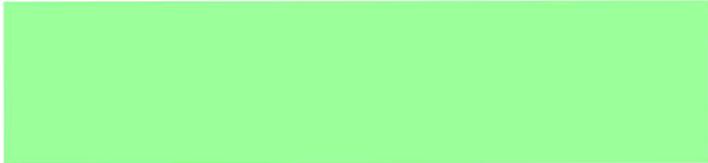




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE:

**MAY 15 2013**

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)

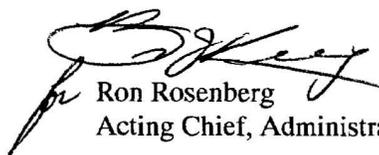
ON BEHALF OF PETITIONER:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a hunt horse farm.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a horse consultant (animal trainer). 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 denied the petition accordingly.

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

As set forth in the director's January 13, 2009 denial, the primary issue in this case is 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.

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 are members of the professions.

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.<sup>2</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1990, and to currently employ 12 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 July 28, 2004, the beneficiary claimed

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<sup>1</sup> The petitioner's tax returns indicate that the petitioner is a personal service corporation (PSC) providing veterinary services. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<sup>2</sup> 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). 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).

to have worked for the petitioner as a horse consultant from August 2001 to the date she signed the Form ETA 750B.

The employer's name on the petition and the labor certification is [REDACTED]. The petitioner's federal employer identification number (EIN) on the Form I-140 is [REDACTED]. According to the tax returns in the record, the petitioner's corporate name is [REDACTED]. The address where the work is to be performed on the petition and the labor certification is [REDACTED] Madison, AL [REDACTED].

The record contains an Agreement of Sale (Agreement of Sale) dated June 22, 2010, between [REDACTED] and [REDACTED] as seller (Seller), and [REDACTED] and [REDACTED] as buyer (Buyer). Pursuant to the Agreement of Sale, the Seller sold all of the assets of [REDACTED] to the Buyer, with the exception of cash on hand and accounts receivable. The petitioner's assets that were sold included the equipment used in the business; the furniture, fixtures and improvements located in the business; the name ' [REDACTED] ' the goodwill of the business; the drugs and other medical supplies used in the business; and all lists of customers and clients of the business and all records related to the customers and clients of the business. The purchase price for the assets was \$420,000. The Buyer did not assume any liabilities or obligations of the Seller. The effective date of the sale is listed as June 25, 2010.

On July 31, 2012, the AAO sent the petitioner a notice of intent to dismiss and request for evidence (NOID) requesting the petitioner to submit evidence to establish its continued existence, operation, and good standing, or that a successor-in-interest exists.<sup>3</sup> [REDACTED] CPA responded to the NOID on August 21, 2012. He asserts that [REDACTED] dba [REDACTED] (EIN [REDACTED]) was "spun-off" from the petitioner.

The petitioner's corporate name is [REDACTED], with EIN [REDACTED]. In response to the AAO's NOID, [REDACTED] CPA states, in part:

(2) [REDACTED] was 100% owned and operated by [REDACTED] from November 1, 1993 until he sold the practice on June 22, 2010 to [REDACTED]

<sup>3</sup> The AAO also requested the following evidence:

- Evidence to document registration of any fictitious names for the petitioner and the successor-in-interest (if any).
- Evidence to establish the petitioner's EIN and the EIN of the successor-in-interest (if any).
- Evidence to establish any name change on the part of the petitioner.
- Copies of federal tax returns, audited financial statements or annual reports for the petitioner and the successor-in-interest (if any) for 2008 to 2011.
- Copies of Internal Revenue Service (IRS) Form W-2s or 1099s issued by the petitioner and the successor-in-interest (if any) to the beneficiary or other verifiable evidence of wages paid to the beneficiary for 2008 to 2011.

[REDACTED] was the wife of [REDACTED] and she worked for him as an employee and ran the [REDACTED] which was their large animal practice. However, for simplicity purposes everything was maintained and the bookkeeping was done under one EIN [REDACTED] (3) [REDACTED] (small animal practice) and [REDACTED] (large animal practice) were one and the same when [REDACTED] owned and operated the veterinary practice and both [REDACTED] and [REDACTED] were employees. However, on June 22, 2010 when [REDACTED] purchased the veterinary practice he did not do large animals so therefore [REDACTED] was spun off and became an entity in and of itself. [REDACTED] and [REDACTED] just continued to work for [REDACTED] as if nothing had ever happened.

