



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: **SEP 26 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:

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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

As set forth in the director's April 17, 2009 denial, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$18.34 per hour (\$38,147.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires three years of experience in the job offered of sous chef or three years of experience in the alternate occupation of line cook.

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

The prospective employer which filed the labor certification is listed as [REDACTED], which operated using federal employer identification number (FEIN) [REDACTED]. The petitioner on the Form I-140 is listed as [REDACTED] formerly known as [REDACTED] which operates using FEIN [REDACTED]. Thus, the labor certification and the Form I-140 have been filed by different corporate entities. 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 [United States Citizenship and Immigration Services (USCIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

However, if a successor-in-interest relationship is established between the two entities, then USCIS will consider the wages paid and the tax returns or other regulatory-prescribed evidence of the successor-in-interest in determining the ability of the petitioner to pay the proffered wage.

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:

---

<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).

(b)(6)

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 director noted in his denial that the petitioner, [REDACTED], became a successor-in-interest to [REDACTED] by purchasing its assets in 2004. The AAO notes that the evidence in the record does not support this conclusion.

In regards to *Matter of Dial Auto*, 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

(b)(6)

rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>2</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>3</sup>

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>4</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

---

<sup>2</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>3</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 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>4</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).

(b)(6)

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. The evidence in the record contains: 1) a letter from counsel dated July 2, 2007, which states that [REDACTED] ceased operations in December 2004 and that all assets were transferred to [REDACTED], which is a sister corporation of [REDACTED], which was the holding corporation for the businesses known as [REDACTED]; 2) a letter from the owner of both entities, [REDACTED], dated December 3, 2006, which states that [REDACTED] and [REDACTED] were sister corporations operating businesses on adjacent properties and that due to financial losses, [REDACTED] was merged into [REDACTED] and the adjacent lot [REDACTED] occupied was sold; and 3) minutes of a special meeting of the shareholders and board of directors dated June 1, 2004, stating that [REDACTED] has been losing money and will be dissolved and that "[o]n a selective basis the [REDACTED] is authorized to absorb some of the assets and some of the employees of [REDACTED]". The record also contains copies of the tax returns of [REDACTED] for 2001 through 2005, and the tax returns of [REDACTED] for 2001 through 2007.

The AAO notes that the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the letter from counsel dated July 2, 2007, is not sufficient evidence to establish that a successor-in-interest relationship existed between [REDACTED] and the petitioner, [REDACTED]. In contrast to counsel's claim that all of [REDACTED] assets were transferred to [REDACTED] the minutes of the special meeting of the shareholders and board of directors states that [REDACTED] "is authorized to absorb some of the assets" of [REDACTED].

The letter from [REDACTED] dated December 3, 2006, and the minutes of the special meeting of June 2, 2004, fail to fully describe and document the transaction transferring ownership of all, or a

(b)(6)

relevant part of, the beneficiary's predecessor employer. The record lacks evidence of the transfer of ownership; evidence 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; and evidence to demonstrate that the essential business functions remain substantially the same as before the ownership transfer. Further, it is not clear how the essential business functions of this particular restaurant could have remained substantially the same if it was closed and the lot on which it sat was sold, as the petitioner has stated.

In contrast to the claims made by counsel and Mr. [REDACTED] that [REDACTED] ceased operations in December 2004, the 2004 tax return of [REDACTED] does not indicate that the business was dissolved at that time. The 2005 tax return of [REDACTED] was filed and submitted into evidence, and the box at section F of the Form 1120S which indicates that a final return is being filed was not marked. An attachment listed as Statement 1 indicated some income and costs for "winding down business," but the business' balance sheet on Schedule L reflected continuing items of assets and liabilities at the end of the fiscal year. Therefore, it does not appear that [REDACTED] ceased operations in December 2004 as counsel and the petitioner claim, and it is not clear that it ceased operations in 2005. According to the Indiana Secretary of State website, [REDACTED] became inactive on November 19, 2009. See [https://secure.in.gov/sos/online\\_corps/name\\_search.aspx](https://secure.in.gov/sos/online_corps/name_search.aspx) (accessed September 1, 2012).

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). Further, the specific details of any dissolution, merger, and/or transfer of essential assets and liabilities have not been demonstrated as required in *Matter of Dial Auto*.

However, even if a successor-in-interest relationship exists between the prospective employer and the petitioner, the petitioner has not demonstrated that it had the ability to pay the proffered wage since the priority date.

