



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAR 18 2013**

OFFICE: TEXAS SERVICE CENTER

FILE

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The petitioner describes itself as a technology services company.² It seeks to employ the beneficiary permanently in the United States as a systems analyst.³ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the 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 denied the petition accordingly.

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

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 the regulation at 8 C.F.R. § 103.2(a)(1). As discussed below, the AAO will not accept the Internal Revenue Service (IRS) Forms W-2 submitted for the first time on appeal, but the record in the instant case provides no reason to preclude consideration of any of the other documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The Commonwealth of Massachusetts indicates the petitioner's name was changed from [REDACTED] to [REDACTED] on May 17, 2012. See <http://corp.sec.state.ma.us/corp/> (accessed December 5, 2012).

³ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the United States Department of Labor (DOL). On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

The director's February 2, 2010 denial identifies the issue of whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On appeal, the AAO has identified three additional issues, whether or not the petitioner has established a successor relationship between [REDACTED] and the petitioner, whether or not the petitioner has established it and its predecessor had the continuing ability to pay the proffered wages to multiple beneficiaries, and whether or not the petitioner has established that the beneficiary possessed the minimum experience required to perform the duties of the proffered position by the priority date.

The petitioner asserts that it is a successor-in-interest to the employer that filed the labor certification, Envitec. 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 the petitioner must establish that it is a successor-in-interest to the employer listed on the labor certification. United States Citizenship and Immigration Services (USCIS) has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. 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. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. 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 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.

The Commissioner's decision does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved" *Id.* (emphasis added).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

Accordingly, *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.⁴ *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.⁵

⁴ 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).

⁵ 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

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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.⁶ *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, 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 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.

⁶ 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).

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. To document the transaction transferring ██████ to the petitioner, the petitioner submitted a copy of a document entitled Purchase and Sale Agreement dated December 1, 2006 between ██████ and the petitioner transferring all of ██████'s "Technology"⁷ and "Immigration related rights and obligations"⁸ to the petitioner. No other assets were transferred.

The predecessor, ██████, had filed a previous Form I-140 for the beneficiary that stated ██████ was a computer consulting and engineering business and its tax returns indicate that it was engaged in environmental consulting. However, the Purchase and Sale Agreement did not transfer any consulting contracts or client lists, thus the petitioner has not established that it succeeded to the essential rights and obligations of ██████ to carry on its business. Therefore, the petitioner has not satisfied the first condition to establish a valid successor relationship.

On the petition, the petitioner listed its business as end to end technology products and services, and its tax returns list its business as programming services. The petitioner has submitted no evidence establishing that it continues to operate the same type of business as ██████ operated, or that it operates in the same metropolitan statistical area, or that the essential business functions remain substantially the same as before the ownership transfer.⁹ Therefore, the petitioner has not satisfied the second condition to establish a valid successor relationship.

⁷ The Purchase and Sale Agreement defines Technology as "all patents, patent applications, trademarks, trademark applications, copyrights, proprietary software, and all Intellectual Property Rights." Intellectual Property Rights are defined as:

all intellectual property rights of ██████ in the Technology, including without limitation applications, patents, inventions, trademarks, design rights, copyrights, database rights (whether or not any of these is registered and including any application for registration of any such rights) Know-How, confidential information and trade secrets and all rights or forms for the protection of a similar nature or having similar affect to any of these which may exist anywhere in the world.

⁸ Immigration related rights and obligations are defined as:

all employer's financial and attestation responsibilities associated with the filing and processing of Applications for Alien Labor Certification, Application of Permanent Employment of Aliens in the US (PERM) and HIB Specialty Occupation matters.

⁹ The director's denial focused only on the third condition, while the AAO finds that the petitioner did not establish any of the three conditions of a successor-in-interest relationship. USCIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has also not established that it is eligible for the immigrant visa in all respects. The petitioner must also establish that its predecessor had the ability to pay from the priority date to December 1, 2006 (the date of the transfer), and that the petitioner had the ability to pay the proffered wage thereafter.

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 Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on May 10, 2002. The proffered wage as stated on the Form ETA 750 is \$60,000 per year. The Form ETA 750 states that the position requires a Bachelor's Degree and two years of experience as a systems analyst.

The evidence in the record of proceeding shows that the petitioner and [REDACTED] are structured as S corporations. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 13 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year, and [REDACTED]'s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 30, 2007, the beneficiary claimed to have started working for the petitioner in April 2006 and to never have worked for [REDACTED].

