U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 11 2006

SRC 05 063 51430

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner[1] is a paint services. It seeks to employ the beneficiary permanently in the United States as a supervisor paint department. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. 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).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is $49,500.00 per year. The Form ETA 750 states that the position requires four years of experience.

On appeal, counsel submits a legal brief and additional evidence.

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[1] The petitioner is variously named Boca Rio Paint (or Paints) Inc. in the record of proceeding.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; one page of a U.S. Internal Revenue Service Form tax return; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested the petitioner's U.S. federal tax returns for 2001 and 2002 as well as the beneficiary's W-2 Wage and Tax Statements for 2002 and 2003.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) tax returns for years 2002, 2003, and 2004, and, counsel submitted a Citizenship and Immigration Services (CIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

Because the director determined, *inter alia*, the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director issued a notice of intent to deny on March 22, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested audited financial statements for the petitioner for the years 2001, 2002, 2003 and 2004,[2] and, the latest IRS Form W-3 statement for all the petitioner's employees.

In response to a notice of intent to deny, counsel submitted, *inter alia*, copies of the following documents: Form W-3 Transmittal of Wage and Tax statement for 2004, the petitioner's U.S. federal tax returns for the petitioner for the years 2001, 2002, 2003 and 2004, and, a CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004.

The W-3 statement, mentioned above, stated wages paid for as $25,480.00 in 2004.

The director denied the petition on April 27, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.[3]

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[2] Counsel, on appeal, states that audited financial statement were not submitted because there is no reason to have them, or, to incur the expense of preparation. *See* 8 C.F.R. § 204.5(g)(2). 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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, 506 (BIA 1980).

[3] The director questioned why the seeks to employ the beneficiary permanently in the United States as a supervisor in its paint department if the petitioner submitted evidence that it had one employee in 2004. If this matter is pursued, this issue should be addressed.

Counsel has submitted the following documents to accompany the appeal statement: a letter from the petitioner's accountant dated June 20, 2005; the petitioner's U.S. Internal Revenue Service (IRS) tax returns for years 2002, 2003, and 2004; a letter from the President and owner of the petitioner dated June 19, 2005; Chassan Professional Wallcovering Inc. U.S. Internal Revenue Service (IRS) tax returns for years 2001 2002, 2003; the owner of petitioner's personal joint tax returns for years 201, 2002, 2003, and 2004; a joint venture agreement dated June 1, 2001 between Chassan Professional Wallcovering Inc. and the petitioner; a W-3 statement by Chassan Professional Wallcovering Inc. as well as corporate documents relating to Chassan Professional Wallcovering Inc.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) 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. No evidence was submitted to show that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.

The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $49,500.00 per year from the priority date of April 24, 2001:

- In 2001, the Form 1120S stated a taxable income loss of <$11,795.00>.
- In 2002, the Form 1120S stated taxable income of $5,610.00.
- In 2003, the Form 1120S stated taxable income of $17,147.00.
- In 2004, the Form 1120S stated a taxable income loss of <$2,777.00>.

The taxable income and losses stated above for the years 2001, 2002, 2003 and 2004 are insufficient to pay the proffered wage.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

[4] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120 return stated current assets of $57,759.00 and $55,030.00 in current liabilities. Therefore, the petitioner had $1,929.00 in net current assets. Since the proffered wage is $49,500.00 per year, this sum is less than the proffered wage.
- In 2002, petitioner's Form 1120 return stated current assets of $59,301.00 and $50,189.00 in current liabilities. Therefore, the petitioner had $9,112.00 in net current assets. Since the proffered wage is $49,500.00 per year, this sum is less than the proffered wage.
- In 2003, petitioner's Form 1120 return stated current assets of $116,252.00 and $89,135.00 in current liabilities. Therefore, the petitioner had $27,117.00 in net current assets. Since the proffered wage is $49,500.00 per year, this sum is less than the proffered wage.
- In 2004, petitioner's Form 1120 return stated current assets of $65,348.00 and $42,123.00 in current liabilities. Therefore, the petitioner had $23,225.00 in net current assets. Since the proffered wage is $49,500.00 per year, this sum is less than the proffered wage.

Therefore, for the period 2001 through 2004 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

On appeal, has submitted a legal brief. Counsel states in the brief that the petitioner utilizes "accelerated depreciation to minimize tax liability." Petitioner's counsel advocates the addition of depreciation taken as a deduction in those years' tax returns to eliminate the abovementioned deficiencies. Since depreciation is a deduction in the calculation of taxable income on tax Form 1120S, this method would eliminate depreciation as a factor in the calculation of taxable income.