The evidence in the record of proceeding shows that the prospective employer on the labor certification is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1994 and to currently employ 35 workers. The tax returns of the prospective employer indicate that it was incorporated in 1990. According to the tax returns in the record, the prospective employer's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary does not claim to have worked for the petitioner, [REDACTED] formerly known as [REDACTED], although he claims to have worked for the employer listed on the Form ETA 750, [REDACTED] from November 1993 to the present.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining a 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 prospective employer, [REDACTED], established that it paid the beneficiary at least the full proffered wage in 2004.<sup>5</sup>

Forms W-2 were submitted indicating that [REDACTED] or [REDACTED] operating under [REDACTED] FEIN [REDACTED], paid the beneficiary wages according to the table below.

- In 2000, the Form W-2 stated wages paid to the beneficiary of \$25,223.72.<sup>6</sup>
- In 2001, the Form W-2 stated wages paid to the beneficiary of \$18,803.28.
- In 2002, the Forms W-2 stated wages paid to the beneficiary of \$16,672.27.
- In 2003, the Form W-2 stated wages paid to the beneficiary of \$22,139.11.
- In 2004, the Forms W-2 stated wages paid to the beneficiary of \$42,993.76.
- In 2005, the Form W-2 stated wages paid to the beneficiary of \$32,035.15.

<sup>5</sup> The beneficiary's Forms W-2 from 2002 and 2004 included one paid from [REDACTED] and one paid from [REDACTED] both reflecting the same employer identification number [REDACTED], thus indicating that both Forms W-2 in 2002 and 2004 came from the same corporate entity. Forms W-2 issued to the beneficiary listing [REDACTED] as the employer and using [REDACTED] FEIN [REDACTED] were submitted for 2006 and 2007. A Form W-2 from [REDACTED] for 2008 was also submitted. The beneficiary's Forms W-2 from 2007 and 2008 reflected payment in excess of the proffered wage. Neither the prospective employer on the labor certification nor the petitioner established that they employed and paid the beneficiary the full proffered wage during any other year.

<sup>6</sup> As the Form W-2 submitted from 2000 covers a period prior to the priority date of April 27, 2001, it is not necessarily dispositive of the employer's ability to pay the proffered wage as of the priority date but may be considered generally.

(b)(6)

Forms W-2 were submitted indicating that [REDACTED] or [REDACTED] operating under [REDACTED]'s FEIN [REDACTED] paid the beneficiary wages according to the table below.

- In 2006, the Form W-2 from [REDACTED] stated wages paid to the beneficiary of \$33,465.67.
- In 2007, the Form W-2 from [REDACTED] stated wages paid to the beneficiary of \$39,457.84.
- In 2008, the Form W-2 from [REDACTED] stated wages paid to the beneficiary of \$38,519.60.

Therefore, as the proffered wage was \$38,147.20 per year, [REDACTED] paid the beneficiary the proffered wage in 2004 only, while [REDACTED] paid the beneficiary the proffered wage in 2007 and 2008, and both entities would be obligated to demonstrate their ability to pay the difference between wages they actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2001	\$38,147.20	\$18,803.28	\$19,343.92
2002	\$38,147.20	\$16,672.27	\$21,474.93
2003	\$38,147.20	\$22,139.11	\$16,008.09
2004	\$38,147.20	\$42,993.76	\$0
2005	\$38,147.20	\$32,035.15	\$6,112.05
2006	\$38,147.20	\$33,465.67	\$4,681.53
2007	\$38,147.20	\$39,457.84	\$0
2008	\$38,147.20	\$38,519.60	\$0

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 January 30, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the employer's 2008 federal income tax return was not yet due. No tax returns were submitted for 2006 or 2007, and no evidence of an extension was in the record.

The tax returns of [REDACTED] demonstrate its net income for 2001, 2002, 2003, 2004, and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>7</sup> of -\$80,714.00.

<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 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 30, 2012) (indicating that Schedule K

- In 2002, the Form 1120S stated net income of -\$8,937.00.
- In 2003, the Form 1120S stated net income of -\$88,208.00.
- In 2004, the Form 1120S stated net income of -\$114,704.00.
- In 2005, the Form 1120S stated net income of -\$3,848.00.

The tax returns of [REDACTED] demonstrate its net income for 2005, 2006, and 2007 as shown in the table below.<sup>8</sup>

- In 2005, the Form 1120S stated net income of -\$52,066.00.
- In 2006, the Form 1120S stated net income of -\$75,526.00.
- In 2007, the Form 1120S stated net income of -\$43,625.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, the evidence does not demonstrate sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</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.

