

(b)(6)

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

DATE: JUL 03 2014

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)

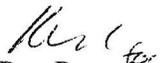
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. On April 22, 2013, the petitioner filed a motion to reopen and reconsider this decision. On January 30, 2014, the director affirmed the previous decision and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a laundry business. It seeks to employ the beneficiary permanently in the United States as a laundry worker. 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: (1) that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; and (2) that the beneficiary met the experience requirements of the labor certification. The director denied the petition accordingly. The director accepted the petitioner's motion to reopen and reconsider and determined that the beneficiary meets the experience requirements of the labor certification. The director also affirmed the previous decision regarding the petitioner's ability to pay the proffered wage. Therefore, at issue on appeal 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.

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.

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

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

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

Here, the Form ETA 750 was accepted on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$9.94 per hour (\$20,675.20 per year at 40 hours per week).

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

Successor-In-Interest

In the instant case, the employer listed on the labor certification is [REDACTED]. The petitioner listed on the Form I-140 is [REDACTED]. The business name listed on the motion to reopen and the instant appeal is [REDACTED]. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the 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).

At the outset, the appellant has not demonstrated that [REDACTED] (taxpayer Employer Identification Number (EIN) [REDACTED]) is the successor-in-interest to the original labor certification employer, [REDACTED] or the Form I-140 petitioner, [REDACTED] (EIN [REDACTED]). The appellant has also not provided independent, objective evidence to resolve the discrepancies in the record regarding the different names and locations of its business as stated on the tax returns, the Forms W-2, the Form I-140 and the labor certification. The record contains the following evidence regarding the different names of the appellant's business:

- Tax returns for 2001, 2002, 2003, 2004, and 2005, stating the name of the business as [REDACTED] in [REDACTED] Maryland, with an EIN of [REDACTED]
- A tax return for 2006 under the name [REDACTED] in [REDACTED] Virginia, with an EIN of [REDACTED]
- A Form W-2 issued to the beneficiary for 2008 by [REDACTED] with an EIN of [REDACTED]
- Tax returns for 2007, 2008, 2009 and 2010, and under the name [REDACTED] in [REDACTED] Virginia, with an EIN of [REDACTED]

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).

² A search of Maryland's Department of Assessments and Taxation website reflects that [REDACTED] is forfeited. *See* http://sdatcert3.resiusa.org/UCC-Charter/searchByName_a.aspx?mode=name (accessed June 30, 2014).

³ A search of Maryland's Department of Assessments and Taxation website reflects that [REDACTED] is also forfeited. *See* http://sdatcert3.resiusa.org/UCC-Charter/searchByName_a.aspx?mode=

- Tax returns for 2010, 2011 and 2012 under the name [REDACTED] in [REDACTED] Maryland with an EIN of [REDACTED]
- Forms W-2 issued to the beneficiary for 2010 and 2011 under the name [REDACTED] in [REDACTED] Maryland with an EIN of [REDACTED]

The record includes a letter from the appellant's owner, dated July 24, 2011, which states that when the labor certification was filed, the petitioner was operating under the trade name [REDACTED] which was later changed to [REDACTED] in the summer of 2002. This letter also states that "[i]n December 2009, [REDACTED] took over the business" and that the beneficiary has worked for [REDACTED] at [REDACTED] Maryland since January 2010. The appellant's assertion that [REDACTED] "took over the business" tends to indicate that there was a reorganization or change in ownership of [REDACTED]. The new EIN associated with the business demonstrates that more than just a name change occurred, which would give rise to a successor-in-interest relationship. The fact that all of the entities shared a common owner does not demonstrate that the appellant and the petitioner are the same entity.

The director sent the petitioner a request for evidence (RFE) on October 17, 2012 and again on November 5, 2012, requesting that the petitioner provide evidence that [REDACTED] is a successor-in-interest to the petitioner. In response to these RFEs, counsel asserts that it is unnecessary to establish a successor-in-interest relationship in this instance because the beneficiary is able to "port" to [REDACTED] due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Counsel asserts that the petition is still "approvable" and that the position offered remains the same for the beneficiary to port to a new employer. We do not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*⁴ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he no longer intends to work for the petitioning entity provided (1) the application for adjustment of

name (accessed June 30, 2014).

⁴ We note that after the enactment of AC21, U.S. Citizenship and Immigration Services (USCIS) altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)* (Public Law 106-313) at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a “same or similar” job. A plain reading of the phrase “will remain valid” suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. We would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term “remains valid” was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). Therefore, AC21 does not apply to the instant matter.

