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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: AUG 0 2 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscaping supervisor. 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 February 24, 2009 denial, the single 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 regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

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

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $16.82 per hour ($34,985.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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]

On appeal, counsel submits a brief; a letter dated June 23, 2009 from [redacted] CPA; a copy of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2001; a copy of an Amended U.S. Individual Income Tax Return (Form 1040X) for [redacted] for 2001; a copy of the U.S. Individual Income Tax Return (Form 1040) for [redacted] for 2001; a copy of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2004; a document which enumerates some net assets for the petitioner and some personal assets for [redacted], and statements from 2004 for stock and investment accounts held by [redacted]

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 1984, to have a gross annual income of $2.2 million, and currently to employ 32 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claims to have worked for the petitioner since February 1992.

On appeal, counsel asserts that the director erred in neglecting to consider the totality of the petitioner's financial circumstances. Further, counsel asserts that the petitioning entity incorporated in May 2002, having been operating as a sole proprietorship prior to that date. On that basis, counsel asserts that United States Citizenship and Immigration Services (USCIS) should consider the personal assets of [redacted] the owner of the petitioning entity since counsel claims that the petitioner was operating as a sole proprietorship during 2001. Counsel also asserts that the petitioner's assets as reflected on its corporation income tax returns for 2004 are not accurately portrayed because the sums for depreciation and loans from shareholders should not be counted as liabilities.

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

[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).

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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, USCIS electronic records show that the petitioner filed at least three other I-140 petitions which have been pending during the time period relevant to the instant petition.[2] Where, as here, a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claims to have worked for the petitioner since February 1992. However, with its initial petition submission, the petitioner provided no evidence of having paid the beneficiary any wages at any time.

On January 6, 2009, the director issued a request for evidence (RFE), asking the petitioner to supply copies of the beneficiary's W-2 or 1099, Wage and Earning Statements, for 2001, 2004, 2007 and 2008. The director requested evidence of wages paid to the beneficiary in these years, only, because the petitioner's federal income tax returns which were submitted with the initial petition submission seemed to indicate that the petitioner had the ability to pay the proffered wage in 2002, 2003, 2005 and 2006. However, the director neglected to consider the fact that the petitioner had three other pending I-140s, the beneficiaries of which the petitioner had to demonstrate the ability to pay as well. In its response to the director's RFE, the petitioner provided copies of IRS Form 1099-MISC which it issued to the beneficiary in 2001, 2004, 2007 and 2008 only.

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[2] [redacted] was filed on December 29, 2005 and approved on April 18, 2006. The priority date accorded by this petition is April 13, 2001. The beneficiary adjusted his status to that of a lawful permanent resident on November 4, 2008. [redacted] was filed on April 24, 2006 and approved on July 7, 2006. The priority dated accorded by this petition is April 25, 2001. The beneficiary adjusted his status to that of a lawful permanent resident on April 25, 2007. [redacted] was filed on March 19, 2001 and approved on July 10, 2001. The priority date accorded by this petition is July 16, 1996. However, the beneficiary of this petition has not yet adjusted his status to that of a lawful permanent resident.

Had the director requested evidence of wages paid to the beneficiary during 2002, 2003, 2005 and 2006, the AAO's findings would not have been different. That is because the Form 1099-MISC which the petitioner provided to the beneficiary in 2001 and 2004 bear a social security number which is registered to an individual who is not the beneficiary.[3]

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

USCIS will not consider funds paid using a stolen social security number towards a determination of the petitioner's ability to pay. Since the Form 1099-MISC for 2001 and 2004 bear a stolen social

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[3] Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

security number, it is likely that the Form 1099-MISC for at least 2002 and 2003 bear that same stolen social security number. However, even if that is not the case, the fact cannot be denied for 2001 and 2004 and, therefore, the petitioner has not demonstrated that it paid the beneficiary during those two years.

The IRS Form 1099-MISC which the petitioner issued to the beneficiary in 2007 and 2008 bears a social security number which is not registered. Therefore, the beneficiary's IRS Forms 1099 show compensation received from the petitioner, as shown in the table below.

- In 2001, the petitioner provided no bona fide evidence of wages paid to the beneficiary.
- In 2002, the petitioner provided no regulatory prescribed evidence of wages paid to the beneficiary.
- In 2003, the petitioner provided no regulatory prescribed evidence of wages paid to the beneficiary.
- In 2004, the petitioner provided no bona fide evidence of wages paid to the beneficiary.
- In 2005, the petitioner provided no regulatory prescribed evidence of wages paid to the beneficiary.
- In 2006, the petitioner provided no regulatory prescribed evidence of wages paid to the beneficiary.
- In 2007, the Form 1099 stated compensation of $19,563.21.
- In 2008, the Form 1099 stated compensation of $21,987.75.

