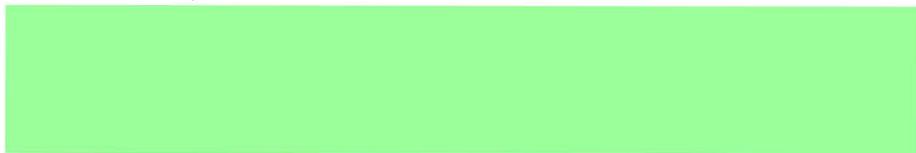




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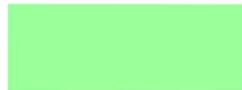
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DATE: APR 17 2013

OFFICE: NEBRASKA SERVICE CENTER

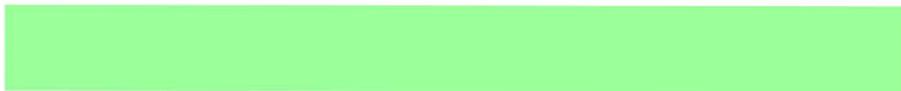
FILE:



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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), approved the employment-based visa petition, then later issued the petitioner a notice of intent to revoke (NOIR) the petition's approval. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker, on October 14, 2010. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what [s]he deems to be good and sufficient cause, revoke the approval of any petition approved by h[er] under section 204." The director's realization that she approved the petition in error may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner<sup>1</sup> identifies itself as a transportation company. It seeks to employ the beneficiary permanently in the United States as a network administrator. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification (labor

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<sup>1</sup> As the director noted in his request for evidence dated March 3, 2010, the petitioner is a different entity than the employer that filed the labor certification, "[redacted]". A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, it must establish that it is a "successor-in-interest" to the labor certification employer in order to use the approved labor certification and its priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part, of the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. Although the director did not base her revocation of the petition's approval on the petitioner's failure to establish its successorship, the evidence in the record does not satisfy all three of the above conditions. Here, the petitioner and the labor certification employer appear to have the same, single shareholder. However, the corporations appear to be separate and distinct entities with their own, different Federal Employer Identification Numbers. The copy of the agreement whereby the petitioner purportedly acquired all of the assets and liabilities of the business from the labor certification employer is unsigned; a copy of an Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement shows that the beneficiary began working for the petitioner in 2004 before the purported acquisition agreement of January 1, 2005; and the record shows that both entities continue to operate after the acquisition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). In any further filings, especially because the record shows that the same sole shareholder owns both the petitioner and the labor certification employer, the petitioner must provide independent, objective evidence, such as copies of filings with state or governmental agencies, of its successor relationship to the labor certification employer.

certification), approved by the United States Department of Labor (DOL)<sup>2</sup>. In her NOR, the director determined that the petitioner failed to establish the continuing ability of it and the company that filed the labor certification to pay the proffered wage beginning on the petition's priority date. The director revoked the approval of 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 NOR, the issue in this case is whether or not the petitioner has demonstrated the ability of it and the labor certification employer 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 its continuing ability to pay the proffered wage beginning on the priority date, which is the date the DOL (or any office within its employment system) accepted the Form ETA 750 for processing. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that,

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<sup>2</sup> The DOL approved the labor certification on December 27, 2006 for [REDACTED] at a worksite address of [REDACTED] CA [REDACTED]. In its most recent correspondence with U.S. Citizenship and Immigration Services (USCIS), however, the petitioner identified its address as [REDACTED] CA [REDACTED]. The petitioner's website provides a different address of [REDACTED] CA [REDACTED]. See [http://www.\[REDACTED\]](http://www.[REDACTED]) (accessed on March 11, 2013). Because [REDACTED], which is about 30 miles from [REDACTED] appears to be within normal commuting distance of the [REDACTED] addresses, the labor certification appears to remain valid for any of these addresses if the petitioner is able to establish that it is a successor-in-interest to the labor certification employer. See 20 C.F.R. §§ 656.3, 656.30(c)(2) (stating that a labor certification remains valid only for the "area of intended employment" and defining the term as within the normal commuting distance of the place of intended employment).

on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, 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 DOL accepted the Form ETA 750 on October 9, 2001. The proffered wage, as stated on the Form ETA 750, is \$29.17 per hour for 40 hours per week (or \$60,673.60 per year). The Form ETA 750 states that the position requires two years of full-time experience in the offered position of network administrator or as a computer programmer.

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>3</sup> The burden remains with the petitioner in revocation proceedings to establish that the beneficiary qualifies for the benefit sought under the immigration laws. *Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1987); *Matter of Cheung*, 12 I&N Dec. 715 (BIA 1968).