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986) (“*Matter of Dial Auto*”) and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary’s predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects

Accordingly, because [REDACTED] is a separate business with a different EIN from the original entity stated on the labor certification and petition, the appellant must demonstrate that [REDACTED] is a successor-in-interest to [REDACTED]

The record does not describe and document any transaction transferring ownership of the petitioner to the appellant. In any further filings, the appellant must provide evidence as to how [REDACTED] “took over” the business originally listed on the labor certification and that it is a successor-in-interest to the petitioner. The petitioner must also provide independent, objective evidence of the various name changes of the petitioner’s business in any further filings.

Ability to Pay the Proffered Wage

As stated above, to establish its ability to pay the proffered wage, the appellant must first provide evidence that [REDACTED] is a successor-in-interest to [REDACTED] and [REDACTED]. The appellant must also provide evidence of the petitioner’s name changes and the relationship of each entity to the petitioner at the different locations listed in the table below.

Employer Identification Number (EIN)	Business Name	Business Location
[REDACTED]	[REDACTED]	Maryland
[REDACTED]	[REDACTED]	Virginia
[REDACTED]	[REDACTED]	Virginia
[REDACTED]	[REDACTED]	Maryland

Even if the appellant demonstrates that [REDACTED] is a successor-in-interest to the petitioner, and that each business at these different locations are the same entity, the appellant must demonstrate the petitioner's and its ability to pay the beneficiary's proffered wage. The following analysis will address the evidence in the record regarding the ability of each entity in the above table to pay the beneficiary's proffered wage.

The evidence in the record of proceeding shows that the petitioner and succeeding entities are structured as S corporations. On the petition, the petitioner claimed to have been established in 2001 and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The W-2 Forms in the record demonstrate the beneficiary's wages as follows:

- 2001 - Not submitted
- 2002 - Not submitted
- 2003 - Not submitted
- 2004 - Not submitted

- 2005 - Not submitted
- 2006 - Not submitted
- 2007 - Not submitted
- 2008 - \$14,519.55
- 2009 - Not submitted
- 2010 - \$9,900.00
- 2011 - \$23,400.00
- 2012 - Not submitted

The record also includes pay statements listing the beneficiary's name and with the following dates and amounts:

- 1/02/2009 \$4,500.00
- 1/16/2009 \$4,500.00
- 4/9/2009 \$1,800.00
- 5/6/2009 \$1,800.00
- 8/5/2009 \$2,250.00

The statements do not include the beneficiary's address or social security number or the EIN of the business. Four statements state, "Repair and Maintenance." One statement states, "Casual Labor." One statement does not include the beneficiary's name and has only handwritten dates and amounts. This evidence does not demonstrate actual wages paid to the beneficiary.

The record also includes pay statements issued to the beneficiary by in March and April 2011 and January through April 2012. This evidence demonstrates that paid the beneficiary \$7,200.00 in 2012.

Thus, for 2001 through 2011 the petitioner and the appellant must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2001 - \$20,675.20
- 2002 - \$20,675.20
- 2003 - \$20,675.20
- 2004 - \$20,675.20
- 2005 - \$20,675.20
- 2006 - \$20,675.20
- 2007 - \$20,675.20
- 2008 - \$6,155.65
- 2009 - \$20,675.20
- 2010 - \$10,775.20
- 2011 - \$0.00
- 2012 - \$13,475.20

The petitioner must demonstrate its ability to pay the full proffered wage from 2001 to 2007 and 2009. The petitioner must demonstrate its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in 2008. The record reflects that the appellant paid the beneficiary wages exceeding the proffered wage for 2011. Therefore, the remaining analysis of the petitioner's and the appellant's ability to pay the proffered wage will address the years 2001 through 2010 and 2012.

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, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

The record before the director closed on January 15, 2013 with the receipt by the director of the petitioner’s submissions in response to the director’s final request for evidence. The appellant submitted its 2012 tax return with the appeal. Therefore, the income tax return for 2012 is the most recent return available. The tax returns in the record demonstrate net income for 2001 through 2010 and 2012, as shown in the table below.