Thus, in the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage in 2001 or 2004 because it provided no bona fide, regulatory prescribed evidence of wages paid to the beneficiary for those years. In 2002, 2003, 2005 and 2006, the petitioner did not demonstrate having paid the beneficiary any wages, as it failed to submit any regulatory prescribed evidence of such wages for those years. In 2007 and 2008, the petitioner provided evidence of having paid the beneficiary a portion of the proffered wage. Therefore, while the petitioner must demonstrate the ability to pay the beneficiary the full proffered wage for 2001, 2002, 2003, 2004, 2005 and 2006, it must only demonstrate the ability to pay the beneficiary the difference between wages already paid and the full proffered wage, that difference being $15,422.39 for 2007 and $12,997.85 for 2008.

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 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:

> 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 record before the director closed on February 3, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 would have been the most recent return available. However, the petitioner did not provide its federal income tax return for 2007. Nor did the petitioner offer an explanation for neglecting to include this return with its initial petition submission. Further, the director addressed this omission neither in his RFE nor in his denial.

Therefore, the petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005 and 2006, as shown in the table below.

- In 2001, the Form 1120 stated a net loss of $6,033.00.
- In 2002, the Form 1120 stated net income of $13,698.00.
- In 2003, the Form 1120 stated net income of $4,378.00.
- In 2004, the Form 1120 stated a net loss of $37,856.00.
- In 2005, the Form 1120 stated net income of $23,964.00.
- In 2006, the Form 1120 stated net income of $68,474.00.

Because the petitioner filed at least three other I-140 petitions the beneficiaries of which the petitioner was obligated to pay until these beneficiaries obtained lawful permanent residence, the wages owed to those individuals must be considered here.[4] Without evidence to the contrary we will assume that the proffered wage in those cases is the same as the proffered wage in this case. In 2001, 2002, 2003, 2004 and 2005, the petitioner did not demonstrate sufficient net income to pay one beneficiary the full proffered wage. In 2006, the petitioner demonstrated sufficient net income to be able to pay at least one beneficiary the full proffered wage. However, the petitioner did not demonstrate the ability to pay more than one beneficiary. For 2007 and 2008 the petitioner provided none of the regulatory prescribed forms of evidence which would demonstrate net income for those years. Therefore, the petitioner has not satisfied the burden of proof in demonstrating that it had sufficient net income to pay the proffered wage during any year from the priority date in 2001 or at any time thereafter.

If the net income the petitioner 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 petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] 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 petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003, 2004, 2005, and 2006, as shown in the table below.

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[4] The petitioner was obligated to pay the beneficiary of the proffered wage from 2001 until November 4, 2008. The petitioner was obligated to pay the beneficiary of the proffered wage from 2001 until April 25, 2007. The petitioner was obligated to pay the beneficiary of the proffered wage from 1996 through the present.

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

- In 2001, the Form 1120, Schedule L stated net current assets of $0.
- In 2002, the Form 1120, Schedule L stated net current assets of $117,654.
- In 2003, the Form 1120, Schedule L stated net current assets of $89,161.00.
- In 2004, the Form 1120, Schedule L stated net current liabilities of $50,231.00.
- In 2005, the Form 1120, Schedule L stated net current assets of $36,556.00.
- In 2006, the Form 1120, Schedule L stated net current assets of $95,549.00.

Therefore, for the years 2001 and 2004, the petitioner did not demonstrate sufficient net current assets to pay one beneficiary the full proffered wage. In 2002, 2003, 2005 and 2006 the petitioner did not demonstrate sufficient net current assets to pay the beneficiaries of all four of the petitions for which the petitioner was responsible.

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, counsel asserts that the petitioning corporation did not come into existence until May 6, 2002 and that prior to that date the petitioner had been operating as a sole proprietor. On that basis, counsel asserts that USCIS should consider the personal assets of [redacted] the owner of the petitioning entity.

It should be noted, however, that in its initial petition submission, the petitioner provided its Form ETA 750 as well as its U.S. Corporation Income Tax Returns (Form 1120) for 2001, 2002, 2003, 2004, 2005 and 2006, thereby suggesting that all of the documents presented pertained to the petitioning corporation. Neither in its initial petition submission nor in its response to the director's January 6, 2009 RFE did the petitioner ever mention that it began operating as a sole proprietor and had restructured to a C corporation in 2002. Further, the petitioner provided no documentary evidence substantiating a restructuring or a successorship.

Form ETA 750 was filed by [redacted] on April 30, 2001. If we accept that the petitioner which filed Form I-140 did not incorporate and begin business operations until May 2002, then we would also have to assume that the petitioner, in this instance, did not file Form ETA 750. The ETA 750 would have been filed by a sole proprietor using the name [redacted] In fact, counsel states that until May 2002, [redacted] had been operating as a sole proprietorship. Thus, the entity which filed Form ETA 750 and the entity which filed Form I-140 are different and distinct.

