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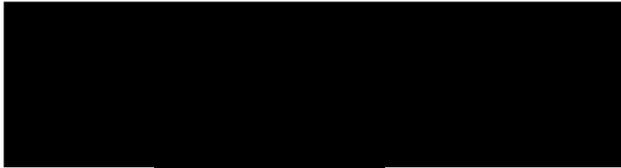
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2007
WAC 06 131 50968

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a communications firm. It seeks to employ the beneficiary permanently in the United States as a multimedia programmer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. 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 and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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, the day 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 for processing on March 1, 2003. The proffered wage as stated on the Form ETA 750 is \$48.21 per hour, which equals \$100,276.80 per year.

The Form I-140 petition in this matter was submitted on March 17, 2006. On the petition, the petitioner stated that it was established during 1997 and that it employs four workers. The petition states that the petitioner's gross annual income is \$119,258 and that its net annual income is \$63,169. On the Form ETA 750, Part B, signed by the beneficiary on February 18, 2003, the beneficiary claimed to have worked for the petitioner since May of 2002. The Form I-140 visa petition states that the petitioner would employ the beneficiary in Palo Alto, California. The Form ETA 750 indicates that the petitioner would employ the beneficiary in Mountain View, California.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

In the instant case the record contains (1) the petitioner's 2003, 2004, and 2005 Form 1120, U.S. Corporation Income Tax Returns, (2) the petitioner's Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2003 and for the first and second quarters of 2005, (3) the petitioner's 2003 and 2004 940-EZ Employer's Annual Federal Unemployment (FUTA) Tax Returns, (4) pay stubs showing wages the petitioner paid to the beneficiary, (5) 2003, 2004, and 2005 Form W-2 Wage and Tax Statements showing wages paid to the beneficiary during those years, (6) the balance sheets of Lee & Lee Communications as of December 31, 2003, December 31, 2004, and December 31, 2005, and (7) a letter dated June 30, 2006 from the petitioner's vice president. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on September 3, 1997, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2003 the petitioner declared a loss of \$236 as its taxable income before net operating loss deduction and special deductions. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2004 the petitioner declared taxable income before net operating loss deduction and special deductions of \$64,449. At the end of that year the petitioner's current liabilities exceeded its current assets.

During 2005 the petitioner declared taxable income before net operating loss deduction and special deductions of \$5,662. At the end of that year the petitioner's current liabilities exceeded its current assets.

The petitioner's 2003 Form 941 quarterly returns show that it paid total wages of \$8,327.27, \$5,850, \$10,410, and \$7,009.67 during the four quarters of that year for a for a total of \$31,596.94 during that year. The petitioner's 2003 940-EZ confirms that total.

The petitioner's 2004 Form 941 quarterly returns show that it paid total wages of \$5,850, \$5,850, \$5,850, and \$11,650 during the four quarters of that year for a for a total of \$29,200 during that year. The petitioner's 2004 940-EZ confirms that total.

The petitioner's 2005 Form 941 quarterly returns show that it paid total wages of \$7,950 and \$9,000 during the first two quarters of that year for a total of \$16,950.

The W-2 forms provided show that the petitioner paid the beneficiary gross wages of \$23,850, \$23,400, and \$40,325 during 2003, 2004, and 2005, respectively.

The pay stubs provided are for December 2005, and January, February, March, and April of 2006. The year-to-date figure on the December 2005 pay stub confirms that during that year the petitioner paid the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary total gross pay of \$40,325 during that year. The April 2006 stub shows that at the end of February the petitioner had paid the beneficiary year-to-date gross wages of \$33,500.

In his June 30, 2006 letter the petitioner's vice president described the petitioner's accomplishments, but admitted that the petitioner's current financial status "is not extremely stable." The vice president cited the assets of [REDACTED] - which is either the petitioner's parent company or an affiliate, apparently as an index of the petitioner's ability to pay the proffered wage.

The director denied the petition on June 6, 2006. On appeal, counsel summarized the issues as follows:

The Issues are whether [CIS] consider the following facts: (1) from the Income Tax Returns Form 1120 for year 2003, 2004, and 2005 that (a) the actual total taxable income should include Taxes/Licenses and depreciation; (b) The Salaries and Wages paid evidenced the ability of the petitioner to pay wages steadily and consistently; (2) the financial health of the entire petitioning organization if it is an international organization; (3) the petitioner's monthly bank balance exceeded the beneficiary's monthly salary; (4) the beneficiary has been paid and is being paid the proffered wage.

[Errors in the original.]

Counsel characterized the balance sheets provided as being from the petitioner's overseas office and stated that they show that it could easily have subsidized the petitioner's operations as necessary to pay the proffered wage. Counsel also cited non-precedent decisions of this office for various propositions.

Counsel's citation of unpublished, non-precedent decisions is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel did not note the reasoning, but only cited the decisions as authority. Counsel's citation of non-precedent decisions is of no effect.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.² Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

² A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

Counsel's reliance on unaudited financial records is similarly misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The unaudited financial statements will not be considered. Further, those financial statements are not those of the petitioner, but of a related company.

