



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 21 2013 OFFICE: NEBRASKA SERVICE CENTER

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)

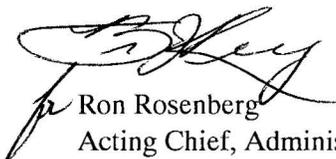
ON BEHALF OF PETITIONER:

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 Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a grocery store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concludes that the beneficiary does not have a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification and that the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage.

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

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On September 25, 2012, the AAO sent the petitioner a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) with a copy to counsel. The NOID/RFE stated, in part:

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The minimum education, training, experience and other special requirements required to perform the duties of the offered position are set forth at Part A, Items 14 and 15 of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: None required.

High School: None required.

College: 4 years.

College Degree Required: Bachelors.

Major Field of Study: None.

TRAINING: None required.

EXPERIENCE: None required.

OTHER SPECIAL REQUIREMENTS: Should be fluent in English and should not have any criminal record.

Part B, Item 11 of the labor certification states that the beneficiary's education related to the offered position is a Bachelor's Degree from [REDACTED] completed in April 1972. The petitioner indicated that the completion date on the labor certification is a typo and that the correct completion date is September 1977.

The record contains a copy of the beneficiary's Bachelor of Arts diploma and transcripts from [REDACTED]. The record also contains a copy of a vocational Trade Certificate awarded to the beneficiary upon completion of his Stenography course with the [REDACTED]. The record does not contain an evaluation of the beneficiary's credentials.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.² If placement recommendations are

² See *An Author's Guide to Creating AACRAO International Publications* available at

included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.³

According to EDGE, a three-year Bachelor of Arts degree from India is comparable to “three years of university study in the United States.” The beneficiary’s trade certificate is vocational training. EDGE does not indicate that vocational training is equivalent to university study.

Based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor’s degree as required by the terms of the labor certification. Therefore, the AAO is issuing this Notice of Intent to Dismiss and Request for Evidence (Notice) to request that you submit such evidence. Any credentials evaluation submitted in response to this Notice should specifically address the conclusions of EDGE set forth above. A copy of the EDGE report is attached to this letter.

If you claim that your organization intended the terms of the labor certification to require an alternative to a four-year U.S. bachelor’s degree or a single foreign equivalent degree, then please submit evidence of your claimed intent.⁴ Such

http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

³ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

⁴ The labor certification does not state that lesser credentials, such as those possessed by the beneficiary, might be acceptable. The DOL has provided the following field guidance for interpreting labor certification requirements: when the labor certification states that a “bachelor’s degree in computer science” is required, and the beneficiary has a four-year bachelor’s degree in computer science from the University of Florence, “there is no requirement that the employer include ‘or equivalent’ after the degree requirement” on the Form ETA 750 or in its advertisement and recruitment efforts. See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of

evidence would be of your organization's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.

Specifically, the AAO requests that your organization provide a copy of the documentation prepared in accordance with the prior DOL labor certification regulations at 20 C.F.R. § 656 (2004), including a signed recruitment report, the prevailing wage determination, all online and print recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. Please also include any other communications with the DOL that may be probative of your intent, such as correspondence or documents generated in response to an audit.

Your submission of this evidence may help establish your intent regarding the minimum requirements of the offered position and show that U.S. workers without four-year bachelor's degrees were in fact put on notice that they were eligible to apply for the position.

The NOID/RFE informed the petitioner that 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).

Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Further, where the Form ETA 750 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent," "we understand ['equivalent'] to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). Where the Form ETA 750 states that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). State Workforce Agencies should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). Finally, the DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

The petitioner responded to the AAO's NOID/RFE on October 23, 2012. The response included a letter dated October 22, 2012 from the petitioner's counsel, and no additional evidence. The petitioner's counsel stated, in part:

The petitioner's basic requirement is four years of college education regardless of number of years required and or spent in education leading to a bachelor's degree. The potential applicants could have earned a bachelor's degree after two, three or four years of college education. Any applicant with a bachelor's degree but less than four years of college education would not have qualified for the job.

Even if the ETA 750 is read as requiring a Bachelor's degree after four years of college education, the beneficiary's Bachelor of Arts degree awarded upon completion of three years of study at college level in [REDACTED] combined with beneficiary's vocational studies should be deemed as foreign equivalent to a Bachelor's Degree in the U.S.

However, 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). The petitioner failed to provide evidence to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree, and it failed to provide evidence of its intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers. Since the petitioner failed to submit requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14).

The petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification.⁵ The petitioner is [REDACTED] with a federal employer identification number [REDACTED]. According to the tax returns in the record, [REDACTED] corresponds to the [REDACTED]. Therefore, the petitioner is a different entity from the employer listed on the labor certification, as the labor certification was filed by [REDACTED] on April 30, 2001, prior to the incorporation of [REDACTED]. According to the tax returns in the record, the labor certification employer was a sole proprietorship with an [REDACTED] when the labor certification was filed.⁶ A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must

⁵ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

⁶ The sole proprietor was [REDACTED]

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'r 1986) (“*Matter of Dial Auto*”).

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. 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. 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.⁷ *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.⁸

Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. 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.

Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor’s ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the

⁷ 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).