Form ETA 750 was filed by [redacted] on April 20, 2001. Form I-140, in Part 1, bears the name [redacted] and the Federal Employer Identification Number (FEIN) [redacted] The copies of the U.S. Corporation Income Tax Return (Form 1120) submitted as evidence bear the name [redacted] The copies of IRS Form 1099 submitted as evidence bear the name [redacted] for 2001, 2004, 2007 and 2008. The copy of the U.S. Individual Income Tax Return (Form 1040) for [redacted] for 2001,

which was submitted on appeal, is accompanied by Schedule C for [redacted] Howevever, this document contains the EIN [redacted] which is different than the EIN included on IRS Form 1099 for the same year.

It is incumbent on 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).

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).

In the present matter, the petitioner did not make the claim of successorship either in its initial petition submission, or in its response to the director's RFE or even on appeal. Therefore, the petitioner did not provide the USCIS Service Center Director an opportunity to evaluate the situation with respect to how ownership of the entity which filed the labor certification was transferred to the entity which filed Form

I-140. Thus, the director could not have determined whether the petitioner, in this case, assumed "all" of the original employer's rights, duties, obligations, and assets or any part of the original employer's rights, duties, obligations and assets. The Commissioner's decision, however, 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.[6] *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.[7]

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[6] 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).

[7] 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

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.[8] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid

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(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.

[8] 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).

successor relationship for immigration purposes. On appeal, counsel for the petitioner states that the petitioner incorporated on May 6, 2002 and that prior to that date had been operating as a sole proprietor. The petitioner provided no documentary evidence explaining or substantiating the nature of the change in business structure or transfer of ownership from the sole proprietorship, to Therefore, the petitioner has not demonstrated that it also assumed the essential rights and obligations of the predecessor necessary to carry on the business.

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)).

Further, the assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983).

Moreover, even if USCIS were to accept counsel's assertions, to wit, that the petitioner in the instant circumstance is the same as the entity which filed Form ETA 750, the evidence in the record does not demonstrate that the entity which filed Form ETA 750 had the ability to pay the proffered wage for 2001, the only year, under consideration in these circumstances for which that entity claimed to have been operating.

In 2001, the petitioner claims to have been a sole proprietorship, 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 report income and expenses from their businesses on their individual (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).

The petitioner provided a copy of a U.S. Individual Income Tax Return (Form 1040) for 2001 for According to this document, the family had an adjusted gross income of $56,453 for 2001. However, since the family claims that it operated as a sole proprietorship for that year, it must demonstrate the ability not only to pay the beneficiaries of four petitions the proffered wage from their adjusted gross income but also to support their household. Such a demonstration would normally necessitate the provision of a sole proprietor's recurring, monthly household expenses. However, the adjusted gross income is not sufficient to pay the beneficiaries of the four relevant petitions alone.

On appeal, counsel cites *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that USCIS should consider the personal assets of Bartolo Lopez, the owner of the petitioning entity. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). If it were demonstrated that the petitioner were a sole proprietorship, USCIS would consider the petitioner's personal assets, in accordance with *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). However, the only evidence of [redacted] personal assets provided on appeal date from 2004. The petitioner provided no evidence of [redacted] personal assets from 2001, the year in which the petitioner claims to have been operating as a sole proprietorship and the only year in which such personal assets would have been relevant if the petitioner's claims were demonstrated.

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)).

On appeal, making reference to a letter written by [redacted] CPA, counsel also asserts that the petitioner's assets as reflected on its corporation income tax returns for 2004 are not accurately portrayed because the sums for depreciation and loans to shareholders should not be counted as liabilities.

With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), 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 v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989) (emphasis added).

also asserts that loans from shareholders should not be counted as a liability because the corporation is 100 percent owned by and that the loan constitutes capital which was contributed by him. states, "We have classified it as a loan rather than capital for accounting reasons." also asserts that the balance sheet includes a loan from the son of and that this sum should be considered capital.

However, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

According to the evidence, the shareholders, as individuals, loaned funds to the corporation which is a separate and distinct legal entity.

Further, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

If the petitioner reported certain sums to the Internal Revenue Service as loans from shareholders, it cannot now claim that the same sums were simply capital contributions on the part of the petitioner's shareholders. The former is, in fact, the case since the petitioner claimed such loans from shareholders as long-term liabilities on its Schedule L.

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

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of 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 was not able to demonstrate the ability to pay the proffered wage for the four outstanding petitions during any of the years under consideration. The petitioner has not demonstrated the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. According to counsel's assertions made on appeal, the petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then 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).

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 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.

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. 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.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

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

ORDER: The appeal is dismissed.