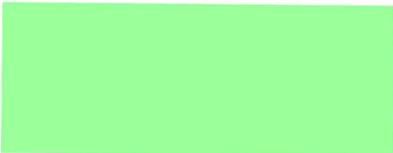




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 06 2013 Office: TEXAS SERVICE CENTER File: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Texas Service Center after determining that the petitioning entity no longer existed, and that the petitioner had failed to demonstrate a successor-in-interest relationship or to establish its ability to pay the proffered wage. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gems and jewelry business. The petitioner seeks to employ the beneficiary as a fancy color diamond assorter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which has been approved by the United States Department of Labor (DOL). The director determined that there was no successor-in-interest relationship between the employer who filed the ETA Form 9089 and the current petitioner, therefore nullifying the labor certification application. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision, the primary issue in this case is whether the petitioner has established a successor-in-interest relationship. Another issue to be addressed is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

As noted above, the first issue in this case is whether or not the current petitioner has established a successor-in-interest relationship with the petitioner who filed the ETA Form 9089.

The regulation at 8 C.F.R. § 204.5(l)(3) provides the following:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

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.

The record does not establish that the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(1)(3)(i); 20 C.F.R. § 656.30(c)(2). The original employer identified in the ETA Form 9089 (filed on November 1, 2005) and the Form I-140 (dated June 11, 2007) was [REDACTED] with a Federal Employer Identification Number (FEIN) [REDACTED]. The petitioner indicated that this petition was to correct a typographical error relating to the beneficiary's classification in the petition filed on March 21, 2006. The petitioner also stated that on January 1, 2006, [REDACTED] "changed its formation," and that [REDACTED], with FEIN number [REDACTED] was formed and that the latter business assumed all of the rights, duties, obligations, and liabilities of [REDACTED]. The petitioner stated that therefore, a successor-in-interest relationship exists. [REDACTED] indicated that it "changed its formation," on January 1, 2006 and that as a result a successor-in-interest relationship exists, [REDACTED] filed the instant I-140 petition on September 6, 2007. In addition, [REDACTED] submitted IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation for [REDACTED] for 2006, 2007, and 2008.

In response to the director's notice of intent to deny and in the petitioner's motions to reopen/reconsider, [REDACTED] indicated that the business was renamed, and that the ownership of the company remains the same. The director determined that petitioner [REDACTED] failed to submit any evidence to substantiate its claim, and denied the petition accordingly. The petitioner appealed the director's decision which was untimely filed and henceforth treated as a motion to reconsider/reopen the petition. In response to the director's request for evidence pertaining to a third I-140 petition [REDACTED] filed March 26, 2009, [REDACTED] submitted as evidence of the successor-in-interest relationship a copy of minutes of a meeting dated January 1, 2006 and held by [REDACTED] two partners where it was proposed that all shares of [REDACTED] be transferred to [REDACTED] and that the latter will assume all rights, duties, obligations, and liabilities of [REDACTED]. The petitioner also submitted a copy of a stock certificate showing that [REDACTED] received two hundred shares of stock from Abramov & Sons, Inc. and a transfer of stock agreement dated January 1, 2006.

The evidence submitted by [REDACTED] is insufficient to demonstrate that [REDACTED] is a successor-in-interest to [REDACTED]. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). 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.

Matter of Dial Auto is a decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all United States Citizenship and Immigration Services (USCIS) employees in the administration of the Act.

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) 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 successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On 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.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is 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 of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities."

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 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 proffered wage. 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.

It is further noted that 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 in the same manner. *See 19 Am. Jur. 2d Corporations* § 2170; *cf. 20 C.F.R. § 656.12(a)*.

In the instant matter, there is no evidence in the record to demonstrate that [REDACTED] of [REDACTED] has assumed the financial and administrative responsibilities and liabilities of [REDACTED]. [REDACTED] there is no evidence to show any transfer of obligations or business assets. A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *Black's Law Dictionary* 1473 (8th ed. 2004); *see also 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. While 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, 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 in the same manner with regard to the assets sold. *See generally 19 Am. Jur. 2d Corporations* § 2170 (2010).

There is no evidence in the record to show any name change, or that the petitioner “changed its formation” as claimed by [REDACTED].

The record contains no evidence to establish a valid successor relationship between [REDACTED]. [REDACTED] The petitioner submitted a letter dated May 20, 2009 from [REDACTED] who stated that [REDACTED] was involved in the manufacturing of jewelry while [REDACTED] was involved in the wholesale distribution of jewelry. The declarant also stated that [REDACTED].

“experienced a great decline in business” in 2006 and ceased operating. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer. The fact that the two business entities are owned by the same shareholders is not sufficient alone to establish a successor-in-interest relationship.

It appears in this case that [REDACTED] purchased the stock from the two original stockholders in 2006. Accordingly, the petitioner is claiming that it is now 100% owned by [REDACTED]. However, the petitioner never ceased to exist and, according to the public website of the State of New York Secretary of State, is in “active” status. The ownership of the petitioner’s stock changed hands, which is irrelevant to a successor-in-interest analysis. A corporation is a separate and distinct entity from its shareholders. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm’r 1980). There is no evidence that the petitioner, either before or after its stock was acquired by [REDACTED] merged into the claimed successor or transferred its assets and obligations to the claimed successor. Its sole stockholder does not have standing in these proceedings.