The tax returns of [REDACTED] demonstrate its net current assets for 2001, 2002, 2003, 2004, and 2005, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$91,384.00.
- In 2002, the Form 1120S stated net current assets of -\$69,309.00.

---

is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because these tax returns showed additional income, credits, deductions, or other adjustments shown on Schedule K for 2001, 2002, 2003, and 2004 of the tax returns of [REDACTED] and on the Schedule K for the 2005, 2006, and 2007 tax returns of [REDACTED] the net income is found on Schedule K of the tax returns for those years. The net income on Schedule K of the 2005 tax return of [REDACTED] is the same as the ordinary business income or loss on line 21.

<sup>8</sup> The record includes the tax returns of [REDACTED] for 2001 through 2007, but as the claimed transfer of ownership and assets took place in 2005, the Forms 1120S of [REDACTED] for 2001 through 2004 are not relevant and thus are not reflected above.

<sup>9</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.

(b)(6)

- In 2003, the Form 1120S stated net current assets of -\$75,681.00.
- In 2004, the Form 1120S stated net current assets of -\$10,706.00.
- In 2005, the Form 1120S stated net current assets of \$34,737.00.

The tax returns of [REDACTED] demonstrate its net current assets for 2005, 2006, and 2007, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of -\$124,306.00.
- In 2006, the Form 1120S stated net current assets of -\$74,688.00.
- In 2007, the Form 1120S stated net current assets of -\$187,141.00.

[REDACTED] had sufficient net current assets to pay the proffered wage in 2005. For the years 2001, 2002, 2003, and 2004, [REDACTED] failed to demonstrate sufficient net current assets to pay the proffered wage. [REDACTED] failed to demonstrate sufficient net current assets to pay the proffered wage in 2005, 2006, and 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the prospective employer who filed the Form ETA 750, [REDACTED] and the petitioner, which filed the Form I-140, [REDACTED], had not established 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 in 2001, 2002, 2003, and 2006.

In addition, the AAO notes that all of the Forms W-2 in the record of proceeding issued to the beneficiary from 2000 to 2006 were issued under the Social Security number ending in 9008, while the Forms W-2 from 2007 and 2008 were issued under the Social Security number ending in 2279. The record of proceeding does not contain any explanations or evidence as to why the beneficiary was using two different Social Security numbers. Further, searches in available databases have indicated that the Social Security number ending in 9008 is associated with multiple individuals.<sup>10</sup>

*Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." In the instant case, the beneficiary's use of multiple Social Security numbers has cast doubt on the credibility of the Forms W-2, and thus they will not be considered in determining the petitioner's ability to pay the proffered wage.

<sup>10</sup> Additionally, Form I-140 filed on the beneficiary's behalf, as well as Form I-485 Application to Register Permanent Residence or Adjust Status, state the beneficiary's social security number as "none." Forms W-2 submitted, however, state two different social security numbers. The petitioner must resolve this inconsistency in order to determine that the wages paid are properly attributable to the beneficiary. 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).

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.<sup>11</sup>

The director stated in his denial of April 17, 2009, that prior to 2004, [REDACTED] and [REDACTED] were two separate entities, and that [REDACTED] became a successor-in-interest to [REDACTED] after the petitioner's claimed purchase of assets. As previously noted, the evidence in the record does not sufficiently demonstrate that the petitioner in these proceedings, [REDACTED] became the successor-in-interest. The director considered the wages paid to the beneficiary, the net income, and the net current assets of [REDACTED] for 2001 through 2004 and those of the petitioner in 2005 through 2007. The director concluded that [REDACTED] failed to demonstrate the ability to pay the proffered wage in 2001, 2002, 2003, and 2004, and that [REDACTED] had the ability to pay the proffered wage in 2007 and 2008 when it paid

---

<sup>11</sup> The following provisions of law deal directly with Social Security number fraud and misuse:

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

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

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

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

the beneficiary in excess of the proffered wage, but that it did not have the ability to pay the proffered wage in 2005 and 2006.

