

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **MAY 24 2013** OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is an automobile repair business. It seeks to employ the beneficiary permanently in the United States as a mechanic. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 February 10, 2010 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.

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

The 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.

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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the priority date is April 30, 2001. The proffered wage as stated on the ETA Form 9089 is \$15.61 per hour (\$32,468.80 per year). The ETA Form 9089 states that the position requires 24 months of experience in the job offered.

On the petition, the petitioner claimed to have been established in 2001, to have “reopened in 2002” and to currently employ 4 workers. On the ETA Form 9089, signed by the beneficiary on June 5, 2008, the beneficiary did not claim to have worked for the petitioner.

The petitioner on the Form I-140 and the employer on the ETA Form 9089 is [REDACTED] a sole proprietorship owned by [REDACTED] with employer identification number [REDACTED]. The initial Form ETA 750 was filed by [REDACTED]. The appeal was filed by [REDACTED] a sole proprietorship owned by [REDACTED] on March 8, 2010. If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986) (“*Matter of Dial Auto*”).

The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID) to the petitioner on January 4, 2013. The AAO stated, in part:

The record contains a letter dated March 17, 2008 from [REDACTED] which states that the labor certification was originally filed by [REDACTED] [REDACTED] which filed for bankruptcy and was dissolved in 2002, and that [REDACTED] formed the petitioner, [REDACTED] in December 2002. [REDACTED] further states that he contacted the DOL and continued the labor certification process under the petitioner’s name. Counsel, in his July 14, 2009 letter, states that [REDACTED] was the sole proprietor of [REDACTED]. The record also indicates that [REDACTED] passed away on February 22, 2010 and that the instant appeal was filed on March 3, 2010 by [REDACTED] as owner. From a search of the Texas Comptroller of Public Accounts website, it appears that [REDACTED] was

² New DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). As of March 28, 2005, Form ETA 750 applications were no longer accepted under the regulation in effect prior to March 28, 2005, and instead new ETA Form 9089 applications had to be filed under the new PERM regulation. Applications filed under the regulation in effect prior to March 28, 2005, continued to be processed under the rule in effect at the time of filing. Where an employer chose to withdraw an application filed under the regulation in effect prior to March 28, 2005, and still in process, and to refile an application for the identical job opportunity under the refile provisions of the PERM regulation, the employer was permitted to use the previously filed Form ETA 750 application filing date. *See* http://www.foreignlaborcert.doleta.gov/perm_detail.cfm (accessed May 13, 2013).

incorporated on June 3, 2010, and is now known as [REDACTED] (Corporation).³

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c).

It appears that [REDACTED] is a different employer than [REDACTED] (who filed the petition) [REDACTED] (the labor certification employer) and it also appears that [REDACTED] is a different employer than the Corporation; therefore, the record must contain evidence to establish the various successor-in-interest relationships. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

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*, 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).

³ See [REDACTED] (accessed November 1, 2012).

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

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 successor 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. 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. The AAO stated in its NOID, in part:

Describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor.

- A. [REDACTED] The record contains a Bill of Sale acknowledged before a notary public on March 21, 2002 wherein [REDACTED] transferred personal property to [REDACTED]. According to [REDACTED] March 17, 2008 letter, he started [REDACTED] December 2002. The AAO will consider this evidence as documenting the transfer between [REDACTED].
- B. [REDACTED] The record contains no evidence documenting the transfer of [REDACTED] from [REDACTED] therefore, this transfer must be documented. Please submit evidence documenting this transfer.

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).

- C. [REDACTED] to Corporation. The record contains no evidence documenting the transfer of [REDACTED] from [REDACTED] to the Corporation; therefore, this transfer must be documented. Please submit evidence documenting this transfer.