A notice of intent to revoke is properly issued for good and sufficient cause when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based on the petitioner's failure to meet its burden of proof. *See Estime*, 19 I&N Dec. at 451. Where a notice of intent to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained, even if the petitioner failed to timely respond to the notice. *Id.* at 452.

In her NOIR of September 3, 2010, the director informed the petitioner that, upon re-examination of the evidence, she found that the petitioner and [REDACTED] the company that filed the labor certification, had not demonstrated their ability to pay the proffered wage in 2003, 2004, 2006, 2007 and 2009. The director also found "unpersuasive" counsel's argument, in response to her request for evidence, that the petitioner and [REDACTED] could reallocate portions of the officer compensation that they paid to their sole shareholder in the relevant years to satisfy the proffered wage requirements. The director determined that the shareholder's renunciation of portions of his past remunerations would result in substantial reductions to his compensation in the relevant years. Further, the director determined that the petitioner failed to submit any evidence of its ability to pay the proffered wage in 2009.

The record at the time the director issued the NOIR confirms that the petitioner failed to establish the ability of it and [REDACTED] to pay the proffered wage in 2002, 2004, 2006, 2007 and 2009. If unexplained and un rebutted, this evidence would warrant denial of the petition. The AAO therefore finds that the director properly issued the NOIR for good and sufficient cause.

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<sup>3</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).

The evidence in the record shows that both the petitioner and [REDACTED] are structured as S corporations. On the Form I-140, the petitioner claimed to have been established in January 1998<sup>4</sup> and to employ 20 workers. According to the tax returns in the record, the fiscal years of both the petitioner and [REDACTED] are based on a calendar year. On the Form ETA 750B, which the beneficiary signed on September 12, 2001, the beneficiary claimed to have worked in the offered position for [REDACTED] since January 2001.

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. USCIS will also consider the magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

At the time of the NOIR's issuance in the instant case, the petitioner had submitted copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements from 2001 through 2009, showing that it and/or [REDACTED]<sup>5</sup> paid the beneficiary the following amounts: \$7,949.50 in 2001; \$18,560 in 2002; \$13,577.95 in 2003; \$26,423.54 in 2004<sup>6</sup>; \$45,509.14 in 2005; \$45,129.10 in 2006; \$45,159.18 in 2007; \$47,696.98 in 2008; and \$48,703.92 in 2009. Because none of these amounts equal or exceed

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<sup>4</sup> Documentation from the California Secretary of State's office that the petitioner submitted shows that it was incorporated on March 15, 2002. The January 1998 date of establishment on the Form I-140 may refer to [REDACTED], which documentation from the secretary of state's office shows was incorporated on January 1, 1998. However, as noted above, the petitioner has not established that it is the successor-in-interest to the labor certification employer.

<sup>5</sup> The beneficiary's W-2 wage statements from 2001 through 2004 are in the name of [REDACTED]. Her W-2 statements from 2004 through 2009 are in the petitioner's name. The beneficiary received W-2 statements from both corporations in 2004. As discussed previously, the petitioner claims it acquired all of the assets and liabilities of the labor certification employer's business as of January 1, 2005. The beneficiary therefore appears to have been working for the petitioner before it purportedly acquired the labor certification employer's business.

<sup>6</sup> The beneficiary's 2004 W-2 statements show that she received \$727.50 from [REDACTED] and \$25,696.04 from the petitioner that year.

the annual proffered wage of \$60,673.60, the petitioner had not established that it or [REDACTED] employed and paid the beneficiary the full proffered wage since the petition's priority date.

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 annual net income figures reflected on the petitioner's federal income tax returns, 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). If the total of the petitioner's annual net income amount and the wages paid to the beneficiary in a given year are equal to or greater than the annual proffered wage, the petitioner is expected to be able to pay the proffered wage that year using its net income.

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).

At the time of the NOIR’s issuance in the instant case, the record before the director had closed on April 16, 2010 with receipt of the petitioner’s submissions in response to the director’s request for evidence. The petitioner’s income tax return for 2008 was the most recent return in the record.<sup>7</sup>

The tax returns of [REDACTED] and the petitioner show the following annual net income amounts:<sup>8</sup> \$56,902 in 2001; (\$79,801)<sup>9</sup> in 2002; \$47,547 in 2003; (\$108,149) in 2004; \$105,445 in 2005; (\$29,596) in 2006; (\$28,415) in 2007; and \$25,579 in 2008. Of these net income amounts, only the amount for 2005 equals or exceeds the annual proffered wage of \$60,673.60. Combining the wages that the petitioner or [REDACTED] paid the beneficiary with the annual net income amounts of the companies from 2001, 2003, and 2008, however, yields amounts exceeding the annual proffered wage for those years. Therefore, based on the annual net income amounts and wages paid to the

