the "same type of transition occurred in 2007 when bought the same assets and franchise." Counsel states that a valid successor-in-interest relationship continued throughout each transaction with the business operating in the same location using the same franchise. Counsel further states that is now offering the job.

United States Citizenship and Immigration Services (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).

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.[2] *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.[3]

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[2] 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).

[3] 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.

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.[4] *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.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes for each of the claimed transfers in ownership. The record contains evidence of only one transfer of the property relating to a business. The record contains a copy of an asset purchase agreement by which sold assets relating to a property located at

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[4] 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).

on June 30, 2001. The asset purchase agreement is signed by as president of The Form ETA 750 labor certification was submitted by a business located at and signed by the owner, on April 16, 2001, prior to the asset purchase agreement of June 30, 2001, and prior to the filing of the instant Form I-140 on March 24, 2003. Therefore, the business located at of which was the president is the proposed employer on the labor certification, and the evidence must demonstrate which, if any, entity is the successor-in-interest to this business.

The asset purchase agreement in the record is sufficient evidence that purchased the assets as well as the essential rights and obligations of the predecessor necessary to carry on the business from the predecessor. However, the evidence does not demonstrate a successor-in-interest relationship between and the petitioner on the Form I-140, The AAO notes that the record contains a copy of an Illinois state corporate annual report for dated November 15, 2000, listing as the president and that the asset purchase agreement between and is signed by as a manager and a member of however, the record does not contain evidence which demonstrates that purchased any assets or liabilities or is otherwise a successor-in-interest to Evidence in the record indicates that the petitioner, operated its business at but the record does not contain documents which fully describe and document the transaction transferring ownership of all, or a relevant part of, Therefore, the evidence does not demonstrate that the petitioner, , is a successor-in-interest to the employer who filed the labor certification.

The AAO also notes that counsel's claims that a successor-in-interest relationship was maintained through several other transfers of ownership of the business is not supported by probative evidence. The record does not contain sufficient evidence regarding which: 1) describes and documents the transactions transferring ownership of all, or a relevant part of, the predecessor employer; 2) demonstrates the job opportunity is the same as originally offered on the labor certification; and 3) proves by a preponderance of the evidence that the new employer is eligible for the immigrant visa in all respects. The record contains copies of various Forms W-2 and Forms 1120S from these entities which reflect different addresses and federal employer identification numbers (FEIN), but these documents do not address the details, including the dates, of any transfers of ownership.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, as the petitioner is not a successor-in-interest to the employer which filed the labor certification application, the petitioner is a dissolved corporation no longer conducting business, and

the most recent job offer has not been made by a successor-in-interest, it is clear that a *bona fide* job offer as certified by DOL on the labor certification does not exist and the petition must be denied.

As set forth in the director's May 22, 2009 decision, another 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. Although the petitioner has not been shown to be the successor-in-interest to the employer which filed the labor certification application, the petitioner's ability to pay the proffered wage is an issue in the director's decision, and thus is analyzed below.

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 27, 2001. The proffered wage as stated on the Form ETA 750 is $14.00 per hour ($29,120.00 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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary did not claim to have worked for the petitioner; however several Forms W-2 reflecting payments to the beneficiary were submitted.

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, 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 paid the beneficiary in excess of the proffered wage in 2003, and did not pay the beneficiary the full proffered wage in any other year. Forms W-2 were submitted indicating that the beneficiary was paid wages according to the table below.

- In 2001, the Form W-2[5] stated wages paid to the beneficiary of $13,960.00.
- In 2002, the Form W-2 stated wages paid to the beneficiary of $13,428.52.
- In 2003, the Form W-2 stated wages paid to the beneficiary of $37,657.22.
- In 2004, the Form W-2 stated wages paid to the beneficiary of $27,540.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of $26,370.00.
- In 2006, the Form W-2 stated wages paid to the beneficiary of $2,610.00.

