



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: JUN 24 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, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO). The AAO subsequently dismissed the appeal. The petitioner has now filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. §103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a wholesale gasoline sales company. It seeks to employ the beneficiary permanently in the United States as a general operations manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director noted that the petitioner failed to demonstrate a successor-in-interest relationship with [REDACTED]. The director denied the petition accordingly.

On motion, the petitioner submitted an affidavit from the petitioner's representative. This constitutes new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion to reopen is granted.

As set forth in the director's decision dated April 10, 2008 and the AAO's decision dated December 2, 2010, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date in this matter is April 30, 2001. Counsel asserts that the petitioner has established its ability to pay the proffered wage.

The AAO determined on appeal that the petitioner had established its ability to pay the proffered wage in 2001, 2002, and 2003. Therefore, on motion the issues are whether a successor-in-interest relationship exists and whether the petitioner has established its ability to pay the proffered wage in 2004 and thereafter.

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.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28.10 per hour based upon a 40 hour work week (\$58,448.00 per year). The Form ETA 750 states that the position requires an associate's degree in math or science and three years of work experience in a related occupation, retail sales operation.

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

The 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 February 1, 1999 and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary did not indicate that he had ever been employed by the petitioner.

The first issue to be addressed is whether the petitioner has established a successor-in-interest relationship. As is noted in the AAO's previous decision, 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.² *Black's Law Dictionary* 1569 (9th ed. 2009) (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.³

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

² 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).

³ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁴ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*) analysis,⁵ 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 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.

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.

⁴ 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).

⁵ The full analysis of *Matter of Dial Auto* is cited in the AAO's denial of the appeal; and therefore, will only be referenced on motion.

The original employer identified in the Form ETA 750 filed on April 30, 2001 was I [REDACTED] [REDACTED] an S corporation owned and operated by [REDACTED] is also listed as the petitioner on the Form I-140. According to the petitioner's accountant, [REDACTED] was dissolved as of May 31, 2006, and its business operations were undertaken and continued by [REDACTED] on or about May 31, 2006.

On appeal, [REDACTED] submitted a copy of a receipt for the filing of the Articles of Organization by [REDACTED] a limited liability corporation (LLC), dated November 30, 2005. [REDACTED] also submitted on appeal copies of the final New York State Quarterly Sales and Use Tax Return for [REDACTED] and the first such return for [REDACTED] for 2006. [REDACTED] asserts in an affidavit submitted on appeal that [REDACTED] is a holding company that took over the operation of the standalone sites and that [REDACTED] owns and operates the gasoline sales company previously owned and operated by the petitioner. The AAO determined that the petitioner had failed to provide sufficient evidence establishing a successor-in-interest relationship and dismissed the appeal.

On motion, counsel asserts that the petitioner has established the existence of a successor-in-interest relationship, and that what occurred between the petitioner, [REDACTED] [REDACTED] was nothing more than a simple name change. Contrary to counsel's assertion, the record of proceeding does not contain a Certificate of Change of Name Form from the New York State, Department of State, Division of Corporations, State Records and Uniform Commercial Code. In addition, [REDACTED] Federal Employer Identification Number (FEIN), [REDACTED] is different from [REDACTED] thus distinguishing one business entity from the other. The assertions of counsel will not satisfy the petitioner's burden of proof. The 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).

Counsel asserts that the business' address, type of business, and ownership interests remain unchanged, and that the job offer to the beneficiary remains unchanged. Counsel further asserts that according to a field memorandum dated August 6, 2009 [REDACTED], this type of business alteration should not jeopardize the successor's [REDACTED] ability to continue with the petition process. While memos may be binding on officers as a supervisor-employee directive pursuant to the Adjudicators Field Manual, memoranda do not create a legal right or obligation that can be enforced in court.⁶ Significantly, Chapter 3.4 of the manual also states that a "higher" authority is controlling where a conflict exists. For example, if a directive in a field manual appears to conflict with a regulation, the regulation must be followed. In addition, counsel does not submit any independent

⁶ USCIS memoranda merely articulate internal guidelines for USCIS personnel; they do not establish judicially enforceable rights. An agency's internal personnel guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)).

objective evidence to demonstrate that a simple name change has occurred or that the assets and obligations of [REDACTED] were acquired by [REDACTED]. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 533. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner submitted an affidavit from the managing member, sole shareholder and president of [REDACTED] who states that both [REDACTED] are in the wholesale gasoline sales business and that he will continue in his request to employ the beneficiary. The declarant further states that with respect to the criteria needed to demonstrate a successor-in-interest relationship: [REDACTED] is offering the beneficiary the same exact position as [REDACTED] required in the labor certification, that the companies operate the same exact type of business, that there are no additional shareholders or members of the business [REDACTED] and that the business had continued to grow and prosper. He further states that through both its income and assets the business has always had the ability to pay the proffered wage, and that 2004 through 2006 were years during which the business was involved in upgrades to equipment that produced a net loss for accounting purposes. The declarant states that the equipment replacement involved fuel storage tanks, dispenser pumps, canopies, fire suppression equipment and consoles which the business supplied and installed for clients in exchange for amortized fuel purchases over a long term. The declarant states however that USCIS should consider the overall strength and vitality of the business over time, in that it has maintained stable growth even during economic downturns. Lastly, the declarant states that a successor-in-interest relationship is established in that he has owned and operated both entities for the past 11 years and that they were wholesale gasoline sales businesses.