<sup>7</sup> The record contains no explanation as to why the petitioner did not submit copies of its 2009 tax returns in response to the director’s September 3, 2010 NOIR. The petitioner also did not submit its 2009 or 2010 tax returns on appeal. The tax returns from 2001 through 2003 are in the name of [REDACTED]. The tax returns from 2004 through 2008 are in the name of the petitioner. As previously noted, the petitioner claims it acquired all of the assets and liabilities of the labor certification employer’s business as of January 1, 2005. The record, however, does not contain the labor certification employer’s 2004 tax return, which would reflect its financial status immediately before the petitioner purportedly acquired its business. The petitioner has therefore failed to show the labor certification employer’s ability to pay the proffered wage in the relevant year of 2004. If the successor-in-interest transaction occurred on January 1, 2005, the labor certification employer should have filed a 2004 tax return and provided a copy in order to document its ability to pay the the beneficiary’s proffered wage.

<sup>8</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 a 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 March 11, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner and [REDACTED] had additional income adjustments shown on their Schedules K in 2001 through 2008, the net income amounts for all years in that period are found on the Schedules K of the tax returns of the petitioner and [REDACTED].

<sup>9</sup> Numbers in parentheses reflect negative amounts.

beneficiary, the petitioner had demonstrated the ability of it and [REDACTED] to pay the proffered wage in 2001, 2003, 2005 and 2008. The petitioner had not, however, demonstrated the ability of it and Jaygav to pay the difference between wages paid to the beneficiary and the proffered wage in 2002, 2004, 2006, 2007 and 2009. The petitioner failed to provide any required evidence for tax year 2009. Further, the petitioner failed to submit any required evidence of the labor certification employer's ability to pay the proffered wage in 2004, before the petitioner purportedly acquired all of the assets and liabilities of the labor certification employer's business.

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>10</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 year-end net current assets and the wages paid to the beneficiary are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage that year using those net current assets.

The tax returns of [REDACTED] and the petitioner show the following year-end net current asset amounts in the relevant years: (\$15,734) in 2002; (\$112,153) in 2004<sup>11</sup>; (\$94,633) in 2006; and (\$143,938) in 2007. Because net current asset amounts for the years 2002, 2004, 2006 and 2007 are negative, and because the petitioner did not provide any evidence of its net current assets for 2009 or the labor certification employer's net current assets for 2004, the petitioner and [REDACTED] did not have sufficient net current assets to pay the differences between wages paid to the beneficiary and the proffered wage in 2002, 2004, 2006, 2007 and 2009.

Thus, from the date the DOL accepted the Form ETA 750 for processing, the petitioner had not established the continuing ability of it and [REDACTED] to pay the beneficiary the proffered wage based on examinations of the wages they paid to the beneficiary, their net income and their net current assets.

As indicated previously, in response to the director's request for evidence, counsel had argued that [REDACTED] and the petitioner could retain portions of the annual officer compensation amounts that they paid their sole shareholder and instead reallocate the amounts as net profits, which would have been available to pay the required annual offered wage amounts.

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<sup>10</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.

<sup>11</sup> The amount of (\$112,153) reflects the net current assets shown on the 2004 tax return of the petitioner. As discussed previously, the petitioner did not submit the labor certification employer's 2004 tax return regarding its financial status immediately before the purported acquisition of its business on January 1, 2005.

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

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner's owner, but, rather, the financial flexibility that the owner has in setting his compensation based on the profitability of the corporation. USCIS recognizes that a sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on Form 1120S U.S. Corporation Income Tax Return. For this reason, in certain circumstances, USCIS may consider a petitioner's figures for officer compensation as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation in the record at the time of the NOIR's issuance indicates that the sole shareholder held 100 percent of the stock of both [REDACTED] and the petitioner. According to the tax returns of [REDACTED] and the petitioner, at line 7 of IRS Forms 1120S, the shareholder received the following annual officer compensation amounts in the relevant years: \$67,990 in 2002; \$67,990 in 2004; \$70,200 in 2006; and \$70,200 in 2007. As indicated previously, the petitioner did not submit its tax return for 2009. Also, the 2004 tax return is the petitioner's return, not the labor certification employer's.

As the director stated in her NOIR, even assuming that the petitioner had established that the sole shareholder's officer compensation in 2002, 2004, 2006, and 2007 could be reallocated, the petitioner had not established its ability to pay the offered wage in 2009. The petitioner had not submitted a copy of its 2009 tax return, annual report or audited financial statements, nor had it submitted evidence that it paid officer compensation to the shareholder in 2009. See 8 C.F.R. § 204.5(g)(2).

