



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 15 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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be approved. Upon review, the appeal will be dismissed.

The petitioner is a wholesale silk screening business. The petitioner seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the 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 AAO dismissed the subsequent appeal, finding that there was insufficient evidence in the record of proceeding to establish a successor-in-interest relationship between the petitioner, [REDACTED] and [REDACTED] or the petitioner, [REDACTED] and [REDACTED]. The AAO also determined that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The filing meets the requirements for a motion to reopen. The motion to reopen is approved.

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history and case precedent will be made only as necessary.

As set forth in the director's April 14, 2009 denial, and the AAO's December 3, 2012 decision, the issues in this case are 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 whether the petitioner has established that it has a successor-in-interest. The priority date is June 22, 2007. On appeal, the AAO determined that notwithstanding any relationship between the owner(s) of [REDACTED] and [REDACTED] and between the owner(s) of [REDACTED] and [REDACTED] the three businesses are separate entities and the petitioner could not use the income or assets of [REDACTED] or [REDACTED] as a means of establishing the petitioner's ability to pay the proffered wage.¹

¹ On appeal and in response to the AAO's Notice of Intent to Deny (NOID) during the adjudication of the appeal, the petitioner submitted [REDACTED] state income tax return for 2007

The AAO determined on appeal that the petitioner had failed to demonstrate a successor-in-interest relationship between [REDACTED] and [REDACTED] sufficient to consider [REDACTED] tax returns and Forms W-2 as evidence of the petitioner's income and assets and wages paid to the beneficiary. The AAO also determined that the petitioner had failed to establish its ability to pay the proffered wage beginning in 2007.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issue. Therefore, on motion the issue is whether the petitioner has established a successor-in-interest relationship with [REDACTED], and established its ability to pay the proffered wage.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on June 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$18.17 per hour based upon a 40 hour work week (\$37,793.60 per year). The ETA Form 9089 states that the position requires a bachelor's degree in graphic design.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).²

and Internal Revenue Service (IRS) Forms W-2 as evidence of the petitioner's ability to pay the proffered wage.

² The AAO considers all pertinent evidence in the record, including new evidence that is

The first issue to be addressed is whether the petitioner has established a successor-in-interest relationship. As is noted in the AAO's previous decision, with respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.³ *Black's Law Dictionary* 1569 (9th ed. 2009) (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.⁴

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.⁵ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

properly submitted upon appeal and on motion.

³ 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).

⁴ 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.

⁵ 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).

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*) analysis,⁶ 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.

The original employer identified in the ETA Form 9089 filed on June 22, 2007 was [REDACTED] a sole proprietorship owned and operated by [REDACTED] [REDACTED] is also listed as the petitioner on the Form I-140. According to the petitioner, [REDACTED] ceased operations in 2007, and its business operations were undertaken and continued by [REDACTED]

The petitioner submitted the following as evidence:

- Two letters dated December 27, 2012 from [REDACTED] president of [REDACTED] [REDACTED] who stated that [REDACTED] is a successor-in-interest of [REDACTED] in that [REDACTED] has assumed the ownership interest, including all rights, duties, obligations and assets of the predecessor, for the continual operation of the business. The declarant further stated that [REDACTED] has assumed the rights and obligations of [REDACTED] and has succeeded to the interests and obligation of the petitioner, [REDACTED] The declarant stated that [REDACTED] wished to continue to employ the beneficiary as its graphic designer.
- A letter dated January 2, 2013 from [REDACTED] who stated that he was the president of [REDACTED] and [REDACTED] that he filed the petition on behalf of the beneficiary, and that in June 2007 he changed the business structure from a corporation to a limited

⁶ The full analysis of *Matter of Dial Auto* is cited in the AAO's denial of the appeal; and therefore, will only be referenced on motion.

liability company at the advice of his tax preparer.⁷ The declarant further stated that the change was a business structure change only, and that a new Employer Identification Number (EIN) had to be acquired due to the corporate structure change. He stated that everything else remained the same. The declarant also stated that he and his wife, [REDACTED] who is the president of [REDACTED] decided in 2007 to operate as a single business entity, and thereafter merged the assets, rights, obligations and ownership of [REDACTED] into [REDACTED] assuming all the immigration related rights and liabilities of [REDACTED] employees at that time.