In that regard, counsel characterizes the petitioner and two other companies with similar names as an individual "organization" and asserts that the financial health of the entire organization should be considered in assessing the ability of the instant petitioner to pay the proffered wage.

The petitioner, however, is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, or anyone else. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *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 [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the owners, stockholders, and others are not obliged to pay the petitioner's debts, the income and assets of the owners, stockholders, and others and their ability, if they wished, to pay the corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. Counsel has not demonstrated that any individual or company is obliged to pay the petitioner's debts and obligations and the petitioner must therefore show the ability to pay the proffered wage out of its own funds.

Counsel appears to have argued that taxes and license fees should be included in, or added back to, taxable income. This office can perceive of no justification for amending the petitioner's taxable income to reflect the cost of taxes and licenses, which are an obligatory cost of doing business and a real expense. Why this expense, or any other, should be considered a fund available to pay additional wages was not adequately explained and is unclear to this office. This office is unable to address that argument further.

Counsel also indicated, without further explanation, that the petitioner's depreciation should be added back to its taxable income to indicate the net income actually available to it during a given year with which it could have paid additional taxes. Although counsel did not make his reasoning explicit, this office is able to apprehend counsel's analysis because it has been argued and rejected by this office so many times before.

This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year.

The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although counsel asserted that they should not be charged against income according to their depreciation schedule, he does not offer any alternative allocation of those costs.³ Counsel appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

Counsel cited the petitioner's annual wage expense as evidence that it could absorb the expense of the wage proffered to the beneficiary. However, showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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 CIS should have considered income before expenses were paid rather than net income.

Further, according to its tax returns, the petitioner's wage expense was \$25,568 during 2003, \$29,200 during 2004, and \$48, 325 during 2005. The petitioner's total wage expense never exceeded, equaled, or even approached the annual amount of the proffered wage, which is \$100,276.80 per year. Even if routinely meeting large payroll expenses were sufficient to show ability to pay the proffered wage, counsel's argument would fail.

Counsel further stated that the petitioner has paid or currently is paying the proffered wage and, in his brief, cited a May 4, 2004 memorandum issued by William R. Yates, the Associate Director for Operations of Citizenship and Immigration Services (CIS), for the proposition that the petition should therefore have been approved.

The memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's

³ Counsel did not urge, for instance, that the petitioner's purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

⁴ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁵ A petitioner might be able to demonstrate, rather than merely allege, that employing its beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage. In the instant case that argument would be ineffective, as the petitioner has employed the beneficiary since 2002.

employment, “[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage.”

The memorandum, by its own terms, was not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but was merely offered as guidance. That said, the AAO’s decision in this case is consistent with the guidelines set forth in that memorandum.

Counsel’s interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage *beginning on the priority date*. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect.

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is March 1, 2003. Thus, the petitioner must show its ability to pay the proffered wage during the entire period since the priority date, and not only during the first few months of 2006. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner’s ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the other salient years as well.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) 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. Comm.1967).

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 petitioner established that it paid the beneficiary \$23,850, \$23,400, and \$40,325 during 2003, 2004, and 2005, respectively. The petitioner must show the ability to pay the balance of the proffered wage during those years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner’s ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ shown on lines 16(d) through 18(d). 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. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$100,276.80 per year. The priority date is March 1, 2003.

The petitioner has demonstrated that it paid the beneficiary \$23,850 during 2003 and must show the ability to pay the remaining \$76,426.80 balance of the proffered wage during that year. During that year the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

The petitioner has demonstrated that it paid the beneficiary \$23,400 during 2004 and must show the ability to pay the remaining \$76,876.80 balance of the proffered wage during that year. During that year the petitioner declared taxable income before net operating loss deduction and special deductions of \$64,449.⁷ That amount is insufficient to pay the remaining balance of the proffered wage. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

The petitioner has demonstrated that it paid the beneficiary \$40,325 during 2005 and must show the ability to pay the remaining \$59,951.80 balance of the proffered wage during that year. During that year the petitioner

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

⁷ For the purpose of determining a Subchapter C corporate petitioner's ability to pay the proffered wage, taxable income before net operating loss deduction and special deductions, found at line 28 of Form 1120, U.S. Corporation Income Tax Return, is considered net income.

declared taxable income before net operating loss deduction and special deductions of \$5,662. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner provided no reliable evidence of any other funds at its disposal with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petitioner paid the beneficiary wages of \$33,500 during 2006 and would ordinarily be obliged to show the ability to pay the remaining \$66,776.80 balance of the proffered wage during that year.

The petition in this matter, however, was submitted on March 27, 2006. On that date the petitioner's 2006 tax return was unavailable. On April 26, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

As was noted above, the approved Form ETA 750 labor certification specified that the petitioner would employ the beneficiary in Mountain View, California, which is in Contra Costa County. The Form I-140 visa petition stated that the petitioner would employ the beneficiary in Palo Alto, California, which is in Santa Clara County. The record contains no indication that the labor certification is valid for employment of the beneficiary in Santa Clara County, California. The petition should have been denied for this additional reason.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also 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 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.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.