As the director stated in her NOIR, the petitioner also failed to provide evidence of the shareholder's willingness to renounce portions of the officer compensation he received. Counsel merely asserted in the petitioner's response to the director's request for evidence that the shareholder would renounce the compensation. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In addition, as the director stated in her NOIR, the petitioner failed to establish the financial ability of its sole shareholder to renounce the officer compensation he received in the relevant years. Without evidence of the shareholder's financial status, such as copies of his personal tax returns for

the relevant years, USCIS was unable to determine whether the shareholder could financially support himself and any dependents with the compensation remaining after reallocations of the offered wage amounts. For the foregoing reasons, the petitioner had failed to establish the continuing ability of it and [REDACTED] to pay the offered wage by reallocating portions of the officer compensation of its sole shareholder in relevant years.

A decision to revoke a petition will be sustained if the evidence of record at the time of the decision - including any explanation, rebuttal, or evidence that the petitioner submitted - warranted such a denial. *Estime*, 19 I&N Dec. at 452. A decision to revoke approval of a visa petition can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations specified in the notice of intent to revoke. *See Matter of Arias*, 19 I&N Dec. at 570; *see also* 8 C.F.R. § 205.2(b).

In response to the NOIR, the petitioner continued to argue that, to fund the difference between the wages paid to the beneficiary and the annual proffered wage amounts in 2002, 2004, 2006, 2007 and 2009, its sole shareholder could renounce portions of the officer compensation he received in those years, which the petitioner and [REDACTED] could then reallocate as net profits. The petitioner submitted a letter from its shareholder, who stated that he receives compensation from six other businesses<sup>12</sup> that he owns. Therefore, the shareholder, who did not indicate how much compensation he received from his other businesses, stated that he could renounce portions of his officer compensation from the petitioner and [REDACTED] to pay the proffered wage in the relevant years.

The AAO finds that the director, in her NOR, properly determined that the sole shareholder's written agreement to renounce portions of his officer compensation was insufficient to meet the petitioner's burden of proof. As the director stated, the petitioner failed to submit evidence that the shareholder received income from his other businesses during the relevant years. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). Moreover, as discussed previously, the petitioner failed to submit evidence of the ability of its sole shareholder to financially support himself and any dependents without the renounced compensation in the relevant years.

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<sup>12</sup> Although the petitioner's sole shareholder claimed to own six other businesses, he identified in his letter only five businesses, one of which was the labor certification employer, to which the petitioner claims to be a successor-in-interest. The continued operation of the labor certification employer and the sole shareholder's continued ownership of both entities casts doubt on the unsigned acquisition agreement and the petitioner's claimed successorship to the labor certification employer's business. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). In the NOIR response, counsel claimed that the petitioner's shareholder was an owner and/or officer of five other businesses. The petitioner submitted documentation regarding only four of the other businesses that its shareholder identified as being active sources of income.

Because the evidence of record at the time of the decision warranted a denial, the AAO finds that the director properly revoked the petition's approval based on the grounds identified in the notice of intent to revoke.

On appeal, the petitioner submits copies of the personal tax returns of its sole shareholder for 2002, 2004, 2006, 2007 and 2009. Counsel again argues that the shareholder can renounce portions of his officer compensation, allowing the petitioner to pay the proffered wage in the relevant years.

Although the petitioner submits copies of the personal tax returns of its sole shareholder, including his 2009 personal tax return, the petitioner does not submit a copy of its own tax return, annual report or audited financial statement for 2009. The record also does not contain a 2004 tax return for the labor certification employer. The regulation at 8 C.F.R. § 204.5(g)(2) specifically requires a petitioner to submit "copies of annual reports, federal tax returns, or audited financial statements" to establish its continuing ability to pay the offered wage from "the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." Although USCIS can accept "additional evidence" of a petitioner's ability to pay the offered wage in appropriate cases, such "additional evidence" can only be considered after submission of the required evidence of annual reports, federal tax returns, or audited financial statements from the years of filing onward. *See* 8 C.F.R. § 204.5(g)(2).

Despite the director's request for the petitioner's annual reports, U.S. tax returns or audited financial statements from 2005 onward in her March 3, 2010 request for evidence, which was due on April 14, 2010, and her finding that the petitioner failed to show how it would pay the 2009 proffered wage in her September 3, 2010 NOID, the petitioner has not submitted any required evidence to show its ability to pay the offered wage for 2009. Further, the petitioner has submitted no evidence of the labor certification employer's ability to pay the proffered wage in 2004.