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

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requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that [REDACTED] employed and paid the beneficiary the full proffered wage during the relevant period from the priority date until December 1, 2006. On appeal, the petitioner submitted copies of IRS Forms W-2 issued to the beneficiary for the years 2006 through 2009. However, for reasons discussed below, the IRS Forms W-2 will not be considered in the ability to pay analysis. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from December 1, 2006 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the

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

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

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on January 20, 2010, at which time the record contained copies of [REDACTED] tax returns for the years 2002 through 2006 and the petitioner's tax returns for the years 2006 through 2008. [REDACTED]'s tax returns demonstrate its net income for the years 2002 through 2006 as shown in the table below.

- In 2002, the Form 1120S stated net income¹⁰ of \$32,859.¹¹
- In 2003, the Form 1120S stated net income of -\$20,643.¹²
- In 2004, the Form 1120S stated net income of \$32,646.
- In 2005, the Form 1120S stated net income of -\$45,652.
- In 2006, the Form 1120S stated net income of -\$47,296.

¹⁰ 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 (2002-2003), line 17e (2004-2005), and line 18 (2006) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 30, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because [REDACTED] had additional deductions shown on its Schedule K for both 2002 and 2003, its net income is found on Schedule K of its 2002 and 2003 tax returns. In the years 2004 through 2006, its net income is found on line 21 of page one of its tax returns.

¹¹ The director incorrectly stated this amount as \$54,043.

¹² The director incorrectly stated this amount as -\$20,543.

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The petitioner's tax returns demonstrate its net income for the years 2006 through 2008 as shown in the table below.

- In 2006, the Form 1120S stated net income¹³ of \$88,358.
- In 2007, the Form 1120S stated net income of -\$207,540.
- In 2008, the Form 1120S stated net income of \$77,957.

Therefore, for the years 2002 through 2006, the petitioner did not establish that [REDACTED] had sufficient net income to pay the proffered wage.¹⁴ Additionally, for the year 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage, but for the years 2006 and 2008, the petitioner did 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.¹⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. [REDACTED] tax returns demonstrate its end-of-year net current assets for the years 2002 through 2006, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of -\$53,942.

¹³ In the years 2006 through 2008, the petitioner did not have any additional income, credits, deductions, or other adjustments on its Schedule K; therefore, its net income for those years is found on line 21 of page one of its tax returns.

¹⁴ It is noted that the director prorated the proffered wage in 2002; however, USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it 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 net 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. USCIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The petitioner must establish that Envitec had the ability to pay the full proffered wage in 2002.

¹⁵ 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.

- In 2003, the Form 1120S stated net current assets of -\$56,650.
- In 2004, the Form 1120S stated net current assets of -\$10,415.
- In 2005, the Form 1120S stated net current assets of -\$50,413.
- In 2006, the Form 1120S stated net current assets of -\$94,869.

The petitioner's tax returns demonstrate its end-of-year net current assets for the year 2007, as shown in the table below.

- In 2007, the Form 1120S stated net current assets of \$114,929.

Therefore, for the years 2002 through 2006, the petitioner did not establish that [REDACTED] had sufficient net current assets to pay the proffered wage. For the year 2007, the petitioner did establish 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 predecessor, [REDACTED] 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 net income or net current assets.

On appeal, counsel asserts that based on previous counsel's failure to submit the requested IRS Forms W-2, the petitioner is now allowed to submit them. As evidence, counsel submitted copies of IRS Forms W-2 for the beneficiary for the years 2006 through 2009. The 2006 Form W-2 was issued by the petitioner, whose federal Employer Identification Number (EIN) is [REDACTED] while the rest of the Forms W-2 were issued by ADP Totalsource II Inc., whose EIN is [REDACTED]. Counsel is correct that the director did request the IRS Forms W-2. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Although counsel claims that previous counsel was incompetent, counsel did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner, through its present counsel, did not articulate a proper claim based upon ineffective assistance of previous counsel. Therefore, the

petitioner has not overcome the failure to submit the requested evidence.¹⁶

Counsel also asserts that the personal resources of the shareholders of both [REDACTED] and the petitioner should be considered. As evidence, counsel submits a letter dated March 3, 2010 from [REDACTED] a certified public accountant, which states that [REDACTED] the petitioner's president, owned a 50 percent interest in [REDACTED], and his wife, [REDACTED], owns a 51% interest in the petitioner. Mr. [REDACTED] includes a spreadsheet listing the bank balances of [REDACTED]'s personal bank account balances from August 2004 through November 2009. Both [REDACTED] and the petitioner are corporations, and because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel also asserts that the beneficiary was receiving long-term disability payments for the period of November 1, 2006 through March 25, 2007 through a long-term disability insurance policy administered by the [REDACTED] and that these payments should be considered as paid by the petitioner. As evidence, counsel submits a copy of a letter dated June 21, 2007 to the beneficiary from the [REDACTED] stating that the beneficiary received long-term disability payments of \$2,500 for December 2006 and \$7,166.67 for January through March 26, 2007. However, as the petitioner has already established its ability to pay for 2006 and 2007, it is not necessary to consider this assertion further.

