

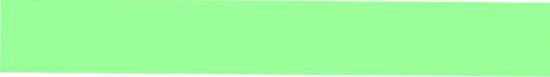
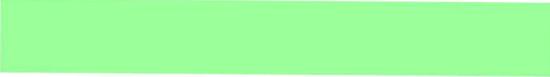


U.S. Citizenship
and Immigration
Services

(b)(6)

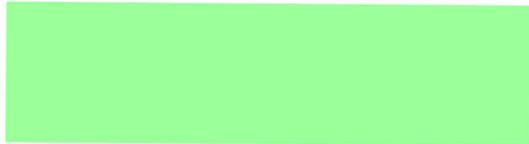


DATE: JUN 04 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional or Skilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The 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 developer. It seeks to employ the beneficiary permanently in the United States as a finish carpenter supervisor. 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and the company that seeks to employ the beneficiary has not established that it is a successor-in-interest to the petitioner. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 denial, the issues in this case are whether or not the company that seeks to employ the beneficiary has established that it is a successor-in-interest to the petitioner and whether or not the petitioner and the claimed successor have the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The AAO will first address whether [REDACTED] with a separate tax identification number from the petitioner, is a successor-in-interest to the petitioner and the entity that filed the labor certification, [REDACTED] President of petitioner, states that he is the owner of the petitioner and the claimed successor. He states that in 2001 when the labor certification was filed, it was the intention for the beneficiary to be employed by the petitioner; since that time the claimed successor was established and construction operations were transferred to that company; and it is now the intention for the sister company, the claimed successor, to employ the beneficiary. He states that the petitioner¹ was established to develop a resort community called [REDACTED] and this would take place in several phases; he decided to create separate entities for each new phase and each new resort operation within the greater [REDACTED] project; and ownership of each particular S corporation or LLC would be 100% held by him and revenues and expenses would flow through to him on that basis.

Counsel states that the petitioner divested itself of its construction operations; it contracted its operations and transferred its construction operation to a newly-created entity; and the claimed successor succeeded to immigration-related liabilities, namely the continued sponsorship of the beneficiary. Counsel cites to a September 12, 2006 USCIS interoffice memorandum and March 22, 2001 and October 17, 2001 letters from legacy INS in asserting that a successor-in-interest occurs

¹ North Carolina state corporation records show that the initial labor certification applicant and the petitioner stated on the I-140 petition still exists as a separate entity, and that another entity [REDACTED] merged into that company on December 21, 2011. See [REDACTED] (accessed May 15, 2013).

when substantially all of the rights, duties, obligations and assets of the original entity are assumed; the assumption of liabilities refers to immigration-related liabilities; and a company is a successor-in-interest when it has taken all of the immigration-related liabilities of the company it has acquired, merged, etc.

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 or appellant is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor.² Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The claimed successor has not fully described and documented the transaction transferring ownership of all, or a relevant part of, the predecessor. Counsel and the owner of the claimed successor have made claims as discussed previously, but sufficient documentary evidence has not been submitted to support their claims. 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). 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)).

In addition, the record does not include evidence that the job opportunity is the same as originally offered on the labor certification. The letter does not demonstrate that the job opportunity is with [REDACTED] and that the job duties, wage, job requirements, job location and hours are the same as with [REDACTED], or with any subsequent merged entity.

The AAO will next address whether 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.

Sections 203(b)(3)(A)(i) and (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) and (ii), provide for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of

² Corporate records additionally show that this company has merged into another surviving entity, [REDACTED] *See* [REDACTED] (accessed May 15, 2003). In any further filings, the petitioner would need to establish the entire chain of successorship from [REDACTED]

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 and qualified immigrants who hold baccalaureate degrees and who 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 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 \$9.00 per hour (\$18,720 per year). The Form ETA 750 states that the position requires two years of experience in the job offered or a related occupation.

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.³

The evidence in the record shows that the initial petitioner is an S corporation and the claimed successor is a limited liability company taxed as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1999 and to currently employ 1 worker. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary claimed to work for the petitioner since July 1993 as a carpenter's assistant. Counsel states that the transfer of construction operations to the claimed successor was done in early 2002.

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

³ 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).

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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage or sent any evidence of 2001 wages paid during any relevant timeframe including the period from the priority date in April 2001 until the unknown date in 2002 that it transferred its construction operations to the claimed successor.

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).

The record before the director closed on October 29, 2009 with the receipt by the director of the petitioner’s submissions included with its motion to reopen. The petitioner’s tax returns demonstrate its net income for 2001, as shown in the table below.

- In 2001, the Form 1120S stated net income⁴ of \$(187,654).
- The 2002 Form was not submitted by the petitioner.

Therefore, for the year 2001, the petitioner did not have sufficient net income to pay the proffered wage. For the portion of 2002 that the petitioner employed the beneficiary, the record does not include evidence that it had sufficient net income to pay the proffered wage.