⁸ 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.

successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

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

In his decision, the director determined that the evidence does not establish that the petitioner had the continuing 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 petitioning successor must prove the predecessor's ability to pay the proffered wage as of 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,⁹ 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 from the date of transfer of ownership forward.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$22.00 per hour (\$45,760.00 per year). The petitioner has not demonstrated when its successor relationship with [REDACTED] was established. Since the petitioner's 2003 tax return was its initial return and covered the period from April 1, 2003 to December 31, 2003, the AAO will assume for purposes of this analysis that the successor relationship between the petitioner and the predecessor sole proprietor, [REDACTED] was formed on or about April 1, 2003. Thus, the petitioner must establish the ability of [REDACTED] to pay the proffered wage from April 30, 2001 to March 31, 2003, and it must establish its ability to pay the proffered wage from April 1, 2003 onward.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on July 13, 1985 and to currently employ 5 workers. According to the tax returns in the record, the petitioner's fiscal year is based on

⁹ See 8 C.F.R. § 204.5(d).

a calendar year. On the Form ETA 750B, signed by the beneficiary on November 27, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of 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 and/or its predecessor employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it and/or its predecessor employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the employer's ability to pay the proffered wage. In the instant case, the following wage documents for the beneficiary were submitted:

- In 2001, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$21,845.00.
- In 2002, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$27,130.75.
- In 2003, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$19,940.33.
- In 2004, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$21,283.00.
- In 2005, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$22,588.00.
- In 2006, Form W-2 issued by [REDACTED] to the beneficiary showing wages paid of \$22,785.00.

Thus, the petitioner has not established that it or its predecessor employed and paid the beneficiary the full proffered wage of \$45,760.00 during any relevant timeframe, including the period from the priority date in 2001 or subsequently. The petitioner must establish that it and its predecessor can

pay the full proffered wage, or the difference between wages paid to the beneficiary and the proffered wage, in each relevant year.

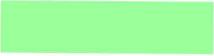
If the petitioner does not establish that it and/or its predecessor employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will next examine the net income figure reflected on the employer's federal income tax return, without consideration of 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 employer's gross receipts and wage expense is misplaced. Showing that the employer's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the employer 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 January 15, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. Therefore, the petitioner’s income tax return for 2007 is the most recent return available.

The labor certification employer appears to have been a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black’s Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm’r 1984). Therefore the sole proprietor’s adjusted gross income, assets and personal liabilities are also considered as part of the petitioner’s ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

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

As previously noted, if the AAO assumes that the successor relationship between the petitioner and the predecessor sole proprietor, [REDACTED] was formed on or about April 1, 2003, the petitioner must establish the ability of [REDACTED] to pay the proffered wage from April 30, 2001 to March 31, 2003. In the instant case, the sole proprietor supported a family of three in 2001 and 2002. The proprietor’s tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Proprietor’s adjusted gross income (IRS Form 1040)	\$95,676 ¹⁰	\$101,847 ¹¹

While the sole proprietor’s adjusted gross income covers the proffered wage in 2001 and 2002, the petitioner has not established that the sole proprietor could pay household expenses for himself and his family, and pay the difference between wages paid to the beneficiary and the proffered wage, in 2001 and 2002. In his decision, the director stated that the petitioner needed to submit a list of monthly household recurring expenses for the sole proprietor. The petitioner did not submit a list of

¹⁰ IRS Form 1040, line 33.

¹¹ IRS Form 1040, line 35.

the sole proprietor's monthly household recurring expenses on appeal. Further, the petitioner did not submit tax returns for the sole proprietor for 2003 and therefore, the petitioner has not established that the sole proprietor had the ability to pay the proffered wage from January 1, 2003 to March 31, 2003. Therefore, if the AAO assumes that the successor relationship between the petitioner and the predecessor sole proprietor, [REDACTED] was formed on or about April 1, 2003, the petitioner has failed to establish the ability of [REDACTED] to pay the proffered wage from April 30, 2001 to March 31, 2003.

If the AAO assumes that the successor relationship between the petitioner and the predecessor sole proprietor, [REDACTED], was formed on or about April 1, 2003, the petitioner must further establish its ability to pay the proffered wage from April 1, 2003 onward. The petitioner is an S corporation. The petitioner's tax returns demonstrate its net income for April 1, 2003 to December 31, 2003, and for 2004 to 2007, as shown in the table below.

- In 2003, the Form 1120S stated net income¹² of \$30,776.00.
- In 2004, the Form 1120S stated net income of \$20,250.00.
- In 2005, the Form 1120S stated net income of \$35,136.00.
- In 2006, the Form 1120S stated net income of \$8,224.00.
- In 2007, the Form 1120S stated net income of -\$9,459.00.

Therefore, for the period from April 1, 2003 to December 31, 2003, and for the year 2005, the petitioner established that it had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage. For the years 2004 and 2006, the petitioner did not establish that it had sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage. For the year 2007, 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.¹³ A corporation's year-end current assets are shown

¹² 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 (2003), line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 7, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions or other adjustments shown on its Schedule K for any relevant year, the petitioner's net income is found on line 21 of page one of its tax returns.

¹³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 2004, 2006 and 2007, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$113,857.00.
- In 2006, the Form 1120S stated net current assets of \$131,413.00.
- In 2007, the Form 1120S stated net current assets of \$106,716.00.

Therefore, for the years 2004 and 2006, the petitioner established that it had sufficient net current assets to pay the difference between wages paid to the beneficiary and the proffered wage. In 2007, the petitioner established that it had sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that its purported predecessor had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

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

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner's predecessor could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of 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

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.

petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not established the predecessor sole proprietorship's historical growth, its overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, or the sole proprietorship's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that its predecessor had the continuing ability to pay the proffered wage from the priority date until the date of transfer of ownership to the successor.

Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.