On appeal, counsel asserts that the petitioner's financial statements should be considered along with the tax returns and payments made to the beneficiary. The AAO notes that as the petitioner has not been shown to be a successor-in-interest to [REDACTED], the entity which filed the labor certification, the petitioner's financial statements, tax returns, and amounts paid to the beneficiary are not relevant. In addition, counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also cites *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009) and asserts that tax returns are not reliable in determining the ability to pay and that cash flow is a better measure. In that case, the seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over \$50,000 per year.<sup>12</sup> The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.<sup>13</sup> The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.<sup>14</sup>

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure."<sup>15</sup>

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."<sup>16</sup> The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."<sup>17</sup> The court found

---

<sup>12</sup> 563 F.3d at 595.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Id. at 596.

<sup>17</sup> Id.

that the employer had failed to establish that it had sufficient resources to pay the proffered wage “plus employment taxes (plus employee benefits, if any).”<sup>18</sup>

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer’s ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner’s federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Further, the court in *Construction and Design* noted that the “proffered wage” actually understates the cost to the employer in hiring an employee, as the employer must pay the salary “plus employment taxes (plus employee benefits, if any).” As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit’s decision in *Construction and Design*. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker’s compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the “fully burdened” wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.<sup>19</sup> In this case, as noted above, the proffered wage as stated on the Form ETA 750 is \$38,147.20 per year. Using the OMB-approved formula, the “fully burdened” wage rate in this case equates to \$53,406.08 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay \$53,406.08 per year.

As determined above, the prospective employer listed on the labor certification was unable to demonstrate the ability to pay the proffered wage in 2001, 2002, 2003, 2006 and 2007. Under the standards set forth in *Construction and Design*, the prospective employer also lacks the ability to pay the wage of \$53,406.08 in 2004 and 2005.

Counsel also cites *Construction and Design* in support of the assertion that a new employee might boost a company’s income by more than the salary paid. Counsel states that the current success of the petitioner’s business in the instant case is related to the work of the beneficiary. The AAO notes

---

<sup>18</sup> Id.

<sup>19</sup> The 1.4 multiplier is from the Bureau of Labor Statistics 2009: <http://www.bls.gov/news.release/ecec.t01.htm> (accessed August 30, 2012).

that this argument is no relevant since the petitioner and the new restaurant it operates has not been shown to be a successor-in-interest to [REDACTED]

Counsel also asserts that the petitioner may reasonably assume that its business will continue to increase as will its profits. Counsel states that the beneficiary is a highly skilled sous chef with his own clientele and that the addition of the beneficiary has already increased revenue in the petitioner's new restaurant. [REDACTED] The AAO notes that the petitioner in this case is not the successor-in-interest. In addition, the employer which filed the labor certification ceased operation due to financial losses during the employment of the beneficiary, thus the claim that the beneficiary will bring increased revenue and growth to the petitioner's business is purely speculative. Further, counsel's claim that the beneficiary has his own clientele which will result in increased business is not persuasive. First, as previously noted, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the beneficiary's duties as listed on the labor certification do not include interaction with the public, thus the establishment of a clientele particular to the beneficiary as a sous chef is unlikely. Third, the record of proceeding contains no probative evidence of counsel's claims in this regard. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel also asserts that the salary paid by [REDACTED] as successor to [REDACTED] should be considered. As previously noted, the petitioner has not been shown to be a successor-in-interest to [REDACTED]. Further, the fact that the same individual owned both corporate entities does not establish that a successor-in-interest relationship has been created between the corporate entities.

Counsel asserts that a totality of circumstances test should be applied as in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The AAO notes the significance of such an analysis and has set forth the details below.

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 *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, the gross receipts of [REDACTED] varied, but financial losses caused the owner to close the business. Labor costs and wages decreased steadily until the business closed. The petitioner indicated on the Form I-140 that it employs thirty-five people, but [REDACTED] is closed. [REDACTED] was incorporated on April 26, 1990, and became inactive on November 19, 2009. Although officer compensation was paid, the record does not contain 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 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. 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, and as discussed above, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

As previously noted, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third,

the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. The record does not contain sales agreements, contracts, or other evidence which specifies which assets and liabilities are to be transferred. The minutes of the special meeting of the shareholders and board of directors dated June 1, 2004, stated that [REDACTED] had been losing money and would be dissolved and that "[o]n a selective basis the [REDACTED] is authorized to absorb some of the assets and some of the employees of [REDACTED]." This document stated that [REDACTED] would be dissolved, but did not set forth a date for the dissolution. This document also stated that certain assets would be transferred to [REDACTED], but it did not specify which assets, whether or not any liabilities would also be transferred, and the dates of any such transfers.

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

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

**ORDER:** The appeal is dismissed.