- A copy of the Articles of Incorporation of [REDACTED] signed by [REDACTED] and dated December 22, 2005.
- A copy of an Operating Agreement of [REDACTED] signed by [REDACTED] and dated December 22, 2005. The member's name listed in the agreement is [REDACTED]. Exhibit A of the Agreement is a schedule of assets showing [REDACTED] acquisition date of December 22, 2005. Article 3.2 of the agreement indicates the assets listed on exhibit "A" will be contributed by the member, [REDACTED].
- A letter dated May 7, 2009 from [REDACTED], accountant, who stated that [REDACTED] is a single member LLC, and that the sole member is [REDACTED], as shown on the Articles of Organization.
- A copy of the Articles of Incorporation of [REDACTED] signed by [REDACTED] and dated March 3, 2008.
- A copy of a Fictitious Business Name Statement dated April 30, 2008 and indicating that [REDACTED] was doing business as [REDACTED].

On motion, counsel asserts that the petitioner has established the existence of a successor-in-interest relationship. Counsel asserts that [REDACTED] meets the requirements of a successor-in-interest under the regulations and meets the ability to pay requirement. Counsel further asserts that what occurred between the petitioner, [REDACTED] and [REDACTED] was nothing more than a change in business structure, from a sole proprietorship to an LLC, necessitating a change in Employer Identification Number (EIN). Counsel infers that the information contained in the Fictitious Business Name Statement dated April 30, 2008 establishes that a merger between [REDACTED] and [REDACTED] took place in 2008.

Contrary to counsel's assertion, the record of proceeding does not contain sufficient evidence to demonstrate a successor transaction between [REDACTED] and [REDACTED] nor does it contain sufficient evidence to demonstrate a merger between [REDACTED] and [REDACTED]. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of*

⁷ The evidence establishes that the petitioner, PCI, was a sole proprietorship, not a corporation.

Laureano, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The assertions of counsel will not satisfy the petitioner's burden of proof.

As noted above, the petitioning successor has failed to fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer, [REDACTED] to [REDACTED] and then through merger with [REDACTED]. The evidence shows that [REDACTED] was initially formed in 2005. There is no evidence of a transaction in 2007 transferring assets from [REDACTED] to [REDACTED]. The record shows that the petitioner [REDACTED] filed IRS Form 1040 for 2007 indicating on the form at Schedule C that the petitioner continued his status as a sole proprietor that year. And, the petitioning successor [REDACTED] has failed to prove by a preponderance of the evidence that it is the successor to [REDACTED]. The letter dated December 27, 2012 from [REDACTED] confirming the transfer and assumption of assets and liabilities from [REDACTED] to [REDACTED] is not supported by the documents in the record. The record of proceeding shows that [REDACTED] continued to issue IRS Forms W-2, Wage and Pay Statements, to the beneficiary in 2009 and 2010, which is subsequent to the claimed merger of [REDACTED] and [REDACTED] on April 30, 2008. A letter from [REDACTED] accountant, identifies [REDACTED] as a single member LLC on May 7, 2009, subsequent to the claimed merger in 2008. In addition, the record contains IRS Forms W-2 issued to the beneficiary by both [REDACTED] and [REDACTED] in 2010. Furthermore, in a letter dated January 2, 2013, [REDACTED] stated that he and his wife decided in 2007 to "operate as only one company and merged the assets, rights, obligations and ownership of [REDACTED] into [REDACTED]." This statement is inconsistent with the evidence of record which establishes that [REDACTED] was formed on March 3, 2008. 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 application. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

Counsel asserts that the business' address, type of business, and ownership interests remain unchanged, and that the job offer to the beneficiary remains unchanged. Counsel further asserts that a change in business structure should not jeopardize the successor-in-interest process between [REDACTED] and [REDACTED] interest, and its successor's [REDACTED] ability to continue with the petition process. Without independent objective documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 533. 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)).

It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, the only way for the successor to be able to use an ETA Form 9089 approved for a different employer, in this case the petitioner, is if it establishes that it

is a successor-in-interest to the petitioner. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). In this matter, the record is devoid of such evidence.

Based on the precedent in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481, and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer.

The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In this matter, the record does not establish the transfer and assumption of ownership of the petitioner by [REDACTED] and from [REDACTED] to [REDACTED] who is the claimed successor. While it appears from the tax returns that the petitioner and [REDACTED] have the same business address and the same stockholders, albeit with some changes in proportional ownership (ownership between husband and wife), the record is devoid of any description or independent objective documentation of the transfer of assets. 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. at 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not established a successor-in-interest relationship with its claimed successor. Accordingly, the petition cannot be approved as the labor certification is not valid for either [REDACTED] or [REDACTED]. The sole proprietor did not file the appeal and is not seeking to hire the beneficiary in the position advertised.⁸

A second issue to be addressed is whether the petitioner has established its ability to pay the proffered wage.

