



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **APR 25 2013**

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:

SELF-REPRESENTED

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 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 retail bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary met the minimum requirements for the position offered and 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 December 2, 2010 denial, the issues in this case are: (1) whether a valid successor-in-interest to the labor certification employer exists; (2) whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and (3) whether or not the beneficiary met the minimum requirements of the labor certification.

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

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

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

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

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.50 per hour (\$21,840 per year). The Form ETA 750 states that the position requires two years of experience in the position offered, or two years of experience as an assistant baker.

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on an unknown date, the beneficiary claimed to have worked for the petitioner beginning in July 2000.

At the outset, we address the issue of the petitioner's corporate status. According to the Wisconsin Department of Financial Institutions, the petitioner was administratively dissolved on August 11, 2010. See [REDACTED] (accessed April 17, 2013).

If the petitioning organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioning organization's business. See 8 C.F.R. § 205.1(a)(iii)(D).

Moreover, any concealment of the true status of petitioner's organization seriously compromises the credibility of the remaining evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988).

On appeal, counsel² does not challenge the petitioner's corporate status, and instead states that [REDACTED] is a successor-in-interest to the petitioner "by virtue of an

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Although counsel checked Box B on Form I-290B to indicate that he will be submitting a brief and/or additional evidence to the AAO within 30 days of the appeal, which was received on January 3, 2011, the record of proceeding contains no further filings from the petitioner or counsel.

² Form I-290B was prepared and signed by an attorney, who was the counsel for the petitioner at the time of filing Form I-140. However, Form I-290B was not accompanied by a properly executed form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, as the Form G-28 filed with Form I-290B was not signed by the petitioner. 8 C.F.R. § 292.4(a) (requires that a new Form G-28 "must be filed with an appeal filed with the [AAO]" and that the Form G-28 "must be

accounting and entity transition from a C Corp to an LLC. We are endeavoring to secure additional business documentation that will clearly demonstrate” that the petitioner and the successor have the ability to pay the proffered wage.³ As noted previously, the petitioner did not submit any documentation with Form I-290B or subsequently.

The director previously notified the petitioner that, if a successor-in-interest existed, such a relationship must be documented in the record. In a letter dated, October 27, 2009, filed with the beneficiary’s Form I-485, Application to Register Permanent Residence or Adjust Status, the owner of the petitioning company acknowledges that the petitioning company remained in business only through the fall of 2006 and that in 2005, he opened up a business enterprise under the name of [REDACTED]. In her decision, the director notes that USCIS issued a request for evidence requesting the petitioner to supply documentation regarding the purported successor-in-interest, however, the director determined:

[t]here is no evidence in the record of the legal name change from [the petitioner] to [REDACTED] or evidence of a change in ownership, such as a contract or agreement which establishes that [REDACTED] assumes substantially all of the rights, duties, obligations, and assets of the originally petitioning entity. While evidence indicates that [the petitioner’s president] is the sole owner of both companies, no evidence has been submitted to establish that [REDACTED] is a successor-in-interest to [the petitioner], the original petitioning entity named on the ETA Form 750.

The director notes that no evidence in the record demonstrates a legal name change, a change in ownership, or a successor-in-interest relationship between the petitioner and [REDACTED].

If the petitioner has merged, the merger or consolidation of the 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

properly completed and signed by the petitioner.”) The AAO notified counsel that a properly executed Form G-28 was required, however, counsel did not respond as of the date of this decision. Therefore, counsel cannot be considered to be the petitioner’s attorney of record.

³ Attached to the Form I-290B are two continuation pages of Part 3 of that form, “Basis for the Appeal or Motion.” Counsel indicated on Form I-290B that he would submit a brief and/or further evidence in 30 days. In a cover letter, dated December 30, 2010, counsel again states that “I will be filing additional documentary evidence, and legal authority, within the 30 day period subsequent to your receipt of this appeal.” The record does not contain a separate appeal brief or further evidence.

rights and obligations of the predecessor necessary to carry on the business.⁴ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

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

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

In the instant case, the petitioner's response to the director's RFE about the successorship included only a letter from counsel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N at 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner submitted no evidence that the purported successor entity, [REDACTED] operates under the same federal tax identification number as the initial petitioner, or that it is the successor to the initial petitioner, or that the successor entity has the ability to pay the proffered wage from the date of the merger onward. The record contains no evidence documenting the transaction transferring ownership of all or a relevant part of the petitioner. The record does not contain any evidence that the job opportunity is the same as originally offered, or that the new entity is eligible for the immigrant visa.

