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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 14 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a 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,

Rachel Nizzio for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (TSC), denied the immigrant visa petition. Prior counsel to the petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on September 25, 2012, the AAO dismissed the appeal. Current counsel subsequently filed a motion to reopen. The motion will be granted and the prior decision dismissing the appeal shall be affirmed.

The petitioner was a mortgage and non-mortgage loan broker. It sought to permanently employ the beneficiary in the United States as a sales manager and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the beneficiary, based on the evidence of record, appeared to have committed marriage fraud with the intent of securing an immigration benefit in violation of section 204(c) of the Act, 8 U.S.C. § 1154(c), and the regulation at 8 C.F.R. § 204.2(a)(1)(ii).[1] The director concluded, therefore, that the beneficiary was ineligible for immigrant visa classification under section 203(b)(3)(A)(i) of the Act. The director denied the petition on June 3, 2008.

Prior counsel subsequently submitted a timely appeal to the denial of the petition. Although the AAO withdrew the director's conclusion that the beneficiary had committed marriage fraud as a basis of denial, the AAO made the additional determination that the business entity [2] had not established that it was the successor-in-interest to the petitioner . The AAO found that there was no valid petitioner in this proceeding, and therefore, the appeal was moot. The AAO also found that the record did not contain sufficient evidence that the beneficiary had the requisite education and work experience, as specified in the ETA Form 9089, to be eligible for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act. Finally, the AAO found that that the petitioner, , had failed to demonstrate its continuing ability to pay the proffered wage to the beneficiary since the priority date. The appeal was dismissed for these reasons by the AAO on September 25, 2012.

The record shows that the motion 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.

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[1] The record includes a decision by the District Director in Miami, Florida, dated May 12, 2004, denying the beneficiary's application for permanent resident status (Form I-485) based on a finding that the beneficiary had committed marriage fraud with the intent of circumventing U.S. immigration laws to obtain an immigration benefit. The decision was certified for review to the AAO, but was dismissed without adjudication by the AAO on September 29, 2004, because the beneficiary withdrew his application for permanent resident status.

[2] Official documentation shows that the company's current name is actually On its letterhead, however, it uses the shorthand of The AAO will refer to the company by the shorter name in this decision.

On motion, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred by failing to conclude that the business entity was the successor-in-interest to the petitioner Counsel argues that USCIS failed to follow the standards put forth in its own policy memorandum, the Neufeld Memorandum, regarding the determination of valid successor-in-interest issues. Counsel declares that the job opportunity remains with the successor to the original employer as the beneficiary is working in the same position at the same location with the same salary and same title. Counsel contends that the fact that the business entity, and the petitioner, have different Federal Employer Identification Numbers (FEINs) is not relevant because the two entities are essentially the same company with the same owner. Counsel states "[t]o limit a corporation from making apparently harmless changes to structure without altering details of the subject matter of the I-140, would go beyond legislative intent." Counsel also asserts that the beneficiary possesses the necessary education and experience to perform the offered job of sales manager.

In support of the motion, counsel submits copies of two checks from for the payment of rent to for the premises at for June 2010 and September 2010; a rent statement dated September 2, 2010 from for these same premises; a lease dated August 26, 2009 for these same premises with as the landlord and . as the tenant; copies of different checks from made payable to respectively, on various dates in 2007 and 2008; copies of four different checks from made payable to respectively, on various dates in October and November of 2008; copies from the website for the Florida Department of State Division of Corporations at http://www.sunbiz.org (accessed on October 18, 2012) of the results of a search relating to the separate business entity, copies of a bank statement dated August 31, 2012 from Wells Fargo Bank for the business checking account of printouts of online statements both of which are dated October 17, 2012 for this same account of one reflecting transactions from October 11, 2012 to October 18, 2012, and the other transactions from October 21, 2011 to October 18, 2012; a copy of the beneficiary's Florida license as a real estate sales associate; a new letter regarding the beneficiary's academic credentials and a corresponding certified translation; a copy of a new email message regarding the beneficiary's employment at and a corresponding certified translation; a new letter from and four letters signed by respectively, all of whom attest to the beneficiary's good character, professional manner, and expertise in the real estate business.

Section 203(b)(3)(A)(i) of the Act 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 set forth in the AAO's prior dismissal of the petitioner's appeal on September 25, 2012, the first issue to be examined in this proceeding is whether the business entity, [redacted] is a valid successor-in-interest to the petitioner, [redacted].