⁴ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed April 29, 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 additional income shown on its Schedule K for 2001, the petitioner’s net income is found on Schedule K of its tax return.

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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$4,541,524
- The 2002 Form was not submitted by the petitioner.

Therefore, for the year 2001, the petitioner had sufficient net current assets to pay the proffered wage. For the portion of 2002 that the petitioner employed the beneficiary, the record does not include evidence that it had sufficient net current assets to pay the proffered wage. The director requested the petitioner's tax returns, annual reports or audited financial statements for the years 2001 through 2007 in his February 12, 2009 request for evidence. The petitioner submitted its 2001 tax return and the claimed successor's 2003 and 2004 Schedule C of Form 1040, and failed to submit relevant tax returns, annual reports or audited financial statements for it and the claimed successor for the other requested years, including 2002, 2005, 2006 and 2007. The regulation at 8 C.F.R. § 204.5(g)(2) states the petitioner must establish its continuing ability to pay the proffered wage and must submit annual reports, federal tax returns or audited financial statements. The record lacks this evidence for these years. The director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide the aforementioned evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In determining the claimed successor's ability to pay the proffered wage during a given period, USCIS will first examine whether the claimed successor employed and paid the beneficiary during that period. If the claimed successor 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 claimed successor's ability to pay the proffered wage. In the instant case, the beneficiary's wages as listed on Form W-2s with the claimed successor are:

<u>Year</u>	<u>Wages</u>
2002	\$17,226.07

⁵ 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.

2003	\$16,816.50 ⁶
2004	\$17,611.60
2005	\$20,156.41
2006	\$21,482.30
2007	\$19,996.53
2008	\$19,714.95

The claimed successor has not established that it employed and paid the beneficiary the full proffered wage of \$18,720 in 2002 through 2004.⁷ The claimed successor would be able to establish that it employed and paid the beneficiary the full proffered wage in 2005 through 2008, but must also establish that it is the proper successor to the initial entity as addressed above. The record does not include evidence from 2009 onwards.

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).

The claimed successor is a single-member limited liability company (LLC).⁸ The claimed successor's 2003 and 2004 tax returns are included in the record.

⁶ The AAO notes that the beneficiary's claimed wages for 2003 appear to be on a 2008 Form W-2 with the "8" from 2008 crossed out and a "3" written in its place. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states, "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The petitioner must address this and resolve this with independent objective evidence before the W-2 form can be accepted.

⁷ The record is not clear as to the exact date of purported successorship in 2002. Therefore it is not clear as to whether his wages in 2002 reflect the successor's ability to pay the proffered wage in 2002. The initial entity, however, has not demonstrated its ability to pay the proffered wage in 2002 prior to any successor transaction.

⁸ A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default

- In 2003, the Schedule C of Form 1040 stated a net income of \$32,229
- In 2004, the Schedule C of Form 1040 stated a net income of \$(163,678)

The record reflects that in 2003 the claimed successor would have had sufficient net income to pay the proffered wage.⁹ It has not established this for the portion of 2002 that it employed the beneficiary, for 2004 or for 2009 onwards.

As an alternate means of determining the claimed successor's ability to pay the proffered wage, USCIS may review the claimed successor's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ The AAO notes that net current assets are found on audited balance sheets, which are not in the record. Therefore, the record does not reflect that the claimed successor had sufficient net current assets to pay the proffered wage in 2002, 2004 and 2009 onwards, or the difference between the wages paid to the beneficiary and the proffered wage during those time periods.

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

classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

⁹ USCIS records reflect that the petitioner filed a Form I-140 for another beneficiary. The priority date of this beneficiary is not clear and it is therefore not clear whether the petitioner and the successor-in-interest would need to establish that it has the ability to pay this beneficiary too.

¹⁰ 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.

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.

Counsel asserts that the average wages for the beneficiary from 2002 through 2008 is \$280.62 more than the prevailing wage. The petitioner must establish its ability to pay the proffered wage in each year and not based on an average of wages paid to the beneficiary. The record does not include sufficient evidence to determine whether the petitioner and claimed successor had significant and increasing gross receipts, and significant salaries and wages. The petitioner failed to establish the successorship of the second entity and corporate records appear to show that the purported successor has merged into a third entity. Even if successorship were established, which it has not been, the petitioner and asserted successor have failed to submit tax returns for 2002 and 2005 onwards pursuant to 8 C.F.R. § 204.5(g)(2). The purported successor's tax returns show extremely low gross receipts (only \$49,373 in 2004). Based on these factors and the prior discussion on the lack of ability to pay the proffered wage, the AAO concludes that the petitioner has not established that it and claimed successor had the continuing ability to pay the proffered wage.

The AAO affirms the director's decision that the petitioner failed to establish that it and the claimed successor had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

In addition, the petition must also be denied because the claimed successor has failed to establish that it is a successor-in-interest to the employer that filed the labor certification and Form I-140.

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.