There is established legal precedent against counsel's contention that depreciation may be a source to pay the proffered wage. The court in *Chi-Feng Chang v. Thornburg,* 719 F. Supp. 532 (N.D. Tex. 1989) noted:

> Plaintiffs also contend that 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. (Original emphasis.) *Chi-Feng* at 537.

As stated above, following established legal precedent, CIS relied on the petitioner's net income without consideration of any depreciation deductions, in its determinations of the ability to pay the proffered wage on and after the priority date. No precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. *See also Elatos Restaurant Corp. v. Sava, Supra* at 1054.

In line with the above, counsel stated on appeal that the company's tax returns submitted do not demonstrate the petitioner's "financial viability" since it uses accounting methods "to minimize tax liabilities." However, 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).

In support of the above contention, Counsel asserts that a decision of the AAO requires CIS to consider "normal accounting practices of the company in the face of tax returns that do not provide evidence of the ability to pay the proffered wage. Counsel cites an unpublished AAO case for the proposition that, according to counsel, accelerated depreciation to minimize tax liability as this deduction is taken as a normal accounting practice of the petitioner. Therefore, counsel by a logical extension of his assertion is requesting that the AAO consider the depreciation taken on the petitioner's tax return as, not a deduction but as an asset, which as is stated above is contrary to case precedent.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished 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). The AAO reviews appeals on a de novo basis. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Each of counsel's contentions in this matter has been discussed. Each case must be reviewed upon its own merits, and by definition, each case has its own particular fact situation that may result, and often does, in differing legal analysis and applicable of regulation.

Counsel also asserts in his brief statement that the determination of the petitioner's "liquidity and viability for purposes of its ability to pay the proffered wage" is by an examination of the petitioner's "gross receipts and total income values."[5] In *K.C.P. Food Co., Inc. v. Sava, Supra* at 1084, the court held that the Service 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.

Counsel asserts that it would be unfair to deny the petition because the petitioner, although requested by the director, did not submit audited financial statements.[6] 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). Audited financial statements are required by regulation, (*See* 8 C.F.R. § 204.5(g)(2)), as proof of the ability to pay the proffered wage. The submission of audited financials are one way to prove the ability to pay the ability to pay the proffered wage. *See* CIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004. Other methods

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[5] IRS Form 1120S, Line 6.

[6] A compilation is limited to presenting in the form of financial statements information that is the **representation of management.** An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The accountant's statement presented was not audited.

as stated in the memorandum are stated above in a discussion of the financial evidence that the petitioner did submit in this matter.

Counsel states that the "full resources" available to the petitioner are evidence of its ability to pay the proffered wage. Counsel is citing *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for that the overall financial circumstances of the petitioner should be considered in the determination of the ability to pay the proffered wage. That case precedent stands for the premise that entities in an agricultural business may regularly fail to show profits and typically rely upon individual or family assets for continuation of their agricultural enterprise. Counsel does not state how the Department of Labor's (DOL) Bureau 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 CIS 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation.

Counsel submits a letter from the owner of the petitioner who states that he would "pledge the use of all resources available to me to pay ... [the beneficiary] his stated wage."[7] Counsel refers to the letter submitted by the owner of petitioner as a "personal guaranty." Further the petitioner's owner offers the financial support of another paint company that shares common ownership and control. While under common control, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders or other corporations. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. Petitioner has submitted no legally binding agreements between the owner of petitioner and the beneficiary, or the two companies that that would ensure that beneficiary would be paid the proffered wage. Further, since the petitioner is the employer of the beneficiary it is its resources that are determinative of its ability to pay the proffered wage.

In the letter above mentioned, the owner of petitioner without substantiation states that the events of September 11, 2001 impacted the petitioner's business as it effected the Southern Florida hotel business on which it depends, and therefore impacted its profitability, and that the petitioner has reasonable expectations of increased profitability. The unsupported assertions of the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Four years of tax return statements of financial results as stated above do not support the petitioner's statement. Three years after the terrorist attacks the petitioner has demonstrated only modest profits and an income loss, substantially below the proffered wage of $49,500.00 per year. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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).

In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in an unprofitable period in 2001, 2002, 2003 and 2004. In 2001, the petitioner's Form 1120S

[7] The petitioner owner's personal tax returns were submitted into evidence.

stated a taxable income loss of <$11,795.00>, in 2002, a taxable income of $5,610.00, in 2003 a taxable income of $17,147.00, and, in 2004, a taxable income loss of <$2,777.00>.

The net current asset values for those years are substantially under the proffered wage of $49,500.00 per year. In 2001, petitioner's Form 1120 return evidenced the petitioner had $1,929.00 in net current assets, in 2002 $9,112.00 in net current assets, in 2003 $27,117.00 in net current assets, and, it decreased to $23,225.00 in 2004.

