

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **FEB 27 2013**

OFFICE: TEXAS 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:
[REDACTED]

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 for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a night shift manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that its predecessor had the ability to pay the proffered wage in 2001 and 2004.² 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.

The director's April 27, 2009 denial identified the issue of whether or not the petitioner established that its predecessor had the ability to pay the beneficiary the proffered wage. On appeal, the AAO has identified two other issues—whether or not the petitioner established that it is the successor-in-interest to the employer that filed the labor certification and whether or not the petitioner established that the beneficiary possessed the minimum experience required to perform the proffered position by the priority date.

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The record indicates that the director reviewed the documentation the petitioner submitted to establish that it was a successor-in-interest to a predecessor sole proprietorship and incorrectly concluded that the petitioner is a successor-in-interest to the sole proprietorship. U.S. Citizenship and Immigration Services (USCIS), through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner claims that its business operated as a sole proprietorship from 1999 until June 2007, when the business was transferred to [REDACTED]. The Form I-140 was filed on July 16, 2007. Thus, the labor certification was filed by the sole proprietorship and the petition was filed by [REDACTED] in the name of [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, then the petitioner must establish that it is a successor-in-interest to the employer listed on the labor certification.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

³On the petition, the petitioner listed its federal employer identification number (EIN) as [REDACTED] which the record indicates was issued to the sole proprietorship. The tax returns for [REDACTED] indicate its EIN is [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The Commissioner's decision does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved" *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.⁴ *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.⁵

⁴ 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).

⁵ 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

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.⁶ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the 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.

To document the transaction transferring the sole proprietorship to [REDACTED] counsel submitted a copy of the Store Franchise Agreement dated February 19, 1999 between [REDACTED] (Franchise Agreement) for the operation of a [REDACTED] franchise at [REDACTED] for a period of 10 years. Pursuant to Exhibit D of the Franchise Agreement, the business was to be known as [REDACTED] which is the sole proprietorship.

The record also contains a copy of an Entity Franchisee Amendment to Franchise Agreement for [REDACTED] dated June 18, 2007 (Amendment) referring to a Store Franchise Agreement dated March 15, 2004 and is for the purpose of allowing [REDACTED] to assign all of his rights and duties under The Store Franchise Agreement dated March 15, 2004 to [REDACTED].

The Franchise Agreement is for [REDACTED] and is dated February 19, 1999, whereas the Amendment is for [REDACTED] and refers to a store franchise agreement dated March 15,

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.

⁶ 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).

⁷ The record indicates the sole proprietor also operated and/or managed [REDACTED] convenience stores at [REDACTED].

2004; therefore, the Amendment does not appear to relate to the Franchise Agreement and the petitioner has not described and documented the transaction transferring the assets of the sole proprietorship to the petitioner.

Further, the petitioner has submitted no evidence that the job it is offering to the beneficiary is the same as the job originally offered on the labor certification.

The petitioner has also not established that it is eligible for the immigrant visa in all respects. The petitioner must establish that its predecessor had the ability to pay the proffered wage from the priority date of April 26, 2001 to the date of the purported business transfer in June 2007, and that the petitioner had the ability to pay the proffered wage thereafter.⁸

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 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$30,000 per year. The Form ETA 750 states that the position requires two years of experience as a night shift manager.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 6 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked for [REDACTED] as a night shift manager from September 2000 until April 23, 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

⁸The petitioner has not established the date of the transfer of ownership, but as the petitioner was not incorporated until April 2007, the transfer could not have occurred before that time.

permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted a copy of Internal Revenue Service (IRS) Form W-2 it issued to the beneficiary for 2008, which reflects the wages paid to the beneficiary as shown in the table below:

- In 2008, Form W-2 reflects wages of \$26,880.⁹ Wage shortfall of \$3,120.¹⁰

Therefore, the petitioner has not established that it or its predecessor paid the full proffered wage to the beneficiary in any relevant year, and it must establish that it can pay the wage shortfall in 2008 and that it or its predecessor can pay the full proffered wage in every other relevant year.

