



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC-05-036-53640

Office: CALIFORNIA SERVICE CENTER

Date: JUN 14 2007

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner operates a restaurant, and seeks to employ the beneficiary permanently in the United States as a cook, restaurant (“cook, Mexican”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s February 9, 2006 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date of the labor certification until the beneficiary obtains permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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.

The regulation 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 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 U.S. Department of Labor. *See* 8 CFR § 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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$10.09 per hour,² 40 hours per week, which is equivalent to \$20,987.20 per year. The labor certification was approved on March 8, 2002. The petitioner filed an I-140 Petition for the beneficiary on November 22, 2004. The petitioner listed the following information on the I-140 Petition: date established: 1968; gross annual income: not listed; net annual income: not listed; and current number of employees: not listed.

The director issued a Request for Evidence (“RFE”) on May 12, 2005 requesting that the petitioner provide a certified copy of Form ETA 750. The petitioner provided the same. On August 26, 2005, the director issued a second RFE for the petitioner to provide evidence of the petitioner’s ability to pay from 2001 to the present, in the form of federal tax returns, audited financial statements, or annual reports, as well as the beneficiary’s Form W-2. Additionally, the RFE noted that records indicated that the petitioner has filed a number of I-140 petitions, and requested that the petitioner submit evidence that it can pay for all the sponsored beneficiaries. The RFE also requested a detailed list naming all approved beneficiaries or pending I-140 petitions, as well as a company organizational chart listing employee names and positions. The RFE further requested that the petitioner provide Quarterly Wage Forms, Form DE-6, filed with the California Employment Development Division (“EDD”). The petitioner responded. On February 9, 2006, the director denied the petition on the basis that the petitioner failed to establish its ability to pay the proffered wage. Further, the decision noted that the petitioner failed to respond to the specific request for additional information related to the petitioner’s filing for other I-140 beneficiaries.³ The petitioner appealed and the matter is now before the AAO.

We will examine the information in the record, and then address counsel’s arguments on appeal. First, in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will 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. On Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary listed that he has been employed with the petitioner since 1996. The petitioner submitted the following documentation regarding the beneficiary’s pay:⁴

² The petitioner initially listed a wage of \$6.50 per hour. DOL required that the petitioner increase the wage to \$10.09 per hour prior to certification.

³ The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

⁴ We note that Form ETA 750 and Form I-140 list the beneficiary as “[REDACTED].” Neither document lists that the beneficiary has or uses a middle name, or has a two-part surname. The W-2 Forms submitted list payments to a “[REDACTED].” The W-2 Forms do not list that the employee has a middle name or initial, or that the employee has a two part surname. Tax returns submitted on behalf of the beneficiary list “Jose [REDACTED]” and no middle name, or two-part surname. The letter submitted to document the beneficiary’s experience lists only “[REDACTED].” The petitioner has not submitted any documentation to show that Jose [REDACTED] and [REDACTED] are the same individuals, such as a passport, or birth certificate listing both names. Counsel on appeal indicates that the filing is for [REDACTED],” but has provided no documentation to demonstrate that the beneficiary is otherwise known by another name. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503,

<u>Year</u>	<u>W-2 Wages Paid</u>
2005	\$11,577.25 ⁵
2004	\$16,610 ⁶
2003	\$17,922.50
2002	\$19,622.00
2001	\$19,294.19

Even if we accept that the wages paid were actually paid to the beneficiary, the wages alone would be insufficient to document that the petitioner has the ability to pay the proffered wage. The petitioner must demonstrate that it can pay the difference between the wages paid to the beneficiary and 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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).

The petitioner initially operated as a sole proprietorship until the business was sold in 2004. Thereafter, the new owner operated the business as a C corporation. 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. 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 S in the amount of \$16,610. 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

506 (BIA 1980). In any further proceedings, the petitioner must provide official documentary evidence that the beneficiary and [REDACTED] are one and the same person. 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).

⁵ The beneficiary's 2005 wages were paid by [REDACTED]. The petitioner's business was sold in 2004. The new entity must demonstrate that it is the successor-in-interest to the original petitioner in order to continue processing under the original labor certification filed by [REDACTED] Mexican Restaurant. To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁶ No W-2 Form was provided, however, the beneficiary's Form 1040 contains a "W-2 Detail Report," which lists that [REDACTED] was paid wages in the amount of \$16,610 by the initial entity with a Federal Employer Identification Number of [REDACTED].