Counsel also asserts that as [REDACTED] and the petitioner have common ownership, their combined and comparative balance sheets should be considered. As evidence, counsel submits both a letter from [REDACTED] a certified public accountant, which states that [REDACTED] owned a 50% interest in [REDACTED] and his wife [REDACTED] owns a 51% interest in the petitioner, and a spreadsheet prepared by [REDACTED] that lists the balance sheet entries for each entity side-by-side for the years 2002 through 2008. This spreadsheet does not indicate that it is an audited version of the balance sheets and the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. There is no accountant's report accompanying the spreadsheet stating it represents audited balance sheets. Additionally, the information listed on the spreadsheet is duplicative; as the information is already listed on [REDACTED]'s and the petitioner's tax return Schedules L and has already been considered in the above net current assets analysis.

¹⁶ The AAO notes that the record does not contain any evidence that the monies paid by [REDACTED] were paid on behalf of the petitioner.

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 [REDACTED] 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *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, as to [REDACTED] there is no record of its historical growth, there is no evidence of its reputation in the industry, and there is no evidence that the beneficiary would have replaced a former employee or an outsourced service. There is no evidence of the occurrence of any uncharacteristic business expenditures or losses from which it suffered and recovered. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that Envitec had the continuing ability to pay the proffered wage.

The petitioner has not established that [REDACTED] had the continuing ability to pay the proffered wage beginning on the priority date and continuing through December 1, 2006. Therefore, the petitioner has not satisfied the third condition to establish a valid successor relationship.

The petitioner has not established a valid successor relationship for immigration purposes.

Ability to Pay: Multiple Beneficiaries

Beyond the decision of the director, the petitioner has failed to establish its continuing ability to pay the proffered wage as of the priority date to multiple beneficiaries. *See* 8 C.F.R. § 204.5(g)(2).

According to USCIS records, the petitioner and [REDACTED] have filed other I-140 and I-129 petitions on behalf of other beneficiaries. The petitioner would need to demonstrate it and [REDACTED]'s ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Further, the petitioner and [REDACTED] would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The evidence in the record does not document the priority date, proffered wage or wages paid to the other beneficiaries, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established it or [REDACTED]'s continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of the other petitions.

Beneficiary Qualifications: Experience

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 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).

In the instant case, the labor certification states that the offered position requires completion of college, a Bachelor's Degree or equivalent in computer science, engineering or related, and two years of experience as a systems analyst. On the labor certification, regarding the experience requirements, the beneficiary claims to qualify for the offered position based on experience as a systems analyst with [REDACTED] MD from January 2001 until January 2002, working 40 hours per week. The labor certification also lists experience with the petitioner as a technical representative and with [REDACTED] MD as a technical resource specialist.

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 copy of a letter dated January 31, 2002 from [REDACTED] as Director of Human Resources on [REDACTED] letterhead stating

that the beneficiary worked as a systems analyst from January 16, 2001 until January 31, 2002 and listing his duties. The letter does not indicate whether the beneficiary's employment was full- or part-time. The letter does not establish the beneficiary's two years of experience as a systems analyst.

The record also contains a copy of a letter dated December 11, 2000 from [REDACTED] as Regional Manager on [REDACTED] India letterhead stating the beneficiary worked as a systems analyst from August 17, 1997 until December 11, 2000 and listing duties. The letter does not indicate whether the beneficiary's employment was full- or part-time. However, this experience is not listed on the labor certification submitted with the petition and signed by the beneficiary on March 20, 2007.¹⁷ It is noted that [REDACTED] filed a petition on behalf of the beneficiary and submitted a labor certification signed by the beneficiary on June 27, 2006 that does list employment with [REDACTED] in New Delhi. It is further noted that the beneficiary has submitted a Form G-325A, Biographic Information, to support his application for adjustment of status to a legal permanent resident on which he states that he lived in [REDACTED] India from March 1969 until January 2001, but the Form G-325A does not list any last occupation abroad.¹⁸ There is an inconsistency regarding the beneficiary's employment at [REDACTED] as between the two labor certifications signed by the beneficiary, the experience letter from [REDACTED], and the Form G-325A, also signed by the beneficiary.

Matter of Ho, 19 I&N Dec. at 591-592, states:

[i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not resolved the inconsistencies in the record regarding the beneficiary's experience with independent, objective evidence.

The evidence in the record does not establish that the beneficiary possessed the required experience

¹⁷ In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

¹⁸ There appears to be a substantial distance between Samana, Punjab, India where the beneficiary claimed he lived and [REDACTED] India where he claimed he worked. See www.maps.google.com. It is not clear how the beneficiary was living in [REDACTED] India and working in Kalkaji, New Delhi, India from August 17, 1997 until December 11, 2000. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.