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

⁹ The wage for each year is the amount shown in Box 1.

¹⁰ The wage shortfall is the difference between the proffered wage and the wages paid.

expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

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

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

The record before the director closed on April 3, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for the years 2007 and 2008, as shown in the table below.

- In 2007, the Form 1120S stated net income¹¹ of \$38,356.

¹¹ 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 (2007 and 2008) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 28, 2012) (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, or other adjustments shown on its Schedule K, the petitioner's net income is found on line 21 of page one of its tax returns.

- In 2008, the Form 1120S stated net income of \$67,822.

Therefore, for the year 2007, the petitioner had sufficient net income to pay the proffered wage, and for the year 2008, the petitioner had sufficient net income to pay the wage shortfall.

The petitioner must also establish that its predecessor had the ability to pay the proffered wage from the priority date until the date of the purported transfer of the business. 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 does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets, and personal liabilities are also considered as part of the petitioner's ability to pay. 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 and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner 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 supported a family of five. The tax returns submitted by the petitioner reflect the following information for the following years:

- In 2001, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]
- In 2002, the proprietor's adjusted gross income (Form 1040, line 35) was \$138,254.
- In 2003, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]¹³

¹²The record contains a copy of IRS Form 1040 for [REDACTED] for 2001, but it does not include a Schedule C for operating a convenience store at [REDACTED]. Instead, the Schedule C lists the principal business for the proprietor, [REDACTED], as "Service-Management," lists no business name or business address and lists no EIN for the business. Therefore, the tax return does not reflect that [REDACTED] was operating the [REDACTED] as a sole proprietorship at [REDACTED] in 2001.

¹³The record contains a copy of IRS Form 1040 for [REDACTED] for 2003. It includes a Schedule C-EZ which reflects income received from retail/management of convenience stores located at [REDACTED]. The Schedule C-EZ lists an EIN of [REDACTED]. However, an attachment to the tax return entitled "Input Screen C, Unit 1" shows that the income received by the taxpayer in 2003 was received from CA

- In 2004, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]⁴
- In 2005, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]¹⁵
- In 2006, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]⁶
- In 2007, the IRS Form 1040 does not establish that the taxpayer operated a sole proprietorship at [REDACTED]⁷

In response to the director's January 16, 2009 request for evidence, the petitioner submitted a list of the proprietor's living expenses, which are \$7,250 monthly or \$87,000 annually (original living expenses). In 2002, the proprietor's adjusted gross income was sufficient to pay the proffered wage and the proprietor's household expenses.

[REDACTED] instead of the two convenience stores listed on Schedule C-EZ. 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 at 591-92. The inconsistencies have not been resolved. Therefore, the tax return does not reflect that Mr. [REDACTED] was operating the [REDACTED] as a sole proprietorship in 2003.

¹⁴The record contains a copy of IRS Form 1040 for [REDACTED] or 2004, but it does not include a Schedule C for operating a convenience store at [REDACTED] therefore, the tax return does not reflect that [REDACTED] was operating as a sole proprietorship at that location in 2004.

¹⁵The record contains a copy of IRS Form 1040 for [REDACTED] for 2005, but it does not include a Schedule C for operating a convenience store at [REDACTED]. Instead, the Schedule C lists the principal business for [REDACTED] as "Mgmt-Retail," lists no business name or EIN, and lists a business address of [REDACTED]. Therefore, the tax return does not reflect that [REDACTED] was operating as a sole proprietorship at [REDACTED].

¹⁶The record contains a copy of IRS Form 1040 for [REDACTED] or 2006, but it does not include a Schedule C for operating a convenience store at [REDACTED]. Instead, it includes a Schedule C-EZ which reflects income received from "Mgmt-Retail" of a [REDACTED] store located at [REDACTED]. The Schedule C-EZ does not list an EIN for the business. Therefore, the tax return does not reflect that [REDACTED] was operating as a sole proprietorship at [REDACTED].

¹⁷The record contains a copy of IRS Form 1040 for [REDACTED] for 2007, but it does not include a Schedule C for operating a convenience store at [REDACTED] therefore, the tax return does not reflect that [REDACTED] was operating as a sole proprietorship at that location in 2007.