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the sole proprietor supported himself, and his spouse and resided in Valley Center, California for the years 2001, and 2002.⁷ In 2003, the owner was a single individual. The tax returns reflect the following information for the following years:

Sabroso Restaurant & Market	Sole Proprietor's AGI (1040)	Petitioner's Gross Receipts (Schedule C)	Petitioner's Wages Paid (Schedule C)	Petitioner's Net Profit from business
2003	Cannot determine AGI as Page 1 of Form 1040 was not provided	\$581,774	\$0 (cost of labor: \$222,509)	\$47,019
2002 Amended ⁸	\$83,517	\$632,115	\$12,232 (cost of labor: \$222,662)	\$52,080
2002	\$32,234	\$632,115	\$12,232 (cost of labor: \$222,662)	-\$11,420
2001	\$2,301	\$1,468,002	\$14,843 (cost of labor: \$327,842)	-\$1,865

If we reduced the sole proprietor's adjusted gross income (AGI) by \$20,987.20, the proffered wage that the petitioner must demonstrate that it can pay the beneficiary, the owner would be left with an adjusted gross income of: 2002: \$62,529.80 (based on the amended filing, which the petitioner should document the filing of, or \$80,452.50 if the petitioner documents the wages paid on Form W-2 were paid to the instant beneficiary); and 2001: -\$18,686 (\$607.99 if the petitioner demonstrates that the wages paid on Form W-2 were actually paid to the beneficiary).⁹

The sole proprietor could likely support himself, his spouse, and pay the instant beneficiary's proffered wage in 2002, if the amended filing is properly documented. However, records indicate that the petitioner has filed I-140 Petitions for five other workers between the end of December 2001 and the end of 2002. The sole proprietor would be unable to demonstrate that it could pay for all the sponsored workers and support himself

⁷ The petitioner filed an amended 2002 federal tax return, which contains a note that the, "taxpayer was ill and died on 10/10/03, because of the taxpayers illness he inadvertently did not include lease income from his restaurant."

⁸ We note that the petitioner did not provide a certified copy, or any proof of filing the amended 2002 federal tax return.

⁹ We cannot determine whether the petitioner can pay the proffered wage in 2003 since the petitioner has not provided page 1 of the individual owner's Form 1040 to exhibit the owner's AGI.

and his spouse.¹⁰ The petitioner would not be able to demonstrate its ability to pay the proffered wage in 2001.¹¹ Further, we note that the petitioner did not provide any information related other beneficiaries that it filed for, despite the director's RFE request, and specific notation in the decision. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Additionally, the petitioner sold its business in 2004 to a new owner. For the new entity to show that it qualifies as a successor-in-interest to the original petitioner to continue processing under the initial labor certification requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). 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. 1980). In a similar case, the court in *Sitar v. Asheroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In support, the new owner provided a California State Board of Equalization seller's permit;¹² a City of Los Angeles Tax Registration Certificate; and on appeal, provided the Bill of Sale¹³ listing equipment obtained; the Buyer's Closing Statement that the business was purchased for a total consideration of \$50,000. The new owner additionally provided a statement that the offer to the beneficiary remained valid. Based on the evidence provided, we conclude that [REDACTED] as documented that it is the successor-in-interest to the initial petitioner

The new entity would need to establish its ability to pay from 2004 onward. The new entity is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
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¹⁰ We note that the Forms 941 do list that some of the other beneficiaries have been paid wages. However, the petitioner failed to provide information related to its ability to pay all sponsored beneficiaries, and in the absence of information related to the proffered wage for each individual, we cannot determine that the petitioner has the ability to support all sponsored individuals. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

¹¹ We note that the record of proceeding does not contain any estimate verified by documentation regarding the sole proprietor's monthly estimated expenses. We are, therefore, unable to determine the amount that the sole proprietor needs to support himself and his spouse and whether sufficient funds would remain to pay the proffered wage.

¹² The Seller's permit reflects that the company is listed as [REDACTED]

¹³ We note that the initial owner signed the statement as the Seller, but the copy provided does not contain the Buyer's signature.

2004¹⁴ \$69,267

Based on the above, the petitioner's net income would allow for payment of the instant beneficiary's proffered wage in the above years, but would likely be insufficient to support six sponsored beneficiaries absent documentation that the petitioner has paid part, most, or all of the other beneficiaries' wages. The petitioner has failed to provide any documentation related to this issue in response to the director's RFE as requested.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁵ Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$12,859

The petitioner would not be able to establish its ability to pay the beneficiary (or multiple beneficiaries) the proffered wage based on its net current assets absent documentation of prior wages paid.

The new entity's 2005 tax return was not available at the time of filing the appeal. The petitioner submitted Forms 941 for all for quarters in 2005. The Forms 941 document wages paid generally, but would not exhibit the petitioner's ability to pay the beneficiary the proffered wage. Wages paid to the beneficiary are noted above.

The petitioner additionally provided a Profit and Loss Statement dated from April 2005 through March 2006. First, we note that the statement provided is unaudited. 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 petitioner has not provided any accountant's report to show that the statement was produced pursuant to an audit, rather than a compilation. 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

¹⁴ The tax return submitted was for "[REDACTED]." Forms 941 additionally submitted list the entity as "[REDACTED]."

¹⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

wage. Additionally, the Profit and Loss Statement provided lists net income as -\$21,809.40, which as a negative value, would be insufficient to pay the beneficiary the proffered wage.¹⁶

On appeal, counsel examines the petitioner's ability to pay on a year-by-year basis. Counsel argues that the petitioner can pay the proffered wage in the year 2001, and in support, he cites to an accountant's letter. The accountant's letter provides that the petitioner had \$13,242 in depreciation, which should be added back in to the net profit.

Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

The accountant's letter further provides that the sole proprietor owned the building and the land where the business was located, and that the owner pays rent to himself in the amount of \$115,000.¹⁷ Further, the accountant provides that "the interest and property taxes would amount to \$43,155, which means that the Schedule C could show an additional \$71,845."

It is unclear where the accountant obtains the figure \$71,845 from, as the interest and property taxes are lower, and the figure for depreciation added to the \$43,155 would not equal this figure. Additionally, we note that the petitioner did not provide a Deed showing that the sole proprietor owned the property. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). We are not persuaded that the accountant's letter demonstrates the petitioner's ability to pay the proffered wage. As noted above, the petitioner operated as a

¹⁶ The statement also provides a note from the owner at the bottom that states, "[the petitioner] was closed from March to May in 2005 for remodeling. Building Repairs and Production Equipment Supply expenses are the one time expense related to the remodeling . . . [amounting to] \$47,913.00."

¹⁷ The sole proprietor's 2001 tax return does reflect rent paid in 2001, but its 2002 tax return does not reflect any rent paid.

sole proprietorship in 2001, and did not provide any estimate of required living expenses. Further, the petitioner did not provide any information related to other beneficiaries sponsored to demonstrate that the petitioner can pay for all sponsored employees.

Counsel argues that in 2002 the petitioner showed an increased profit. As noted above, if the amended tax return was validly filed, the petitioner would be able to demonstrate its ability to pay for the instant beneficiary, but not all sponsored beneficiaries.

Counsel asserts that in 2003, the petitioner can demonstrate its ability to pay based on wages paid to the beneficiary in the amount of \$17,922.50¹⁸ and that the petitioner showed a profit of \$47,019. As the petitioner operated as a sole proprietorship at that time, the net profit is not the relevant figure, but rather the sole proprietor's AGI. Since the sole proprietor did not provide her entire Form 1040, we cannot determine the available 2003 AGI to consider whether the sole proprietor could support herself in that year, and also pay the proffered wage. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel provides that the company was sold in 2004, and that the 2004 net income would demonstrate the petitioner's ability to pay in 2004. The net income would reflect the ability to pay the instant beneficiary, but not all sponsored beneficiaries in the absence of documentation that the petitioner has paid some or all of the other beneficiaries' wages.

In 2005, counsel argues that Forms 941 exhibit wages paid in the amount of \$211,288, and that the company maintained 13 workers on its payroll. Further, the business was closed for three months for equipment repairs and renovations, which would constitute a one time capital expense.

Counsel cites to *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) and asserts that CIS should not just look at "a simple snapshot" of the petitioner's finances but must look at the expectation of the petitioner for earning new income as well. Counsel asserts that the petitioner's "one time" investment in capital improvement "can only serve to increase profitability in the future."

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of the decision relates to a petitioner's expectations, and the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage.

Further, in this instance, the petitioner has not provided a detailed explanation of how its "one-time" capital improvement will increase profitability. If we examine the funds expended for the business' remodeling, \$32,680.75 was spent on building repairs, and \$15,233.83 on equipment. We note that most of the funds were expended on "repairs" as opposed to "improvements." The repairs may have been necessary to maintain the business, rather than add any future value to the petitioner's income.

Further, the petitioner's future earning potential, or expectations thereof, does not negate the requirement to establish the petitioner's ability to pay from the time of the priority date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

¹⁸ We note that the petitioner has not sufficiently documented any alternate names used by the beneficiary to show that the wages paid on Forms W-2 were actually paid to the beneficiary.

Counsel additionally cites to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support and argues that CIS should consider the totality of the circumstances.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

While the petitioner has provided that it incurred a "one-time impact" in renovation expenses in 2005, the one-time expense does not explain the petitioner's inability to pay the proffered wage in 2001, and lack of documentation in other years.

Further, counsel contends that the petitioner supports a payroll of eleven employees and has paid the beneficiary almost the full amount of the proffered wage in many of the years. Counsel provides that financial data indicates the petitioner can pay the proffered wage from 2001 to 2005, and that the petitioner had one-time capital improvements in 2005, which affected its net income.

In examining the totality of the circumstances, we find that the petitioner has failed to demonstrate that it has paid any wages to the beneficiary based on the inconsistencies in the name listed on Form I-140 and on the W-2 Forms provided. 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). The petitioner has failed to respond to the director's RFE inquiry related to sponsoring other beneficiaries, a point also raised in the decision. See 8 C.F.R. §§ 103.2(b)(8) and (12); 8 C.F.R. § 103.2(b)(14). The petitioner has failed to document the initial owner's ability to pay the proffered wage in 2001, and has not provided adequate documentation in 2002, or 2003. Further, documentation provided on appeal would not establish the successor's ability to pay in 2005. Based on the totality of the circumstances, we conclude that the petitioner is unable to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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.