In response to the NOID, the petitioner submitted copies of the Last Will and Testament (Pour-over Will) of [REDACTED] dated November 23, 1999, and the [REDACTED] Revocable Living Trust Agreement dated November 23, 1999 (Revocable Trust). Pages 6 and 8 of the Revocable Trust were not submitted. Therefore, the successor has not established that [REDACTED] received the assets of [REDACTED] upon the death of her husband. Further, the successor submitted no evidence documenting the transfer of [REDACTED] from [REDACTED] to [REDACTED]. 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). Therefore, the successor has not fully described and documented the transactions transferring ownership of all, or a relevant part of, the predecessor employer, [REDACTED] to its ultimate purported successor, [REDACTED].

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 its NOID, the AAO requested evidence that the job opportunity is the same as originally offered on the labor certification. No evidence was submitted in response to this request. 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). Thus, the successor has not established that the job opportunity is the same as originally offered on the labor certification.

In order to establish eligibility for the immigrant visa in all respects, the successor must support its claim with all necessary evidence, including evidence of ability to pay. The 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 successor must establish its 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.

In its NOID, the AAO stated, in part:

Demonstrate that each of the four employers is eligible for the immigrant visa in all respects, including establishing each employer's continuing ability to pay the proffered wage.

⁷ It is not clear from the record what happened to the business between March 21, 2002 and December 2002.

- A. [REDACTED] The record contains a copy of a payroll record issued by [REDACTED] to the beneficiary on December 21, 2001, showing the beneficiary's year-to-date earnings to be less than the proffered wage, and a copy of an Internal Revenue Service (IRS) 2002 Form W-2 issued to the beneficiary,⁹ both of which show the beneficiary was being paid less than the proffered wage. The record also contains a copy of only the first page of [REDACTED] IRS Form 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002.¹⁰ The record also contains copies of only the first page of [REDACTED] bank statements for the months of January through April and June through December 2001 and January through August 2002.¹¹ Please submit evidence to establish [REDACTED] ability to pay, including complete copies of its federal tax returns, its annual reports or its audited financial statements for each relevant year.
- B. [REDACTED] Counsel's July 14, 2009 letter states that [REDACTED] operated as a sole proprietor from December 2002 until his passing on February 20, 2010.¹² The record does not

⁸ As previously discussed, [REDACTED] March 17, 2008 letter states that [REDACTED] was doing business as [REDACTED]

⁹ The record contains IRS Forms W-2 issued to the beneficiary by [REDACTED] for the years 2002, 2003, 2005, 2006, and 2007. The record contains a copy of a letter dated March 17, 2008 from [REDACTED] stating that [REDACTED] contracted with [REDACTED] from December 1, 2002 through September 30, 2005 and again from February 6, 2006 through March 17, 2008 to provide payroll services and payroll tax reporting.

¹⁰ Where an S corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income shown on line 21 of page one of its tax return. 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 which appears after page one of the tax return. In this case, no Schedule K was submitted for either year. In addition to net income, USCIS will also consider net current assets shown on Schedule L of the tax return, but no Schedule L was submitted for either year.

¹¹ Bank statements are not among the three types of evidence, enumerated in 8 C.F.R §204.5(g)(2) required to illustrate ability to pay the proffered wage. Additionally, while the bank statements may represent the cash [REDACTED] had in the bank, there is no evidence to suggest that [REDACTED] did not have any current liabilities to offset monies in the bank as would typically be shown on the Schedule L. Debt is an integral part of any business operation and USCIS must evaluate the overall financial position of [REDACTED] to determine if it is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