Therefore, for the years 2001, 2003, 2004, 2005, 2006 and 2007, the petitioner did not establish that the sole proprietorship had the ability to pay the proffered wage. The petitioner has established that the sole proprietorship had the ability to pay the proffered wage in 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that the sole proprietorship had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid, adjusted gross income, or other assets for the years 2001, 2003, 2004, 2005, 2006 and 2007. The petitioner has established the sole proprietorship's ability to pay the proffered wage in the year 2002 and the petitioner's ability to pay the proffered wage in the years 2007 and 2008.

On appeal, counsel asserts with regard to 2001: (1) that the proffered wage should be prorated; (2) that a portion of the proprietor's income should be double-counted and some of his expenses ignored; (3) that the proprietor's original living expenses should be reduced; (4) that the proprietor's bank account should be considered; and (5) that a totality of circumstances analysis should be applied. With regard to 2004, counsel asserts: (1) that a portion of the proprietor's income should be double-counted and some of his expenses ignored; (2) that the proprietor's household expenses should be reduced; and (3) that a totality of circumstances analysis should be applied.

Counsel requests that USCIS prorate the proffered wage for the portion of 2001 that occurred after the priority date. USCIS will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than USCIS would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

Counsel, referring to the proprietor's 2001 tax return, asserts that the monies the proprietor paid for medical expenses of \$14,684 and for home mortgage interest of \$8,951¹⁸ should be considered as being "available cash flow" to pay the proffered wage; however, counsel does not indicate how these monies would be available since the funds were expended for other purposes. 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)). Additionally, counsel asserts that the amount used to determine the proprietor's self-employment tax as shown on his Form 1040, Schedule SE, line 4 should also be considered as being available to pay the proffered wage. The amount shown on Form 1040, Schedule SE, line 4 was already considered as part of the proprietor's adjusted gross income. Furthermore, Schedule SE is not used to report income, but rather it is used to compute the proprietor's self-employment tax. Therefore the amount on Schedule

¹⁸ These amounts are shown as deductions on the proprietor's 2001 Form 1040, Schedule A. Regarding the medical expenses, the proprietor reported spending \$17,660 in medical expenses, but because the deduction is statutorily limited, the proprietor was only allowed to deduct \$14,684.

SE on line 4 reflects income reported elsewhere on the proprietor's tax return and is merely the amount that is the basis for computing the amount of the proprietor's self-employment tax.

Counsel asserts that the proprietor's original living expenses should be reduced for 2001 because the proprietor and his family were just starting out in 2001 and renting an apartment at that time. Counsel submitted a second listing of household expenses (revised living expenses) which states the proprietor's 2001 living expenses as \$1,205 per month¹⁹ or \$14,460 per year. Counsel submitted no evidence to support the revised living expenses, such as payment receipts, billing statements, cancelled checks, or a rental agreement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Moreover, the revised living expenses of \$14,460 are inconsistent with the proprietor's 2001 tax return. The revised living expenses show the proprietor purportedly renting living quarters for \$500 per month (\$6,000 annually), yet his 2001 tax return includes a Schedule A on which he claimed \$8,951 as a home mortgage interest deduction. His 2001 New Jersey tax return shows that he and his wife owned their principal residence located in New Jersey that entire year. The proprietor's Schedule A also indicates he expended \$17,660 towards medical expenses, yet his revised living expenses do not include any medical expenses. These inconsistencies have not been resolved.

Matter of Ho, 19 I&N Dec. at 591-592, states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. ... [i]t is incumbent on 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, in fact, lies, will not suffice.