⁸ The record of proceeding contains an executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for [REDACTED]. Additionally, the Form I-290B, Notice of Appeal or Motion, was signed by counsel as legal representative for [REDACTED]. The petitioner, [REDACTED] is not before the AAO on motion. As the motion was not properly filed by the affected party, it must be dismissed for this reason. 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

Based upon the above noted analysis, the AAO will consider only the petitioner's ability to pay the proffered wage. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. Comm. 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. Comm. 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.

The priority date in the instant case is June 22, 2007. The proffered wage amount is \$18.17 per hour based upon a 40 hour work week (\$37,793.60 per year).

As noted above, the record does not demonstrate a successor-in-interest relationship between [REDACTED] and either [REDACTED] or [REDACTED]. Even if the AAO were to accept that [REDACTED] is the successor to [REDACTED] and [REDACTED] the evidence does not establish that the petitioner and its successors have the ability to pay. The record of proceeding contains copies of IRS Forms W-2 representing wages paid to the beneficiary as shown below:

- In 2007, the [REDACTED] Form W-2 stated total wages of \$7,139.58 (a deficiency of \$30,654.02).⁹
- In 2008, the [REDACTED] Form W-2 stated total wages of \$27,368.39 (a deficiency of \$10,425.21).
- In 2009, the [REDACTED] Form W-2 stated total wages of \$28,558.12 (a deficiency of \$9,235.48).
- In 2010, the [REDACTED] Form W-2 stated total wages of \$9,519.44 (a deficiency of \$28,274.16).
- In 2010, the [REDACTED] Form W-2 stated total wages of \$4,759.72 (a deficiency of \$23,514.44 considering both the wages paid of [REDACTED] and [REDACTED]).

⁹ [REDACTED] failed to submit its federal income tax returns, as required by the regulation at 8 C.F.R. § 204.5(g)(2). The IRS Forms W-2 from [REDACTED] thus may not be considered for this additional reason.

If, as in this case, 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.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore, the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay the proffered wage. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C (or, if a farm, Schedule F) and are carried forward to the first page of the tax return. Where the sole proprietor is unincorporated, the gross income is taken from the IRS Form 1040, line 37. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647, *aff'd*, 703 F.2d 571.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor's IRS Forms 1040 reflect his adjusted gross income (AGI) as follows:

- In 2007, the proprietor's IRS Form 1040 stated AGI of \$30,417.00.

The sole proprietor has failed to establish his ability to pay the difference between wages paid to the beneficiary and the proffered wage. In addition, where the petitioner's AGI amount exceeds the proffered wage amount, the sole proprietor must show that he can sustain himself and his dependents by listing his personal household expenses. *See id.* There is no such evidence in the record. Therefore, there is insufficient evidence in the record of proceeding to demonstrate the sole proprietor's ability to pay the proffered wage in 2007 or thereafter.

If the AAO were to take into consideration [REDACTED] federal tax returns, there is sufficient evidence in the record to demonstrate [REDACTED] ability to pay the proffered wage in 2008, 2009, 2010 and 2011.¹⁰ However, there is no evidence of record indicating that the petitioner could pay the difference between the wages paid by [REDACTED] and the proffered wage amount in 2007. As noted above [REDACTED] the sole proprietor, did not have sufficient AGI to pay the proffered wage in addition to household expenses; [REDACTED] did not submit a federal tax return for 2007. As the petitioner has not shown that it could pay the beneficiary the proffered wage from the priority date, it has not established the ability to pay, even considering the income of the claimed successors in interest.

The argument and evidence presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the

¹⁰ The net income of [REDACTED] was as follows: 2008, \$55,168; 2009, \$64,798; 2010, \$80,667; 2011, \$81,672. These amounts exceed the proffered wage for those years.

proffered wage. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089.

Beyond the decision of the director, USCIS records indicate that the petitioner has filed multiple immigrant petitions since the petitioner was established in 2008. Therefore, the petitioner must establish that it had sufficient funds to pay the wages to all beneficiaries from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer. *See also* 8 C.F.R. § 204.5(g)(2).

In response to the AAO's NOID, the petitioner submitted copies of Forms W-2 and a list of its prior beneficiaries; including their names, receipt numbers, priority date, dates of employment, proffered wage, actual wage paid, and current status. Furthermore, although the petitioner stated in response to the AAO's NOID that the beneficiary with receipt number LIN 08 170 50908 never worked for the company, USCIS electronic records show that that the petition with receipt number LIN 08 170 50908 was approved on April 13, 2009, and there is no indication of record that the petition was withdrawn. The petitioner has not submitted tax returns of the sole proprietorship past 2007. Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, the fact that there are other immigrant visa petitions further calls into question the petitioner's eligibility for the benefit sought.

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

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reopen/reconsider is dismissed, and the AAO's prior decision, dated December 3, 2012, is affirmed. The petition remains denied.