⁴ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

As noted above, the director requested evidence of the purported successorship in her RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). As the record contains only a letter from the petitioner, which provides no description of the purported successorship, and a letter from counsel, the petitioner has not submitted any independent, objective evidence that a *bona fide* successorship exists.

The evidence in the record does not satisfy all three conditions described above because it does not describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must be denied because [REDACTED] has failed to establish by a preponderance of the evidence that it is a successor-in-interest to the petitioner/labor certification employer and appellant. In any future filings, the petitioner must provide independent, objective evidence documenting that a valid successorship exists.

The next issue on appeal is the petitioner's ability to pay the beneficiary's proffered wage. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of 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. Listed below are wages paid by the petitioner and its purported successor-in-interest. Although the W-2 information from the purported successor-in-interest is listed, without the establishment of a valid successor relationship, it cannot be considered to establish the petitioner's ability to pay the beneficiary's proffered wage. The petitioner submitted the following Forms W-2 and pay stubs for the beneficiary:

- In 2005, the W-2 stated that the petitioner paid the beneficiary \$2,100.
- In 2006, the W-2 stated that the petitioner paid the beneficiary \$2,240.
- In 2007, the W-2 stated that (b)(6) paid the beneficiary \$2,771.65.
- In 2008, the W-2 stated that (b)(6) paid the beneficiary \$1,500.
- In 2009, the W-2 stated that (b)(6) paid the beneficiary \$9,500.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage in any year. The petitioner has not established that it paid the beneficiary any wage in 2001, 2002, 2003 or 2004. The W-2 statements show that the petitioner did not pay the beneficiary the proffered wage in years 2005 and 2006 and thus they do not establish the ability to pay for these years. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in 2005 and 2006.

The W-2 statements show that the purported successor-in-interest also did not pay the beneficiary the proffered wage in years 2007, 2008, and 2009. In the instant case, neither the petitioner nor its purported successor-in-interest has established that they employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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

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

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

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

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 2, 2010, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2010 federal income tax return was not yet due. The record contains federal income tax returns, Form 1120, for the petitioner for 2001 to 2006. The record also contains federal income tax returns, Form 1120S, for the petitioner's purported successor-in-interest, taxed as an S corporation, for 2006, 2007, 2008 and 2009, the most recent return available. Although the tax information from the purported successor-in-interest is listed, without the establishment of a valid successor relationship, it cannot be considered to establish the petitioner's ability to pay the beneficiary's proffered wage. The tax returns of the petitioner and petitioner's successor-in-interest demonstrate net income as shown in the table below.

- In 2001, the Form 1120 stated net income of an undetermined amount.⁵

⁵ The petitioner submitted two different copies of its 2001 corporate tax return. The first copy of Form 1120 stated net income of \$469. The second copy of Form 1120 stated net income of \$54,469. Because it is not clear which of the returns, if either, were filed with the IRS, the AAO cannot determine the petitioner's net income for 2001. 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). In any future filings, the petitioner must submit a 2001 tax abstract certified by the IRS or similar proof of the actual tax return filed with the IRS.

- In 2002, the Form 1120 stated net income of \$10,964.
- In 2003, the Form 1120 stated net income of \$14,113.
- In 2004, the Form 1120 stated net income of \$255.
- In 2005, the Form 1120 stated net income of \$2,592.
- In 2006, the Form 1120 stated net income of -\$196.
- In 2006, the Form 1120S stated net income⁶ of -\$2,871.⁷
- In 2007, the Form 1120S stated net income of -\$4,275.⁸
- In 2008, the Form 1120S stated net income of -\$5,774.⁹
- In 2009, the Form 1120S stated net income of \$5,229.¹⁰

Therefore, for the years 2002, 2003, 2004, 2005 and 2006, the petitioner did not have sufficient net income to pay the difference between the wages paid, if any, and the proffered wage. The petitioner's purported successor-in-interest also did not have sufficient net income to pay the difference between the wages paid, if any, and the proffered wage in 2006, 2007, 2008, and 2009. As stated above, it is unclear if the petitioner had net sufficient income to pay the proffered wage in 2001.