On motion, counsel asserts that USCIS erred by failing to conclude that the business entity [redacted] was the successor-in-interest to the petitioner [redacted]. Counsel argues that USCIS failed to follow the standards put forth in its own policy memorandum, the Neufeld Memorandum, regarding the determination of valid successor-in-interest issues. Counsel declares that the job opportunity remains with the successor to the original employer as the beneficiary is working in the same position at the same location with the same salary and same title. Counsel contends that the fact that the business entity, [redacted] have different FEINs is not relevant because the two entities are essentially the same company with the same owner. Counsel states "[t]o limit a corporation from making apparently harmless changes to structure without altering details of the subject matter of the I-140, would go beyond legislative intent."

Counsel's reliance upon guidance contained in the USCIS Interoffice Memorandum, the Neufeld Memorandum, issued on June 1, 2007, is misplaced. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viňa, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC,* 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency

and the public. Legislative rules are the product of an exercise of delegated legislative power." Id. at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?,* 41 Duke L.J. 1311 (1992).

USCIS has issued no regulations governing immigrant visa petitions filed by successor-in-interest employers. 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. The case 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 the successor-in-interest issue reads as 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).

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.[3] *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.[4]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[5] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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,

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[3] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[4] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

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

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.

With respect to the instant case, the record showed that the petitioner, , was incorporated in the State of Florida on December 13, 2002. The Articles of Incorporation named as the sole initial officer and/or director. The ETA Form 9089 was filed with the DOL by on October 4, 2007, and certified by the DOL in the name of on November 15, 2007. As indicated in its federal income tax returns (Forms 1120S) for the years 2007-2009 contained in the record, was a corporation wholly owned by Its FEIN was The website of the Florida Department of State, Division of Corporations, confirms that is inactive, having been administratively dissolved on

On July 5, 2007 (while was still active), was organized as a two-member limited liability company in the State of Florida. The Articles of Organization named as managing members. As indicated in its federal income tax returns (Forms 1065) for the years 2009-2011, has been taxed as partnership and is co-owned by each with a 50% interest. Its FEIN is The website of the Florida Department of State, Division of Corporations, reflects that on February 13, 2012, changed its name to (with the same FEIN). The Florida Secretary of State's record of this name change identifies as the managing members of

Thus, . was a different company, with a different FEIN, from and were both in active status from July 2007 to September 2009. While the current is clearly the same company as (only the name having changed), the same does not apply with respect to the petitioner,

In a notarized letter dated June 18, 2012, and co- stated that his business operation – mortgage and real estate investments – has remained the same under each company name. According to the progression from was just a series of name changes.

Counsel submits a new undated letter signed by on motion, in which asserts in pertinent part:

> Our company name Was used for Mortgage and Investment purposes, the company after the 2008 Mortgage crunch had a tremendous income drop which led to the result of changing the use of the company to real-estate, we decided to change the company to then recently had a name change to the need to have remains the same.
>
> is the company that we have formed for purpose of investment which is doing very good, the purpose of the company is to buy and sell property and Manage said properties as well, in this company we have a partnership but I've always maintained part of all three companies and always utilized as an asset in all three companies for exterior or international Business relations. [sic]

It is noted that a review of the website of the Florida Department of State, Division of Corporations, reveals that on September 7, 2010, was organized as a limited liability company in the State of Florida. The Articles of Organization named as the manager. The name of this limited liability company was changed to being added as a manager on October 4, 2010. On February 13, 2012, was added as a managing member of Clearly, is a distinct and separate business entity from both the petitioner, and the business entity . While counsel submits documentation relating to on motion, this evidence has no probative value in determining whether a valid successor-in-interest exists in the instant case. It is further noted that while the petitioner, , the business entity and the business entity, appear to have utilized a common business address during the course of this proceeding, this fact alone does not establish a valid successor-in-interest exists between any of these separate and distinct business entities.

As previously discussed, however, were distinct companies. They had different organizational and ownership structures, co-existed for more than two years, and had separate FEINs. There is no evidence in the record that any assets and liabilities were transferred from at any time between the founding of the latter company on July 5, 2007, and the administrative dissolution of the former company on September 25, 2009. There is no contract or agreement submitted into the record of proceeding between the two entities whereby the assets, rights, duties, and obligations of were transferred to

This lack of documentation casts doubt over exactly what rights and obligations, if any, were transferred from In fact, the record does not show that any

rights and obligations were transferred form [redacted] In visa petition proceedings, the petitioner bears the burden of proving eligibility in all respects. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). That burden has not been met in this case.

Although counsel and [redacted] contend that the business entity, [redacted] was the successor-in-interest to the petitioner, [redacted] on motion, their contention cannot be considered as persuasive without corroborative evidence. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, the evidence of record fails to establish that [redacted] is the successor-in-interest to the entity that filed the immigrant visa petition, [redacted] is dissolved, there is no valid petitioner in this proceeding. Accordingly, the petition cannot be approved for this reason. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on this basis.