¹² A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors

contain a copy of [REDACTED] 2002 IRS Form 1040. The record contains a copy of [REDACTED] 2003 and 2004 IRS Form 1040, but there is no Schedule C self-employment income reported in either of those years. The record also contains a copy of [REDACTED] 2005, 2006, 2007, and 2008 IRS Form 1040, all of which report self-employment income from [REDACTED]. The record does not contain any evidence of [REDACTED] monthly living expenses, but does contain copies of the first page of bank statements for [REDACTED] for the months of May through December 2008.¹³ Counsel's July 14, 2009 letter also states that "when [REDACTED] was born post 2002, [REDACTED] was named head of the business and therefore his name appears on some of the petitioning business' documents." The record contains a copy of [REDACTED] IRS Schedule C for the years 2003 and 2004 which show that he was operating [REDACTED] as a sole proprietor in those two years.¹⁴ The record also contains the first page of numerous bank statements for several months in 2003, 2004, 2005, 2006, 2007, and 2008 in the name of [REDACTED].¹⁵ The record contains

report income and expenses from their businesses on their individual (IRS Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

¹³ There is no evidence to suggest that the monies shown on these bank statements are not already shown on [REDACTED] 2008 Schedule C as gross receipts and expenses. USCIS will not consider gross income without also considering the expenses that were incurred to generate that income.

¹⁴ From the record it appears that [REDACTED] was being operated as a sole proprietorship by [REDACTED] in 2003 and 2004 which is inconsistent with Counsel's assertions that [REDACTED] was operating it as a sole proprietorship in those years. 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 inconsistency regarding who was actually operating [REDACTED] in 2003 and 2004.

¹⁵ These bank statements showing [REDACTED] doing business as [REDACTED] are inconsistent with other evidence in the record, including [REDACTED] 2005, 2006, 2007, and 2008 tax returns, [REDACTED] 2008 partial bank statements, [REDACTED] March 17, 2008 letter, and Counsel's July 14, 2009 letter, where were submitted to establish that [REDACTED] was operating [REDACTED] as a sole proprietor. 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

IRS Forms W-2 issued to the beneficiary for the years 2002, 2003¹⁶, 2005, 2006, and 2007, none of which indicate that the beneficiary was receiving the proffered wage. Lastly the record contains a copy of a payroll record issued by [REDACTED] on behalf of [REDACTED] to the beneficiary on December 24, 2004, showing the beneficiary's year-to-date earnings to be less than the proffered wage. Please submit evidence to establish [REDACTED] ability to pay to proffered wage, including federal tax returns, audited financial statements or annual reports, together with evidence of the sole proprietor's annual household expenses for each relevant year.

- C. [REDACTED] The record contains no financial information for [REDACTED]. Please submit evidence to establish [REDACTED] ability to pay the proffered wage, including federal tax returns, audited financial statements or annual reports, together with evidence of the sole proprietor's annual household expenses for each relevant year.
- D. Corporation. The record contains no financial information for the Corporation. Please submit evidence to establish the Corporation's ability to pay the proffered wage, including complete copies of its federal tax returns, its annual reports or its audited financial statements for each relevant year.

In response to the AAO's NOID, the 2002 IRS Form 1040 for [REDACTED] and the 2011 IRS Form 1120S for [REDACTED] were submitted. The remaining evidence regarding ability to pay the proffered wage requested by the AAO in its NOID was not submitted. Further, the inconsistency regarding who was actually operating [REDACTED] in 2003 and 2004 has not been resolved with independent, objective 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).

Even assuming the successor had established that [REDACTED] was succeeded by [REDACTED] in December 2002; that [REDACTED] was succeeded by [REDACTED] upon the death of [REDACTED] in February 2010; and that [REDACTED] was succeeded by [REDACTED] in June 2010, the job offer to the beneficiary must be a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

inconsistency regarding who was actually operating [REDACTED] and whether or not it was being operated as a sole proprietorship.

¹⁶ The record also contains a copy of a 2003 IRS Form W-2 issued to the beneficiary by [REDACTED] which is different employer than [REDACTED]

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 employer employed and paid the beneficiary during that period. If the employer 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 employer's ability to pay the proffered wage. In the instant case, the record contains the following documents evidencing payments to the beneficiary:

- Copy of a payroll record issued by [REDACTED] to the beneficiary on December 21, 2001, showing the beneficiary's year-to-date earnings of \$4,400.00;
- Copies of IRS Forms W-2 issued to the beneficiary by [REDACTED] for the years 2002, 2003, 2005, 2006, and 2007 showing wages paid of \$17,056.29, \$5,292.39, \$6,350, \$9,400, \$10,400, respectively; and
- Copy of a payroll record issued by [REDACTED] on behalf of [REDACTED] to the beneficiary on December 24, 2004, showing the beneficiary's year-to-date earnings of \$19,450.