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.¹¹ 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

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 3, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, other adjustments shown on its Schedule K for 2006 - 2009, the petitioner's net income is found on line 21 of page 1.

⁷ The business name listed on the 1120S is not the petitioner but instead, [REDACTED] LLC, which has a different Federal Employer Identification Number (FEIN) than the petitioner.

⁸ *Id.* at n. 6.

⁹ *Id.* at n. 6.

¹⁰ *Id.* at n. 6.

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

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. Although the tax information from the purported successor-in-interest is listed, without the establishment of a valid successor relationship, it cannot be considered. The tax returns of the petitioner and the petitioner's purported successor-in-interest demonstrate end-of-year net current assets for as shown in the table below.

- In 2001, the Form 1120 stated net current assets of an undetermined amount.¹²
- In 2002, the Form 1120 stated net current assets of \$11,788.
- In 2003, the Form 1120 stated net current assets of \$2,110.
- In 2004, the Form 1120 stated net current assets of -\$1,474.
- In 2005, the Form 1120 stated net current assets of \$4,378.
- In 2006, the Form 1120S stated net current assets of \$7,327.
- In 2007, the Form 1120S stated net current assets of \$20,328.
- In 2008, the Form 1120S stated net current assets of \$21,972.
- In 2009, the Form 1120S stated net current assets of \$19,190.

If the successor-in-interest relationship were established, it would appear that the successor-in-interest would have sufficient net current assets to pay the proffered wage in 2008. However, for the years 2002, 2003, 2004, 2005, 2006, 2007, and 2009 neither the petitioner nor the purported successor-in-interest had sufficient net current assets to pay the difference between the wages paid, if any, and the proffered wage. As stated above, it is unclear if the petitioner had net current assets sufficient to pay the proffered wage in 2001.

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

On appeal, counsel asserts "the simple mathematical approach to looking at the annual tax returns, to conclude whether the company actually had the ability to pay the wage at all times since submission of the labor certification, flies in the face of generally used and acceptable accounting practices." Counsel states, "[w]hy does USCIS get the leeway to operate in a reality vacuum, when actual businesses do not have that luxury?" Counsel asserts that the totality of the circumstances should take into account that

¹² As noted above, the petitioner submitted two different copies of its 2001 corporate tax return. The first copy of Form 1120 stated net current assets of \$7,659. The second copy of Form 1120 stated net current assets of \$1,808. Because it is not clear which of the returns, if either, were filed with the IRS, the AAO cannot determine the petitioner's net income for 2011. 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). In any future filings, the petitioner must submit a 2001 tax abstract certified by the IRS or similar proof of the actual tax return filed with the IRS.

over a nine year period “businesses have been significantly impacted by events such as those impacting on the economy of the USA, as well as global issues.” However, counsel has not submitted, and the record does not contain, any information about economic impacts to the petitioner’s business. The petitioner failed to submit evidence to show that there were economic impacts to the petitioner’s business, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of those events. A mere broad statement by counsel that the petitioner’s business was impacted adversely by national or global events cannot by itself, demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date. Without such evidence, the AAO does not find counsel’s claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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

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

The AAO is unable to assess the petitioner’s reputation because the petitioner has not submitted any independent evidence of its reputation. The plaintiff in *Sonogawa* submitted independent evidence to establish her reputation in the industry including magazine news articles and a scrapbook showing that she is well known for her designs and fashions and outstanding in her field. The petitioner has submitted no such evidence.

On the issue of adverse economic conditions, the record of proceeding contains no evidence to demonstrate any short term decline in the petitioner's circumstances based on economic conditions. A mere broad statement by counsel that its business was impacted adversely by economic conditions, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the economic downturn. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The record does not contain evidence to establish the reason for any downturn or the petitioner's historical growth.

In the instant case, the petitioner indicates that it has been in business since 1993. The petitioner's tax returns show that its gross receipts reflect a downward trend from 2001 to 2005. While the purported successor-in-interest has substantially higher gross receipts, its tax returns also reflect an overall downward trend from 2006 to 2009. Further, the petitioner was incorporated in 1993 and, as of the date of filing the Form I-140, listed the number of employees as five. Considering this number of employees, the costs of labor as reported on the tax returns were not substantial. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In addition, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The second basis for the director's denial is that the beneficiary did not meet the minimum requirements for the position. In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading

and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION: None Required.

TRAINING: None Required.