Matter of Sonegawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonegawa*, to establish that the period examined was an uncharacteristically unprofitable period for the petitioner. Counsel asserts that "the petitioner's expectations of continued increase in business and increasing profits" are reasonable expectations are evidence of the ability to pay the proffered wage. The petitioner, for the four years examined from the priority date, has stated profits or losses of <$11,795.00>, $5,610.00, $17,147.00, and, <$2,777.00> respectively. There are no "increasing profits" evident from the record of proceeding. As already stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). By the evidence presented, the petitioner has not proved its ability to pay the proffered wage.

Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, 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). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay wages. Here, counsel's assertion is that CIS should treat the petitioner's reasonable expectations of increased business, and, the owner of petitioner's "personal financial support" as evidence of its ability to pay. Counsel further cites the above case for the proposition that, analogous to what counsel perceives is the holding in the case, "the [Church] need not be fully self-reliant" therefore, the petitioner need not have the ability to pay the proffered wage so long as there are additional resources mentioned above to pay the proffered wage. Since the additional resources are a personal promise by the petitioner's owner, case precedent is contrary to this contention or chain of assertions.

Counsel has submitted the tax returns[8] of another separate corporation, Chassan Professional Wallcovering Inc., as proof of the petitioner, Boca Rio Paints Inc.'s ability to pay the proffered wage. Counsel, through that corporation's accountant statements, explains why those tax returns do not "fully reflect its current assets and financial viability." An examination of the accounting practices of another separate corporation is not relevant or admissible evidence in this matter. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

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

The second issue discussed is the contention by counsel and the finding by the director that resulted from the duties described in the labor certification for the job. Form ETA 750 A, Sections 9 and 13, state the following:

> 9. Name of Job Title
> Supervisor, Paint Dept.
> DOT 749.131-014
>
> 13. Describe Fully the Job to be Performed (*Duties*)
>
> Supervises and coordinates activities of workers engaged in mixing paint, preparing surface of object to be Painnted [sic], painting object or project. Responsible for determining paint mixture formulas. Must have experience with "Porter" brand paint.

The director questioned why the petitioner seeks to employ the beneficiary permanently in the United States as a supervisor in its paint department if the petitioner submitted evidence that it had one employee in 2004, and therefore questioned the bona fide of the job offer.

In the brief submitted, counsel stated in pertinent part the following:

> [T]he Service's confusion concerning the beneficiary's employment as paint department supervisor can be clarified. While the Service could not understand how he "would be responsible supervising ... of all the workers engaged in painting" when they [CIS] were"[led] to believe there is only one employee for this company," the beneficiary will be providing services to both of [redacted] companies, Boca Rio Paint, Inc. and Chassan Professional Wallcovering, Inc. ....

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey,* 661 F.2d

[8] The tax returns state taxable incomes (IRS Form 1120, Line 28) of $13,458, $87,807, and <$48,876.00> in tax years 2001, 2002 and 2003.

1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.,* 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon,* 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. The CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

The above statement will be considered an admission against the petitioner's interest in this matter. The petitioner did not disclose that fact of joint employment by two corporations of the beneficiary (according to an existing agreement mentioned below) to CIS when it initially filed the petition, nor is it indicated that it made the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process, since there is no such inclusion in the purportedly complete copy of the alien labor certification filing submitted to DOL that the petitioner submitted to CIS in response to the director's notice of intent to deny. In the record of proceeding is a joint venture agreement dated June 1, 2001 between Chassan Professional Wallcovering Inc. and the petitioner agreeing to share employees and their services without mention of additional compensation for their "shared services."

According to DOL precedent and regulations, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. ***See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).** According to statements made by the owner of petitioner and counsel representing the petitioner in the record of proceeding, there was an intent that the beneficiary would be employed by both corporations and relying upon both the owner of petitioner and Chassan Professional Wallcovering, Inc. to pay or help pay the proffered wage. The failure to make critical disclosures to DOL and CIS initially undermined the labor certification process. The AAO cannot conclude that the petitioner is extending a *bona fide* job offer to the beneficiary. The petitioner Boca Rio Paint (or Paints) Inc. is the sole employer and petitioner in this matter with the legal obligation to employ the beneficiary not Chassan Professional Wallcovering, Inc.

The evidence submitted does not demonstrate credibly by a preponderance of evidence that a *bona fide* job opportunity is available to U.S. workers.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Counsel's contentions cannot be concluded to outweigh the evidence presented in the four corporate tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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

ORDER: The appeal is dismissed.