Pursuant to the Agreement of Sale dated June 22, 2010 between [REDACTED] and [REDACTED] as Seller, and [REDACTED] and [REDACTED] as Buyer, the Seller sold all of the assets of [REDACTED] to the Buyer, with the exception of cash on hand and accounts receivable. The name [REDACTED] was included in the sale. The Agreement of Sale did not exclude any assets for a large animal practice, and it did not mention [REDACTED] or a "spin off" of any branch or division of [REDACTED]

Further, the Agreement of Sale included a covenant not to compete, which provided that the Seller and any entity in which the Seller has an interest cannot operate a veterinary medical practice or veterinary hospital, or otherwise perform veterinary services, for a period of three years after the effective date of the Agreement of Sale and within a 15 mile radius of the veterinary practice located at [REDACTED] Madison, AL [REDACTED]. The record contains a letter dated March 24, 2011 from [REDACTED] which stated

On June 30, 2010 [REDACTED] sold his veterinarian practice to a doctor that had been working for him but [REDACTED] kept [REDACTED] open and [REDACTED] continued to work for this corporation. However, due to Payroll tax law in the State of Alabama there couldn't be 2 companies operating under the same name. This is what prompted the name change only to [REDACTED] EIN [REDACTED].

The letter contradicts the terms of the Agreement of Sale and the covenant not to compete contained therein. The petitioner did not simply change its name to [REDACTED], as [REDACTED] asserts.<sup>4</sup> A notice dated July 19, 2010 from the IRS to [REDACTED] indicates that EIN [REDACTED] was issued to [REDACTED] dba [REDACTED]. A printout from the IRS submitted in response to the AAO's NOID indicates that [REDACTED] requested an EIN because she "started a new business" in July 2010. [REDACTED] dba [REDACTED] is a sole proprietorship. The AAO's NOID requested that the petitioner provide evidence to establish any name change on the part of the petitioner, and

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<sup>4</sup> A corporation is not required to obtain a new EIN if the corporate name changes or its location changes. <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Do-You-Need-a-New-EIN%3F> (accessed April 29, 2013).

evidence to document registration of any fictitious names for the petitioner. The petitioner failed to provide such evidence. The 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).

sold the assets (except cash and accounts receivable) of the petitioner to another veterinarian. was prevented by the covenant not to compete from operating a veterinary medical practice or veterinary hospital, or otherwise performing veterinary services, for a period of three years after the effective date of the Agreement of Sale and within a 15 mile radius of the veterinary practice. Therefore, he could not have kept his veterinary practice open at a location 5 miles from in 2010 as asserted by . Instead, the record shows that the beneficiary began working for a different employer, a sole proprietorship operated by in 2010. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the inconsistencies in the record by independent objective evidence.

Further, dba has not established that it is a successor-in-interest to the petitioner. 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.

19 I&N Dec. at 482-3 (emphasis added).

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.<sup>5</sup> *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.<sup>6</sup>

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<sup>5</sup> 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).

<sup>6</sup> For example, unlike a corporation with its own distinct legal identity, if a general partnership adds

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.<sup>7</sup> *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 successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the 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 petitioner must prove its 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.

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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.

<sup>7</sup> 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, a valid successor relationship between the petitioner and [REDACTED] dba [REDACTED] has not been established for immigration purposes.

First, [REDACTED] dba [REDACTED] has not fully described and documented the transaction transferring ownership of all, or a relevant part of, the predecessor employer. As previously stated, the Agreement of Sale establishes that all of the assets of the petitioner were sold to [REDACTED] and [REDACTED] except cash and accounts receivable. The Agreement of Sale does not indicate that a division of the petitioner retained sufficient rights to continue to operate the business, or that any part of the petitioner's business was transferred to [REDACTED] dba [REDACTED]. The sole proprietorship operated by [REDACTED] has not established that it is the same employer as the petitioner, or that ownership of all or a relevant part of the petitioner was transferred to it.<sup>8</sup>

Next, [REDACTED] dba [REDACTED] has not demonstrated 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<sup>9</sup> 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. The petitioner's tax returns indicate that it is a professional veterinary practice, although it describes itself as a hunt horse farm on the petition. [REDACTED] dba [REDACTED] has not established that it provides professional veterinary services. Therefore, [REDACTED] dba [REDACTED] has not established that it operates the same type of business as the petitioner or that the essential business functions remain substantially the same as before the purported transfer.