As set forth in the AAO's prior September 25, 2012 dismissal of the petitioner's appeal, the next issue to be examined in this proceeding is whether the petitioner, [redacted] has demonstrated its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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 labor certification application was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). In this case, the labor certification application was received by the DOL on October 4, 2007. At Box G of the ETA Form 9089 the "offered wage" for the proffered position is stated as $2,500.00 biweekly, which amounts to $65,000.00 per year based upon a 52 week year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document,

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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 this case, the record includes a Form 1099-MISC issued to the beneficiary by for each of the years 2007-2009. They record "nonemployee compensation" to the beneficiary in those years as follows:

2007	$21,095.90[6]
2008	$15,847.71
2009	$ 1,314.60

The compensation received by the beneficiary in 2007, 2008, and 2009 was below the proffered wage of $65,000.00 per year. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (October 4, 2007) until the present based on its actual compensation to the beneficiary from 2007 through 2009.[7] The petitioner must therefore demonstrate its ability to pay the difference between wages paid and the proffered wage from 2007 through 2009 in the respective amounts of $43,905.10, $49,152.29, and $63,685.40.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See 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. *See 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

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[6] In 2007 the compensation was paid to a corporate entity – – owned by the beneficiary.

[7] For 2008, 2009, 2010, and 2011 Form 1099-MISCs were issued to the beneficiary by which has not been shown to be the successor-in-interest to In any event, the "nonemployee compensation" to the beneficiary in those years – $30,210.80, $19,994.00 in 2009, $1,406.00 in 2010, and $5,558.50 in 2011 – was just a fraction of the proffered wage.

(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).

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 [sic] 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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

As shown in its federal income tax returns (Forms 1120S) for the years 2007-2009, the net income of was as follows: [8]

[8] 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 of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the

2007:	$ 41,707.00
2008:	$ - 113.00
2009:	$ - 13,921.00

The net income figure for 2007, combined with the nonemployee compensation of $21,095.90 actually paid to the beneficiary that year, fell just short (by a little over $2,000) of the proffered wage. In both 2008 and 2009, however, the petitioner sustained a net loss for the year. Accordingly, the petitioner cannot establish its continuing ability to pay the difference between wages paid and the proffered wage from the priority date of October 4, 2007 up to the present based on its net income.[9]

As another alternate means of determining the petitioner's ability to pay the proffered wage, the AAO reviews the petitioner's net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner's current assets and current liabilities.[10] 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 of Schedule L. 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.

As shown in its federal income tax returns (Forms 1120S) for the years 2007-2009, the net current assets of were as follows:

2007:	$ - 64,357.00
2008:	$ - 48,510.00
2009:	$ 0.00

Thus, the petitioner recorded net current liabilities in two of the three years and no current assets in the third. Accordingly, the petitioner cannot establish its continuing ability to pay the difference

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corporation's income, deductions, credits, etc.). Because the petitioner had additional income, deductions, adjustments, and/or expenses shown on its Schedule K for all of the years in question, the petitioner's net income is found on Schedule K of its tax returns.

[9] Since the federal income tax returns in the record for 2010 and 2011 were filed by LLC, which has not been shown to be the successor-in-interest to , they will not be considered in the net income analysis.

[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.

between wages paid and the proffered wage from the priority date of October 4, 2007 up to the present based on its net current assets.[11]

On motion, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.[12] Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment will generate income as the petitioner, , is no longer an active business. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns of for 2007, 2008, and 2009.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612.[13] USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner was incorporated in December 2002 and stated that it had eight employees at the time the instant petition was filed in December 2007. Federal income tax statements for

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[11] Since the federal income tax returns in the record for 2010 and 2011 were filed by LLC, which has not been shown to be the successor-in-interest to , they will not be considered in the net current assets analysis.

[12] Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

[13] The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

show that its gross income was $618,347.00 in 2007, then plunged to $101,433.00 in 2008 and $11,910.00 in 2009, the year of its dissolution. Thus, . appears to have been in financial distress during its last two years of operation. As previously discussed, was no longer an active business after September 2009. Thus, there is no basis for to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage from the priority date (October 4, 2007) up to the present.

For all of the reasons discussed above, the record fails to establish the petitioner's, continuing ability to pay the proffered wage of the sales manager position from the priority date up to the present. For this reason as well, the petition cannot be approved. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on this basis.

As set forth in the AAO's prior dismissal of the petitioner's appeal on September 25, 2012, the final issue to be examined in this proceeding is whether the beneficiary had the requisite education and work experience, as specified in the ETA Form 9089, to be eligible for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

To be eligible for approval under section 203(b)(3) of the Act, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).[14] As previously discussed, the priority date in this case is October 4, 2007.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834.