- In 2001, the Form 1120S for [REDACTED] stated net income⁵ of \$5,460.00.
- In 2002, the Form 1120S for [REDACTED] stated net income of (\$12,691.00).
- In 2003, the Form 1120S for [REDACTED] stated net income of (\$49,118.00).
- In 2004, the Form 1120S for [REDACTED] stated net income of (\$26,755.00).
- In 2005, the Form 1120S for [REDACTED] stated net income of \$3,896.00.
- In 2006, the Form 1120S for [REDACTED] stated net income of \$51,748.00.
- In 2007, the Form 1120S for [REDACTED] stated net income of \$29,435.00.
- In 2008, the Form 1120S for [REDACTED] stated net income of (\$17,793.00).⁶
- In 2009, the Form 1120S for [REDACTED] stated net income of (\$130,399.00).
- In 2010, the record contains two separate tax returns:

⁵ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003), line 17e (2004-2005), and line 18 (2006-2012) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 17, 2014) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001, 2002, 2003, 2009, and 2010 the petitioner’s net income is found on Schedule K of its tax returns for these years.

⁶ It is unclear why the beneficiary’s 2008 Form W-2 was issued by [REDACTED] and the petitioner’s 2008 tax return was filed under the name [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

- The Form 1120S for [REDACTED] stated net income of (\$87,127.00).
- The Form 1120S for [REDACTED] stated net income of \$9,752.00.
- In 2012, the Form 1120S for [REDACTED] stated net income of \$96,474.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2008, 2009 and 2010, neither the petitioner nor the appellant had sufficient net income to pay the proffered wage or the difference between the proffered wage and the wages paid to the beneficiary. The petitioner's net income for 2006 and 2007, and the appellant's net income for 2012, was greater than the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax returns in the record demonstrate end-of-year net current assets for 2001 through 2011, as shown in the table below.

- In 2001, the Form 1120S for [REDACTED] stated net current assets of \$5,068.00.
- In 2002, the Form 1120S for [REDACTED] stated net current assets of (\$1,284.00).
- In 2003, the Form 1120S for [REDACTED] stated net current assets of (\$59,068.00).
- In 2004, the Form 1120S for [REDACTED] did not state any net current assets.
- In 2005, the Form 1120S for [REDACTED] stated net current assets of (\$83,676.00).
- In 2008, the Form 1120S for [REDACTED] stated net current assets of (\$2,516.00).
- In 2009, the Form 1120S for [REDACTED] stated net current assets of \$2,106.00.
- In 2010, the record contains two separate tax returns:
 - The Form 1120S for [REDACTED] stated net current assets of (\$1,763.00).
 - The Form 1120S for [REDACTED] stated net current assets of \$17,077.00.

Therefore, for the years 2001, 2002, 2003, 2004, 2005, 2008, and 2009 the petitioner did not have sufficient net current assets to pay the proffered wage. The appellant had sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary for 2010.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner and the appellant have not established that they had the continuing ability to pay the beneficiary the

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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, counsel asserts that the petitioner's owner's personal tax returns are relevant to whether the petitioner has the ability to pay the proffered wage to the beneficiary. We do not agree. As noted above, the petitioner is an S corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). Counsel states that because the petitioner is an S corporation, "income flows directly to the owner and is reflected in his own individual tax return." While it is true that corporate income is passed through to the corporation's shareholders for taxation purposes, this does not mean that the shareholders are responsible for any of the liabilities of the corporation. In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the personal assets of the petitioner's owner will not be considered toward the ability to pay the proffered wage.

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

The record also contains an "Accountant's Compilation Report" from the appellant's accountant which includes a "Statement of Revenues and Expenses" and a "Statement of Assets, Liabilities and Capital" for January, February and March 2012 and for 2013. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the 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 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 *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 Form I-140 states that the petitioner has been in business since 2001 and that it currently employs 20 workers. As stated above, it is unclear whether the original petitioner is still in business. The July 24, 2011 letter states that "[i]n December 2009, [REDACTED] took over the business." The evidence in the record has not established that a successor-in-interest relationship exists between the original petitioner on the labor certification and [REDACTED]

In addition, the tax returns in the record reflect low amounts of net income for 2001, 2002, 2003, 2004, 2005, 2008, 2009 and 2010. The tax returns also reflect low amounts of net current assets for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010 and 2011. The record reflects that no salaries and wages are listed on the petitioner's tax returns for 2001 through 2005 and 2009 through 2010. The tax returns reflect an overall decline in gross receipts from 2001 to 2008, with no gross receipts reported in 2009 or 2010. This reflects a financial history that does not establish in the totality of the circumstances that the petitioner had the ability to pay the proffered wage to the beneficiary. The petitioner has not provided any evidence of its reputation in the industry, its historical growth or any uncharacteristic expenses or losses. 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 had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.