Additional Forms W-2 from 2006 and 2007 from , as well as paystubs reflecting payments to the beneficiary from 2008 issued by (another unrelated entity which has not been shown to be a successor-in-interest, were submitted, but as these were not issued by the petitioner or its claimed predecessor listed on the labor certification, they have not been included above. In order to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the petitioner, which claims to be a successor-in-interest to the employer which filed the labor certification application, must demonstrate that the

[5] The beneficiary's Form W-2 for 2001 was issued by shown elsewhere in the record as which is the proposed employer on the Form ETA 750, of which the petitioner claims to be a successor-in-interest. Although no successor-in-interest relationship has been demonstrated, the Form W-2 is shown here as it reflects wages paid to the beneficiary in the same year as the priority date.

predecessor had the ability to pay the proffered wage and that the petitioner, as a successor-in-interest has the ability to pay the proffered wage. Although the petitioner has failed to demonstrate that it is a successor-in-interest, it would also have been obligated to demonstrate its ability to pay the difference between the proffered wage and wages it or its claimed predecessor actually paid, as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2001	$29,120.00	$13,960.00	$15,160.00
2002	$29,120.00	$13,428.52	$15,691.48
2003	$29,120.00	$37,657.22	$0
2004	$29,120.00	$27,540.00	$1,580.00
2005	$29,120.00	$26,370.00	$2,750.00
2006	$29,120.00	$2,610.00	$26,510.00
2007	$29,120.00	$0	$29,120.00
2008	$29,120.00	$0	$29,120.00

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).

The record before the director closed on April 24, 2009, with the receipt by the director of the petitioner's motion to reopen and reconsider. As of that date, the petitioner's 2009 federal income tax return was not yet due to be filed with the IRS. The petitioner's income tax returns for 2007 and 2008 were not submitted, and the petitioner's 2006 Form 1120S indicated that it was the final return. Therefore, the petitioner's income tax return for 2006 is its most recent return in the record. The 2006 and 2007 tax returns for [redacted] were submitted, but are not considered here as they are not relevant to the petitioner's ability to pay. The petitioner's claimed predecessor, [redacted] filed its final tax return Form 1120S for 2000, which covered the period of January 1, 2000, to September 30, 2001, and reflected net income[6] of $167,659. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, and 2006 as shown in the table below.

- In 2001, the Form 1120S stated net income of $19,431.00.
- In 2002, the Form 1120S stated net income of $47,566.00.

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[6] 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), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 17, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner and its claimed predecessor had additional income, credits, deductions, or other adjustments shown on its Schedules K for 2000, 2002, 2004, and 2006, the net income is found on Schedule K of those tax returns.

- In 2003, the Form 1120S stated net income of $4,894.00.
- In 2004, the Form 1120S stated net income of $7,008.00.
- In 2005, the Form 1120S stated net income of -$95,274.00.
- In 2006, the Form 1120S stated net income of $123,388.00.

Therefore, for the year 2001, both the proposed employer on the labor certification and the petitioner had sufficient net income to pay the difference between the wages paid and the proffered wage. The petitioner, had it been the successor-in-interest, also demonstrated sufficient net income to pay the proffered wage or the difference between the proffered wage and wages paid in 2002, 2004, and 2006. The petitioner did not demonstrate sufficient net income to pay the proffered wage in 2005 or in 2007 and 2008 - after the petitioner had filed its final return and the corporation was dissolved.

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

- In 2001, the Form 1120S stated net current assets of -$14,808.00.
- In 2002, the Form 1120S stated net current assets of $10,239.00.
- In 2003, the Form 1120S stated net current assets of $5,635.00.
- In 2004, the Form 1120S stated net current assets of $3,363.00.
- In 2005, the Form 1120S stated net current assets of -$1,666.00.
- In 2006, the Form 1120S stated net current assets of $0.00.

Therefore, for the years 2001, 2002, 2005, and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between the wages paid and the proffered wage. The petitioner also did not demonstrate sufficient net current assets to pay the proffered wage in 2007 and 2008 after the petitioner had filed its final return and the corporation was dissolved. The petitioner had sufficient net current assets to pay the proffered wage or the difference between the proffered wage and wages paid in 2003 and 2004.