Even if the petitioner had submitted the required financial evidence for 2004 and 2009, the petitioner's evidence on appeal does not establish the ability of it and [REDACTED] to pay the beneficiary's offered wage by reallocating portions of the officer compensation of their sole shareholder in the relevant years. The personal tax returns of the shareholder, which he jointly filed with his wife, may indicate that he and/or his wife earned enough income to allow him to renounce the required portions of his officer compensation in the relevant years while supporting their family.<sup>13</sup> But the tax returns of [REDACTED] and the petitioner undermine the claims of counsel and the sole shareholder that the shareholder's compensation was discretionary and available to pay the beneficiary's proffered wage in the relevant years.

The tax returns of [REDACTED] and the petitioner from 2001 through 2004 indicate that the shareholder received exactly \$67,990 each year in officer compensation. The petitioner's tax returns from 2006 through 2008 indicate that he received exactly \$70,200 each year in compensation. Thus, the amount

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<sup>13</sup> The personal tax returns of the petitioner's sole shareholder state that his wife worked as an executive in 2006, 2007 and 2009. The petitioner, however, did not submit Form W-2 statements or other evidence detailing the annual income amounts attributable to each spouse in those years.

of officer compensation paid to the shareholder did not vary from 2001 through 2004, or from 2006 through 2008. Despite wide swings in the net incomes of the companies from year to year, as the tax returns that the petitioner submitted reflect, the officer compensation amounts remained the same during the two time periods. For example, when [REDACTED] generated \$56,902 in net income in 2001, the shareholder received \$67,990 in officer compensation, just as he did when [REDACTED] lost \$79,801 the following year. The shareholder also received annual officer compensation of \$70,200 in 2007 and 2008, even though the petitioner lost \$28,415 in 2007 and earned \$25,579 in 2008.

The constancy of the shareholder's compensation amounts during these periods shows that his compensation did not fluctuate in relationship to the profitability of his businesses. Rather, the shareholder's compensation amount remained fixed during the time periods, suggesting that the petitioner and [REDACTED] lack discretion to reallocate his compensation amounts. The petitioner did not submit evidence to show that the officer compensation payments were not fixed by contract or otherwise. Without such evidence, the AAO does not find the petitioner's argument persuasive.

Also, although the shareholder indicated that he was willing and able to renounce portions of his officer compensation from 2002, 2004, 2006, 2007 and 2009, the petitioner did not submit evidence that the shareholder could, as a practical matter, retroactively forego portions of the officer compensation that he received. The petitioner has not demonstrated the shareholder could meet his living expenses without the officer compensation amounts he received. A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971); *see also Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988) (a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165, *citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

Counsel also argues that the annual amounts that [REDACTED] and the petitioner paid, from 2001 through 2008, in wages to employees and to independent contractors, as well as the amounts of their gross annual incomes, demonstrate their continuing ability to pay the offered wage.

As indicated previously, a petitioner may not use gross annual income and/or wage amounts to demonstrate its continuing ability to pay the offered wage. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084; *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). USCIS may, however, consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonogawa*, 12 I&N Dec. at 612.

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 *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.

Like the petitioner in *Sonegawa*, the petitioner and [REDACTED] in the instant case have together been doing business for more than 10 years. The record shows that the petitioner was incorporated on March 15, 2002. [REDACTED] was incorporated on January 1, 1998. The record shows that [REDACTED] continues to operate despite the purported transfer of its business to the petitioner in 2005.

Unlike the petitioner in *Sonegawa*, however, the tax returns of [REDACTED] and the petitioner do not reflect a pattern of historical business growth. Rather, the returns show that the gross annual incomes of the petitioner and [REDACTED] have generally fallen each year from 2001 to 2008. Also unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not identified any uncharacteristic business expenditures or losses that otherwise prevented it and/or [REDACTED] from demonstrating an ability to pay the proffered wage. Nor has the petitioner established that it or [REDACTED] has an outstanding reputation in its industry. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO concludes that the petitioner has not established the continuing ability of it and [REDACTED] to pay the proffered wage.

The evidence of record does not establish that the petitioner, if established to be a successor-in-interest to the labor certification employer, and the predecessor company that filed the labor certification, had the continuing ability to pay the proffered wage beginning on the priority date. Therefore, the AAO may not reinstate the approval of the petition.

The AAO affirms the director's October 14, 2010 decision that the petitioner failed to demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward.

The petition's approval will remain revoked for the above-stated reasons. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed. The approval of the petition remains revoked.