Thus, the successor must demonstrate the following:

- In 2001, that [REDACTED] had the ability to pay the difference of \$28,068.80 between wages actually paid to the beneficiary and the proffered wage;
- In 2002, that [REDACTED] had the ability to pay the difference of \$15,412.51 between wages actually paid to the beneficiary and the proffered wage;
- In 2003, that [REDACTED] had the ability to pay the difference of \$27,176.41 between wages actually paid to the beneficiary and the proffered wage;
- In 2004, that [REDACTED] had the ability to pay the difference of \$13,018.80 between wages actually paid to the beneficiary and the proffered wage;
- In 2005, that [REDACTED] had the ability to pay the difference of \$26,118.80 between wages actually paid to the beneficiary and the proffered wage;
- In 2006, that [REDACTED] had the ability to pay the difference of \$23,068.80 between wages actually paid to the beneficiary and the proffered wage;

- In 2007, that [REDACTED] had the ability to pay the difference of \$22,068.80 between wages actually paid to the beneficiary and the proffered wage;
- In 2008, that [REDACTED] had the ability to pay the proffered wage;
- In 2009, that [REDACTED] had the ability to pay the proffered wage;
- From January 1, 2010 to February 22, 2010, that [REDACTED] had the ability to pay the proffered wage;
- From February 23, 2010 to June 2, 2010, that [REDACTED] had the ability to pay the proffered wage;
- From June 3, 2010 to December 31, 2010, that [REDACTED] had the ability to pay the proffered wage; and
- In 2011, that [REDACTED] had the ability to pay the proffered wage.

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 tax returns in the record demonstrate net income as shown in the table below.

- In 2005, the adjusted gross income of the sole proprietor, [REDACTED] was \$22,267
- In 2006, the adjusted gross income of the sole proprietor, [REDACTED] was \$18,964.
- In 2007, the adjusted gross income of the sole proprietor, [REDACTED] was \$30,903.
- In 2008, the adjusted gross income of the sole proprietor, [REDACTED] was \$26,260
- In 2011, the Form 1120S for [REDACTED] stated net income of \$11,618.¹⁷

Therefore, for the years 2001 and 2002, the successor did not establish that [REDACTED] had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage.¹⁸

¹⁷ Line 21 of page one of the taxpayer’s IRS Form 1120S.

¹⁸ As noted in the AAO’s NOID, 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 taxpayer’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. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed May 13, 2013) (indicating that Schedule K is a summary schedule of all shareholders’

For the years 2003, 2004, 2009 and the period from January 1, 2010 to February 22, 2010, the successor did not establish that [REDACTED] had sufficient adjusted gross income to cover the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage, together with the proprietor's personal household expenses.¹⁹

For the years 2005 and 2006, the sole proprietor's adjusted gross income fails to cover the difference between wages actually paid to the beneficiary and the proffered wage. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the difference between wages actually paid to the beneficiary and the proffered wage.

In 2007, the sole proprietor's adjusted gross income exceeds the difference between wages actually paid to the beneficiary and the proffered wage. However, because the record does not contain a listing of the sole proprietor's personal household expenses for 2007, the successor has not established that the sole proprietor could have supported himself on \$8,834.20, which is what remains after reducing the sole proprietor's adjusted gross income by the amount required to pay the difference between wages actually paid to the beneficiary and the proffered wage.

In 2008, the sole proprietor's adjusted gross income fails to cover the proffered wage. It is improbable that the sole proprietor could support himself on a deficit, which is what remains after reducing the adjusted gross income by the proffered wage.