Counsel asserts that the funds in the proprietor's bank account should be considered as evidence of the sole proprietorship's ability to pay the proffered wage. As evidence, counsel submits a letter dated May 26, 2009 from a bank manager on Bank of America letter stating the proprietor "maintained accounts with Summit Bank in 2001 and his average balance was in excess of \$7500." Counsel states that Summit Bank was acquired by Bank of America. The record does not contain any 2001 bank statements.²⁰ Thus it is not possible to determine the type of accounts referred to in the banker's letter. If the proprietor maintains an account solely for his business, then it is likely that the funds in such an account are already shown on Schedule C of the sole proprietorship's tax return as gross receipts and expenses and it would not be proper to consider those funds again. As in the instant case, where the petitioner has not established its ability to pay the proffered wage based on the proprietor's adjusted gross income, the proprietor's bank statements must show an initial average

¹⁹ The list submitted contains a number of expenses which when added together actually total \$1,155 and not \$1,205 as counsel suggests.

²⁰ The record contains a copy of a partial Sovereign Bank statement for the period December 31, 2008 through January 31, 2009.

annual balance exceeding the full proffered wage. The petitioner has not established the type of bank accounts it is relying on and has not established that those accounts show an initial average annual balance which exceeded the full proffered wage of \$30,000.

Counsel, referring to the proprietor's 2004 tax return, asserts that the monies the proprietor paid for home mortgage interest and investment interest of \$25,443²¹ should be considered as being available to pay the proffered wage; however, counsel does not indicate how these monies would be available since the funds were expended for other purposes. 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.

Counsel asserts that the proprietor's original living expenses should be reduced for 2004 because the proprietor and his family were just starting out and renting an apartment at that time. As evidence, counsel submits a listing of living expenses which state the proprietor's 2004 living expenses as \$1,465 per month or \$17,580 per year. Counsel submitted no evidence to support the 2004 household expenses, such as payment receipts, billing statements, cancelled checks, or a rental agreement. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Moreover, the 2004 annual living expenses of \$17,580 are inconsistent with the proprietor's 2004 tax return. The 2001 living expenses show the proprietor purportedly renting his living quarters for \$650 per month (\$7,800 annually), yet his 2004 tax return includes a Schedule A on which he claimed \$25,422 as a home mortgage interest deduction. His 2004 New Jersey tax return shows that he and his wife owned their principal residence located in New Jersey that entire year. The petitioner has not resolved this inconsistency. *See Matter of Ho, supra.*

Counsel also asserts that a totality of circumstances analysis should be used. 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

²¹ These amounts are shown as deductions on the proprietor's 2004 Form 1040, Schedule A.

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

In the instant case, there is no evidence of the sole proprietorship's reputation throughout the industry. There is no record of the sole proprietorship's historical growth.²² There is no evidence that in the sole proprietorship suffered any temporary and uncharacteristic disruption in its business activities. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that the sole proprietorship, its purported predecessor, had the continuing ability to pay the proffered wage.

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's purported predecessor could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

In sum, the evidence in the record does not satisfy all three conditions for a successor-in-interest described above because it does not fully describe and document the transaction transferring ownership of the sole proprietorship to the petitioner, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the petitioner is eligible for the immigrant visa in all respects, including whether the sole proprietorship possessed the ability to pay the proffered wage for the relevant period.

Therefore, the petitioner has not established that it is the successor-in-interest to the employer listed on the labor certification.

Beneficiary Qualifications – Experience

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon*

²² A letter dated June 4, 2007 from the petitioner's accountant indicated "steady growth and excellent cash flow." However, the accountant references two [redacted] and it is unclear if the income referenced in the letter represents the combined income of the two [redacted]

Chinese Restaurant, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience as a night shift manager. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a manager of [REDACTED] from July 1998 until July 2000. The labor certification also lists the beneficiary working for the petitioner as a night shift manager from September 2000 through April 23, 2001.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(I)(3)(ii)(A). The record contains a copy of a letter dated May 1, 2001 from [REDACTED] on computer-generated company letterhead stating the beneficiary worked as a manager at [REDACTED] from July 1, 1998 to July 31, 2000, and listing the beneficiary's duties. The letter does not state that the beneficiary worked as a night shift manager or indicate whether his employment was full- or part-time.

The evidence in the record does not establish that the beneficiary possessed two years of experience as a night shift manager as required by the labor certification. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

ORDER: The appeal is dismissed.