As no successor-in-interest relationship has been established, and the petitioner no longer intends to employ the beneficiary, the petition is without a valid labor certification pursuant to 8 C.F.R. § 204.5(1)(3)(i). The petition has become moot.

A second issue in this matter is whether the petitioner, [REDACTED] has established its ability to pay the proffered wage.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the 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 November 1, 2005. The proffered wage as stated on the ETA Form 9089 is \$10.75 per hour (\$22,360.00 annually). The ETA Form 9089 states that the position requires 24 months (two years) of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on February 10, 1994. The petitioner indicated that it currently employs eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 9, 2006, the beneficiary does not claim to have been employed by either the petitioner or [REDACTED]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application 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, 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.

If the wages paid do not equal or exceed the proffered wage, the petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. In this matter, the petitioner has not provided evidence to demonstrate wages or compensation paid to the beneficiary. The petitioner submitted as evidence Forms W-2 for 2006, 2007, and 2008 showing wages allegedly paid to the beneficiary by [REDACTED] during those years. However, this evidence is irrelevant to the petitioner's ability to pay the proffered wage in that there has been no evidence provided to demonstrate a successor relationship. Furthermore, the beneficiary does not claim to have been employed by [REDACTED] and in fact, he indicated on the ETA Form 9089 that he was employed by [REDACTED] located in [REDACTED] New York from March 6, 2003 to March 5, 2007 working as a managing partner 40 hours per week. 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. It 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner also submitted copies of the beneficiary's IRS Forms 1040 for 2005 and 2006. However, on the tax returns the beneficiary indicated his filing status as married filing jointly. Therefore, the AAO is unable to determine the specific wages for the beneficiary for those years. Therefore, the Forms W-2 will not be used to determine the petitioner's ability to pay the proffered wage.

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.

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

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

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

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

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these

figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The proffered wage is \$22,360.00 annually. Although the petitioner submitted tax returns for [REDACTED] for 2006, 2007, and 2008, as noted above, the petitioner has failed to demonstrate a successor relationship between the two business entities. Therefore, [REDACTED] tax returns will not be considered. The record of proceeding contains two copies of the petitioner’s 2005 tax return. In the first return dated March 8, 2006, the petitioner indicated that its net income was \$0.00; however, in the second 2005 tax return the petitioner indicated that its net income was \$1,823.00. It is noted that both tax returns bear the name [REDACTED] as the tax preparer. There has been no explanation given for this contradiction. The contradiction calls into question the authenticity of this evidence. 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. It 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. *See Matter of Ho* at 591-592. Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

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.¹ 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 2005 tax return dated March 8, 2006 indicated that its end-of-year net current assets of \$434,893.00; however, the second 2005 tax return indicated the petitioner’s end-of-year net current assets of \$8,945.00. As noted above, the contradictions bring into question the authenticity of this evidence and create doubt as to their reliability as evidence of the petitioner’s ability to pay the proffered wage. In addition, the petitioner has not provided any evidence to demonstrate its ability to pay the proffered wage in 2006, 2007, and 2008. As the petitioner appears to have “experienced a great decline in business” in 2006, it appears more likely than not that the petitioner could not pay the proffered wage from 2006 onwards.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the

¹According 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.

proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.²

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

In assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. The petitioner has not established the existence of any facts paralleling those in *Sonogawa*. The petitioner has not established that 2005, 2006, 2007, or 2008 were uncharacteristically unprofitable years or difficult periods for its business. To the contrary, the petitioner admits that it "experienced a great decline in business" in 2006 and failed to submit any of its tax returns for 2006 onwards. The petitioner has not established its reputation within the industry. The petitioner has not indicated that the beneficiary is replacing as an employee or outsourced service. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

² The petitioner submitted tax returns for [REDACTED] however, there is insufficient evidence in the record of proceeding to demonstrate that a successor relationship exists between the petitioner and [REDACTED]. Regardless, even if the AAO were to take into consideration the net income and net current asset amounts for 2007 and 2008; such amounts would be insufficient to demonstrate its ability to pay the proffered wage since the priority date. It appears from the record that [REDACTED] had negative net income in 2007 (-\$2,576,618.00) and in 2008 (-\$1,005,934.00), and negative current assets in 2007 (-\$3,040,826.00) and in 2008 (-\$2,966,090.00).

Beyond the decision of the director, the petitioner has not established that the beneficiary meets the qualifications set forth on the ETA Form 9089. According to the ETA Form 9089, the position requires two years (24 months) experience as a fancy color diamond assorter. In support of this claim, the petitioner submitted a letter from [REDACTED] the proprietor of [REDACTED] who stated that his company employed the beneficiary as a fancy color diamond assorter from September 1996 through October 1999. This letter fails to provide specific dates of the beneficiary's employment, whether he was employed full-time, or a specific description of his job duties. Accordingly, it has not been established that the beneficiary has the requisite 2 years of job experience for the proffered position. 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is November 1, 2005. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The appeal will be dismissed for this additional reason.

Beyond the decision of the director, USCIS records show that the petitioner has filed multiple immigrant petitions subsequent to the priority date of the instant petition; and therefore, the petitioner must establish that it had sufficient funds to pay all the wages 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 750B job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.