For the period from February 23, 2010 to June 2, 2010, the successor did not establish that [REDACTED] had sufficient adjusted gross income to cover the proffered wage, together with the proprietor's personal household expenses.

For the period from June 3, 2010 to December 31, 2010, and in 2011, the successor did not establish that [REDACTED] had sufficient net income to pay the proffered wage.²⁰

As an alternate means of determining an employer's ability to pay the proffered wage, USCIS may review the employer's net current assets. Net current assets are the difference between the employer's current assets and current liabilities.²¹ A corporation's year-end current assets are shown

shares of the corporation's income, deductions, credits, etc.). The record does not include Schedule K of the 2001 and 2002 tax returns of [REDACTED] and, therefore, its net income cannot be determined for those years.

¹⁹ As noted in the AAO's NOID, the record contains copies of the 2003 and 2004 IRS Forms 1040 for [REDACTED] but there was no Schedule C business income reported by [REDACTED] in either of those years. The record does not contain a tax return for [REDACTED] for 2009 and 2010.

²⁰ The record does not contain a federal tax return, audited financial statement or annual report for [REDACTED] for 2010.

²¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the employer is expected to be able to pay the proffered wage using those net current assets. In 2011, the Form 1120S for [REDACTED] stated net current assets of \$31.

Therefore, for the years 2001 and 2002, the successor did not establish that [REDACTED] had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage.²²

For the years 2003, 2004, 2005, 2006, 2007, 2008, 2009, and the period from January 1, 2010 to February 22, 2010, the successor did not establish that [REDACTED] had sufficient net current assets to cover the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage.

For the period from February 23, 2010 to June 2, 2010, the successor did not establish that [REDACTED] had sufficient net current assets to cover the proffered wage.

For the period from June 3, 2010 to December 31, 2010, and in 2011, the successor did not establish that [REDACTED] had sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it or its predecessor or successors 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, net income or net current assets.

Counsel asserts on appeal that the director erred in not considering the bank statements submitted in response to the director's Notice of Intent to Deny dated June 16, 2009. The record contains bank statements for [REDACTED] for several months in 2001 and 2002. However, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the successor has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of [REDACTED]. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Additionally, no evidence was submitted to demonstrate that the funds reported on the bank

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.

²² As noted in the AAO's NOID, the record does not include Schedule L of the 2001 and 2002 tax returns of [REDACTED] and, therefore, its net current assets cannot be determined.

statements of [REDACTED] somehow reflect additional available funds that were not reflected on its tax returns, such as the corporation's taxable income (income minus deductions).

Further, as previously noted in the AAO's NOID, the record contains numerous bank statements for several months in 2003, 2004, 2005, 2006, 2007, and 2008 in the name of [REDACTED]. The bank statements showing [REDACTED] doing business as [REDACTED] are inconsistent with other evidence in the record, and do not establish the ability of the petitioner [REDACTED] to pay the proffered wage.

In addition, the record contains bank statements for [REDACTED] for the months of May through December 2008. The funds are located in the sole proprietorship's business checking account. However, there is no evidence to suggest that the monies shown on these bank statements are not already shown on the 2008 IRS Form Schedule C for the sole proprietorship as gross receipts and expenses. USCIS will not consider gross income without also considering the expenses that were incurred to generate that income.

Counsel also asserts on appeal that the totality of the circumstances should be considered in the instant case. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner, [REDACTED] was established in December 2002, after the priority date of the petition. It has not established its historical growth since December 2002, it paid minimal wages to its employees in 2005, 2006, 2007 and 2008, and the inconsistency regarding who was actually operating [REDACTED] in 2003 and 2004 has not

been resolved. 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.

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

In sum, the successor has not established a valid successor relationship for immigration purposes. First, the successor did not fully describe and document the transactions transferring ownership of all, or a relevant part of, the predecessors. Second, the successor did not demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor did not prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

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.