EXPERIENCE: Two (2) years in the job offered or two years in the related occupation of assistant baker.

OTHER SPECIAL REQUIREMENTS: None.

The labor certification also states that the beneficiary qualifies for the offered position based on experience with [REDACTED] in Parma, Ohio from March 1995 to July 1999 as an assistant baker and from July 1999 to July 2000 as a baker.

The labor certification also lists the beneficiary’s experience as a baker with the petitioner from July 2000 to the present. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains two experience letters related to the beneficiary’s position at [REDACTED] as listed on the Form ETA 750. As noted in the director’s decision, the author of the first letter did not include his or her printed name and position and did not specify the beneficiary’s duties. Therefore, in a request for evidence dated July 22, 2010, the director requested that the petitioner provide corroborating documentary evidence of the beneficiary’s position at [REDACTED]. The decision further notes that in response to the request for evidence, on September 2, 2010, the petitioner provided a second experience letter in support of the beneficiary’s stated experience as [REDACTED].

In her decision, the director noted that that the claim by the author of the second letter, that he was the president of [REDACTED] was not consistent with the [REDACTED] business filings which showed that [REDACTED] was owned by a different individual. The director states, “no evidence was submitted regarding [the author’s] ownership of [REDACTED] during the time of the

beneficiary's employment." Also noted by the director was the fact that the petitioner had not supplied any of the requested corroborating evidence such as payroll records, tax returns or other official government of personnel documentation is insufficient to establish the beneficiary's claimed experience.

Even if the petitioner had established that the author of the letter was, in fact, the president of [REDACTED] the letters in the record are insufficient to demonstrate the beneficiary's claimed experience.

In addition to the deficiencies noted by the director in the first letter, the letter is not on letterhead and also does not identify the petitioner's job title and does not identify the day and month that the petitioner started and ended his employment. It indicates only the year of employment as 1996. Further, the letter does not describe the duties in detail, or state if the job was full-time. Additionally, the 1996 start date is not fully consistent with the dates of employment claimed by the beneficiary on the labor certification and the G-325.¹³ This casts doubt on the beneficiary's claimed employment experience as the position held and dates of employment are contradictory. 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).

In the second experience letter, the author, [REDACTED] states that he was the owner of [REDACTED]. The words [REDACTED] and an address are listed at the top of the page. The letter states that the beneficiary worked as an assistant, starting in March 1996, and after three years, worked without supervision as a baker before he left the position in July 2000. The letter does not state what type of assistant position the beneficiary held. The letter does not specify what day in March 1996 the beneficiary began working, does not specify the end date of employment, or state if the job was full-time. Thus, the AAO is prevented from calculating the beneficiary's total length of experience with the employer to determine whether he meets the minimum experience qualifications of the labor certification. As explained above, the job title and 1996 start date indicated here are not consistent with the information on the labor certification and the G-325. This letter does not attempt to explain or clarify the discrepancies previously discussed. Inconsistencies in the record must be overcome with independent, objective evidence. *Id.*

On appeal, the petitioner states the petitioner did not supply corroborating evidence such as payroll records, tax returns or other official government of personnel documentation to establish the beneficiary's claimed experience at [REDACTED] because the beneficiary was working without employment authorization, was paid in cash and was not issued W-2s. Regarding ownership of [REDACTED] counsel states that the Ohio Secretary of State business filing generally includes the name of

¹³ The Form ETA 750, Part B, Question 15 B, in the "Name of Job" block, states that the beneficiary started working at [REDACTED] in March 1995 as an assistant baker. However, the next block, "Date Started," lists the start date at "[REDACTED] as March 1996. The file contains a Form G-325 that lists the beneficiary's start date at [REDACTED] as March 1995 in the position of baker.

a registered agent, does not provide the identity of the owner(s), and, that the information referred to in the decision is not conclusive about ownership of [REDACTED] during the relevant time period. Counsel states that [REDACTED] attorney "will be able to provide us with copies of business records clearly showing the ownership connection of [REDACTED] with [REDACTED] during the indicated time frame." However, as noted above, the record of proceeding contains no such records and the petitioner did not submit any evidence after filing Form I-290B. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As the petitioner has not provided evidence to overcome the grounds for denial, the petitioner failed to establish by a preponderance of the evidence that the beneficiary is qualified for the position offered.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

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, petitioner has not met that burden.

ORDER: The appeal is dismissed.