Contrary to the declarant's assertions, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, the only way for the successor to be able to use a Form ETA 750 approved for a different employer, in this case the petitioner, is if it establishes that it is a successor-in-interest to the petitioner. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). In this matter, the record is devoid of such evidence.

Based on the precedent in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481, and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer.

The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In this matter, the record does not establish the transfer and assumption of ownership of the petitioner by [REDACTED] who is the claimed successor. While it appears from the tax returns that the petitioner and [REDACTED] have the same business address and the same stockholders, albeit with some changes in proportional ownership, the record is devoid of any description or independent objective documentation of the change in ownership. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Thus, the petitioner has not established a successor-in-interest relationship with its claimed successor. As the petitioner has been dissolved, the petition is moot. Accordingly, the petition cannot be approved for this reason.

Nevertheless, the materials submitted on behalf of the claimed successor-in-interest have been analyzed.

A second issue to be addressed is whether the petitioner has established its ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. 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. In this matter, the record is devoid of evidence that the petitioner employed the beneficiary or paid wages to him.

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).

The proffered wage is \$58,448.00. The petitioner’s tax return demonstrates its net income as an S corporation as shown in the table below:

- In 2004, the HSM Form 1120S stated net income⁷ of -\$147,040.00.
- In 2005, the HSM Form 1120S stated net income of -\$1,450.00.
- In 2006, the THTTZ Form 1065⁸ stated net income of \$8,409.00.

Therefore, for the years 2004, 2005, and 2006, the petitioner did not have 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.⁹ A corporation’s year-end current assets are shown

⁷ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

⁸ The Form 1065, U.S. Return of Partnership Income, was filed by [REDACTED] as noted above, the AAO will consider this income, although the petitioner has not established that [REDACTED] is its successor-in-interest. For a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In this case, the net income is taken from page 4 of Form 1065, Line 1, Analysis of Net Income (Loss) of Schedule K. In this case, the net income is taken from page 4, of Form 1065, Line 1, analysis of net income (loss) of Schedule K.

⁹ 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,

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 as shown in the table below:

- In 2004, the HSM Form 1120S stated net current assets of -\$608,881.00.
- In 2005, the HSM Form 1120S stated net current assets of \$00.00.
- In 2006, the Form 1065 stated net current assets¹⁰ of -\$371,051.00.

Therefore, for the years 2004, 2005, and 2006, the petitioner did not have 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 it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner's representative states on motion that the petitioner has been in business for 11 years, that through both its income and assets the business has always had the ability to pay the proffered wage, that the business was involved in upgrades to equipment that produced a net loss for accounting purposes in 2004, 2005, and 2006, that the petitioner has maintained stable growth even during economic downturns, and that it anticipates steady growth in the future. Although the petitioner states that it anticipates future growth of its business sufficient to pay the beneficiary's wages as proffered, reliance on the petitioner's future receipts and wage expense is misplaced. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Similarly, the petitioner showing that it paid wages in excess of the proffered wage to others is insufficient. Contrary to the petitioner's claim, the record of proceeding contains no evidence specifically connecting the petitioner's temporary net loss in 2004, 2005, and 2006 to its equipment upgrades, nor does it contain independent documentation as evidence of its difficulty in doing business specifically because of the above noted event. A mere broad statement cannot by itself demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events noted above.

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.

¹⁰This figure was taken from the Form 1065 of [REDACTED]. An LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17.

The AAO also notes that the petitioner's tax returns suggest that 2004 was one of its better years in the context of its gross receipts, net income, and net current assets reported in 2001, 2002, and 2003.

Counsel's assertions and the evidence presented on motion do not outweigh the evidence of record that demonstrates that the petitioner 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. 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 or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in 2004 to 2006 or thereafter. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. The petitioner asserts that it has been in business for a number of years, that the petitioner has experienced growth in its income and that it has always maintained positive net current assets. Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability

to pay the proffered wage beginning on the priority date.

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

In the instant case, the labor certification states that the offered position requires a two year associate's degree in math or science and three years of experience in a related occupation, retail sales operation. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a first-line manager from January 1997 to April 2000 for [REDACTED] and [REDACTED] located in New York. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [REDACTED] who stated that he was employed by Super 9 Store as a night clerk from November 1996 to July 2000. He further stated that he has firsthand knowledge of the beneficiary's employment with Super 9. He stated that the beneficiary was employed by [REDACTED] as a general and operations manager from January 1997 to April 2000, and that the declarant submitted daily and weekly business summaries to the beneficiary. The declarant described the beneficiary's job duties and stated that the [REDACTED] store closed in 2004. The declarant does not state that he was the owner of the business, the beneficiary's manager, supervisor, or human resources representative.

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

Submitting secondary evidence and affidavits. (i) General. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

See also 8 C.F.R. § 204.5(g)(1) (Other documentation relating to experience will be considered if the required letters are unavailable).

The petitioner fails to overcome the unavailability of primary evidence. The statement by the beneficiary's subordinate is not the best evidence. There has been no documentation submitted to substantiate the declarant's claim with regard to the Super 9 Store being closed since 2004 and the beneficiary being unable to obtain official documentation from his former employer [REDACTED]. In fact, the employment letter dated September 17, 2007 list the name and address for the [REDACTED].

[REDACTED] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). Because of these inconsistencies, the AAO does not accept the employment statement as evidence of the beneficiary's three years of work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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 March 29, 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. 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 AAO's prior decision, dated December 2, 2010, is affirmed. The petition remains denied.