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

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

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets in 2005, 2007, and 2008.

On appeal, counsel asserts that the petitioner is able to pay the proffered wage through 2008 and that the business underwent renovations in 2005 which affected the figures for that year. Counsel also asserts that a successor-in-interest relationship can be proven. Counsel also refers to a previous claim in the record in which he had asserted that the petitioner needed to demonstrate the ability to pay the beneficiary for only 35 hours of work per week rather than the 40 hours per week as specified on the Form ETA 750. Counsel now states that the petitioner can demonstrate the ability to pay the proffered wage calculated using 40 hours per week.

The AAO notes that no additional evidence was submitted on appeal. As discussed above, the petitioner has failed to demonstrate that it had the ability to pay the proffered wage in 2005, 2007, and 2008. The petitioner also failed to demonstrate that the business continues to exist. The petitioner has also failed to demonstrate that a successor-in-interest relationship existed between it and the employer which filed the labor certification. The petitioner also failed to demonstrate a successor-in-interest relationship between the employer on the labor certification and any of the corporate entities which counsel claims were operating a business and employing the beneficiary, including The evidence in the record indicates that only one of the entities, was operating at the original employer's location, but the record does not include probative evidence of any of the transactions by which the ownership of the business was transferred.

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

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

In the instant case, counsel claims that the business underwent renovations which affected operations in 2005. No probative evidence of these renovations or of their economic effects was submitted into the record. The petitioner failed to include copies of its 2007 and 2008 tax returns and failed to demonstrate that it or a successor-in-interest continues to exist and operate the business. The petitioner filed its final tax return for the year 2006, after which it ceased activity. The petitioner's gross receipts during the relevant years varied, reaching its highest point in 2002. The petitioner indicated on the Form I-140 that it employs four people. Salaries and wages were not substantial. While the petitioner was in business, it did not pay substantial compensation to its owner. The petitioner also did not submit evidence sufficient to demonstrate that the owner was willing and able to forego officer compensation in order to pay the beneficiary the proffered wage in any year. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. is a nationally recognized franchise, but the record contains no evidence of the reputation of the petitioner's individual business operation. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K.*

Irvine, Inc. v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered as a baker. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a baker working 45 hours per week for at 1 from March 1998 to June 2000.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains three letters of experience from employers, but none of them list the address given on the Form ETA 750.

The record contains a letter dated April 18, 2009, from who claims to be the former owner of which operated a I states that the beneficiary worked for the business full-time as a baker from March 1998 to December 1998.

The record also contains a letter dated April 20, 2009, from who claims to be the former manager of which operated a states that the beneficiary worked for the business full-time as a baker from February 1999 to March 1999.

The record contains a letter dated April 8, 2009, from who claims to be the former owner of which operated a Dunkin Donuts at 1160 S. Main Street, Lombard, Illinois. Mr. Patel states that the beneficiary worked for the business full-time as a baker from October 1999 to October 2001.

The AAO notes that, although accompanied by copies of Forms W-2 from the employers, none of these employment experiences is listed on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Further, the letter from Mr. Patel which claims the beneficiary worked full-time for his business in from October 1999 to October 2001 conflicts with the beneficiary's claims to have worked 45 hours per week for a different donut shop in St. Charles, Illinois from March 1998 to June 2000, as the beneficiary would have had to have worked between 40 to 45 hours per week at two different businesses in two separate cities during the overlapping period of October 1999 to June 2000. In addition to these conflicting accounts, the beneficiary is also claimed to have worked full-time at another location in Chicago, Illinois for Mr. Dadani from March 1998 to December 1998. Therefore, the evidence is claiming that the beneficiary worked three full-time jobs in different locations simultaneously from March 1998 to December 1998. The AAO does not find these

conflicting claims plausible and notes at the very least, the claims of full-time employment during these periods is doubtful.

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

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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

ORDER: The appeal is dismissed.