The requirements for the subject position of sales manager are found in Part H of the ETA Form 9089. The minimum education is a high school diploma (Line 4). The minimum experience is 24 months in the "job offered" (Line 7). No "foreign educational equivalent" is acceptable (Line 9).

The job duties of the sales manager position are described in Box 11, as follows:

[14] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

> Direct activities with U.S. Real Estate to Latin American customers; coordinate/establish services, sales goals, training, final transactions, analyze sales potential/customer preferences; review records; project sales; determine profit; liaison between buyers and sellers; develop marketing; identify potential in Latin America.

As evidence of the beneficiary's education, documentation has been submitted showing that he completed five years of secondary studies at a parochial school – in , Peru – culminating in a diploma. While the beneficiary's diploma would appear to be comparable to a U.S. high school diploma, it does not meet the requirements of the labor certification, which specifies that a "foreign educational equivalent" is not acceptable. According to the labor certification, the beneficiary had to have a U.S. high school diploma.

On motion, counsel submits a new letter dated October 23, 2012 that is signed by , of the Central Office of Registration and Matriculation at Peru. The letter is written in Spanish and is accompanied by a certified English language translation. In this letter, states that the beneficiary earned 110 credits towards a degree in economics while attending this institution from 1983 until 1999 and that graduates of the program must pass 200 credits. Nevertheless, the beneficiary's additional academic credentials cannot overcome the fact that the beneficiary does not possess a U.S. high school diploma as required by the ETA Form 9089.

The record contains a letter dated May 4, 1999 containing the letterhead of the in Lima, Peru, that is signed by the . The letter is written in Spanish and is accompanied by a certified English language translation. In this letter, stated that the beneficiary worked in the bank as a branch manager in the office of from April 28, 1997 to May 4, 1999.

The record also contains a letter dated November 26, 2007 containing the letterhead of in Miami, Florida, that is signed by senior human resources assistant . In this letter, stated that the beneficiary was employed as a material handler from November 4, 2002 to December 23, 2005.

The regulation at 8 C.F.R. § 204.5(g)(1), which sets forth the substantive requirements of letters from former employers. The regulation states, in pertinent part, as follows:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The above letters do not meet the regulatory requirements insofar as they both fail to provide "a specific description of the duties performed by the alien." *Id.* Both letters provide the title of the beneficiary's position with no details as to specific duties performed. Thus, it is impossible to determine whether the

beneficiary's experience included the substantive duties of a sales manager as described in the labor certification based upon the information contained in the either of the letters discussed above.

On motion, counsel submits a copy of an email message regarding the beneficiary's employment at and corresponding certified translation. The text appears to have originated from , legal adviser for ' ' In the text, reiterates the beneficiary's dates of employment from April 1997 to May 1999 as an office manager for this enterprise and then provides a detailed listing of his duties in this job.

However, the beneficiary's alleged employment at the from 1997 to 1999 conflicted with the information provided in a Form G-325A, Biographic Information, submitted during the beneficiary's earlier proceeding seeking permanent resident status. In that form, signed by the beneficiary and dated April 30, 2002, the beneficiary stated that he had worked as a self-employed handyman during the previous five years. The beneficiary subsequently submitted a new Form G-325A, dated June 22, 2012, which replaced the "handyman" status from 1997 to 2002 with two different employment experiences in Peru – including the aforementioned branch manager position with the bank from April 1997 to May 1999 and as a self-employed financial advisor from June 1999 to February 2001.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

According to counsel, the original Form G-325A was submitted by a non-attorney and contained incorrect information. The AAO notes, however, that the original Form G-325A was signed and dated by the beneficiary himself, and appears to have been filled out by the beneficiary as well. There is no signature of anyone else on the form, nor evidence that anyone else filled it out.

On motion, neither counsel nor the beneficiary addresses the conflicting employment history listed on two separate Forms G-325A contained in the record. As neither the petitioner nor the beneficiary has provided a convincing explanation for the evidentiary conflict discussed above, the email received from regarding the beneficiary's employment at cannot be considered as persuasive evidence.

Based on the foregoing analysis of the evidence, the AAO concludes that the beneficiary does not meet the education and experience requirements for the job, as specified on the labor certification. The petition cannot be approved on these two grounds. The AAO finds that the appeal to the denial of the Form I-140 petition was properly dismissed on these grounds.

The AAO's decision of September 25, 2012 dismissing the appeal of the denied petition will not be disturbed.

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 prior decision of the AAO dated September 25, 2012 dismissing the appeal is affirmed.