In addition, the petitioner has established its ability to pay the proffered wage as of the priority date and until the date of purported transfer of ownership to the successor on June 25, 2010; and the petitioner has not established 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.

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

<sup>8</sup> On the petition, the petitioner claimed to employ 12 workers. The 2010 and 2011 IRS Forms W-3 submitted for [REDACTED] dba [REDACTED] show that it had only one employee, the beneficiary, in each of those years.

<sup>9</sup> The address where the work is to be performed on the petition and the labor certification is [REDACTED], Madison, AL [REDACTED]. On appeal, [REDACTED] CPA states that [REDACTED] dba [REDACTED] is located at [REDACTED] Madison, AL [REDACTED] less than five miles from the petitioner.

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 July 29, 2004. The proffered wage as stated on the Form ETA 750 is \$32,000 per year. The Form ETA 750 states that the position requires completion of grade school and high school, four years of college education and a bachelor of science degree in equine science.

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, 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'l Comm'r 1967).

In determining an employer's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner and/or its purported successor employed and paid the beneficiary during that period. If the petitioner or its purported successor 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 its ability to pay the proffered wage. In the instant case, the record contains the following evidence of payments to the beneficiary:

- A check dated October 9, 2008 in the amount of \$440.54 payable by [REDACTED] to the beneficiary;<sup>10</sup>

<sup>10</sup> The record contains two pages of handwritten ledgers. One ledger records payments made to an unnamed person on unknown dates. The other ledger shows payments purportedly made to the beneficiary in 2008. However, in a request for evidence dated November 11, 2008, the director requested the petitioner to submit IRS Forms W-2 or 1099, or pay vouchers, evidencing wages paid to the beneficiary in each relevant year. In its NOID, the AAO also requested IRS Forms W-2 or

•IRS Form W-2 for 2010 showing wages paid by [REDACTED] (EIN [REDACTED]) to the beneficiary in the amount of \$7,215.00;

•IRS Form W-2 for 2010 showing wages paid by [REDACTED] (EIN [REDACTED]) to the beneficiary in the amount of \$6,105.00; and

•IRS Form W-2 for 2011 showing wages paid by [REDACTED] (EIN [REDACTED]) to the beneficiary in the amount of \$13,320.00.

Therefore, in 2008 and from January 1, 2010 to June 25, 2010, the petitioner must establish that it can pay the difference between the wages paid to the beneficiary and the proffered wage.<sup>11</sup> [REDACTED] dba [REDACTED] must establish that it can pay the difference between the wages paid to the beneficiary and the proffered wage for the period from June 26, 2010 to December 31, 2010, and in 2011.

If the petitioner or its successor 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 employer's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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:

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1099 issued to the beneficiary. The 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).

<sup>11</sup> It must establish that it can pay the full proffered wage in all other relevant periods.

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

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner’s tax returns demonstrate its net income, as shown in the table below.

- In 2004, the Form 1120 stated net income of \$50.00.
- In 2005, the Form 1120 stated net income of -\$1,518.00.
- In 2006, the Form 1120 stated net income of \$437.00.
- In 2007, the Form 1120 stated net income of \$1,087.00.
- In 2008, the petitioner failed to submit any regulatory-prescribed evidence of its net income.
- In 2009, the petitioner failed to submit any regulatory-prescribed evidence of its net income.
- In 2010, the Form 1120 stated net income of \$36,506.00.<sup>12</sup>

Therefore, for the years 2004, 2005, 2006, 2007 and 2009, the petitioner did not establish that it had sufficient net income to pay the proffered wage. For 2008, the petitioner did not establish that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage. For the period from January 1, 2010 to June 25, 2010, the petitioner established that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage.

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<sup>12</sup> The petitioner’s 2010 tax return does not reflect an asset sale in the amount of \$420,000.

did not submit any regulatory-prescribed evidence of its net income. Therefore, it did not establish that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage for the period from June 26, 2010 to December 31, 2010, and in 2011.

In its NOID, the AAO requested federal tax returns, annual reports or audited financial statements for the petitioner and/or its successor in interest for 2008 to 2011.<sup>13</sup> The petitioner failed to provide the requested evidence. The 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).

If the net income the employer demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the employer's net current assets. Net current assets are the difference between the employer's current assets and current liabilities.<sup>14</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 employer 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 Form 1120 stated net current assets of -\$20,750.00.
- In 2005, the Form 1120 stated net current assets of -\$62,157.00.
- In 2006, the Form 1120 stated net current assets of -\$73,800.00.
- In 2007, the Form 1120 stated net current assets of -\$67,009.00.
- In 2008, the petitioner failed to submit any regulatory-prescribed evidence of its net current assets.
- In 2009, the petitioner failed to submit any regulatory-prescribed evidence of its net current assets.

Therefore, for the years 2004, 2005, 2006, 2007 and 2009, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. For 2008, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage.

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<sup>13</sup> The record contains the petitioner's 2010 IRS Form 1120.

<sup>14</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

\_\_\_\_\_ dba \_\_\_\_\_ did not submit any regulatory-prescribed evidence of its net current assets. Therefore, it did not establish that it had sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage for the period from June 26, 2010 to December 31, 2010, and in 2011.

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.

On appeal, \_\_\_\_\_ the sole shareholder of the petitioner, states in an affidavit dated December 22, 2008, that he took salaries from 2004 to 2007 to reduce the petitioner's taxable income. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the IRS Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns show that \_\_\_\_\_ was paid \$107,000, \$174,250, \$178,500 and \$224,000 in officer compensation in 2004, 2005, 2006, and 2007, respectively. However, \_\_\_\_\_ has not established that he had the ability to forgo his salary in each relevant year to pay the proffered wage.<sup>15</sup> 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)).

\_\_\_\_\_ also states in his affidavit that the petitioner pays him rent for the veterinary clinic facilities, which he and his wife own. It appears that he is suggesting that those rents could be reduced to pay the proffered wage. However, rents are already accounted for in the calculation of line 21 net income on the petitioner's IRS Form 1120, and there is no evidence in the record that the petitioner could reduce the rent paid to the shareholder in order to pay the proffered wage. The petitioner must pay the fair rental value for the property. Rents below fair rental value may be adjusted by the IRS. *See* I.R.C. § 482. The petitioner did not provide a rental agreement between the parties establishing the required rent. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

\_\_\_\_\_ also asserts that he will personally guarantee the beneficiary's wage.<sup>16</sup> The guaranty is dated December 22, 2008, more than 4 years after the priority date. Even if enforceable as a guaranty

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<sup>15</sup> The record contains \_\_\_\_\_ individual income tax returns for 2004, 2005, 2006 and 2007; however, the record does not contain evidence of his liabilities to establish that he had the ability to forgo a portion of his officer compensation to pay the proffered wage in each of those years.

<sup>16</sup> Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders 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

of the future wages of the beneficiary, the affidavit of [REDACTED] could not help to establish the ability of the petitioner to pay the proffered wage prior to December 22, 2008. With the I-140 petition, evidence is required of a sponsoring employer's ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal, counsel asserts that the totality of the circumstances should be considered in determining the petitioner's ability to pay the proffered wage. 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, the petitioner has not established its historical growth since its incorporation in 1993. The petitioner has not submitted any regulatory-prescribed evidence of its ability to pay the proffered wage in 2008 and 2009. Further, the petitioner sold all of its assets except cash and accounts receivable to [REDACTED] and [REDACTED] in 2010. [REDACTED] dba [REDACTED] a sole proprietorship, is a different employer than the petitioner, a professional corporation. The petitioner has not established that [REDACTED] dba [REDACTED] is the petitioner's successor-in-interest. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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resources of individuals or entities who have no legal obligation to pay the wage.”

(b)(6)

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The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.