U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: APR 29 2008
SRC 05 012 51386

IN RE: Petitioner:
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, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair and body shop.[1] It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.[2] The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary and two other beneficiaries the proffered wage as of the 2001 priority date based on the petitioner's net assets.[3] The director also noted that based on state of Georgia Department of Labor wage reports, the petitioner had presented fraudulently manufactured documents in its response to the director's request for further evidence in another I-140 petition that misrepresented the number of employees paid by the petitioner during the third and fourth quarters of 2004 and the first quarter of 2005.[4] The director further stated that based on a U.S. Department of State investigation in Korea, the petitioner also committed fraud by submitting a false letter of work experience. The director stated that the U.S. Department of State on site investigation revealed that the beneficiary had worked at Orient Express Industries from September 20, 1993 to November 21,1999, not as an auto mechanic, but rather as a driver. Finally the director noted two additional beneficiaries for whom the petitioner had submitted I-140 petitions, and stated that the petitioner did not have sufficient net assets to pay their proffered wages in addition to the beneficiary's proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 2, 2006 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. The AAO will first address the petitioner's ability to pay the proffered wage.

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[1] Former counsel in a cover letter, stated that the petitioner was a successor in interest to More Than Brakes, Inc., 4330 Lawrenceville Highway, Lilburn, Georgia. With its I-140 petition, the petitioner submitted a Commercial Purchase and Sale Agreement document dated October 21, 2003 for the purchase of More Than Brakes, Inc. by the instant petitioner for $40,000.

[2] The applicant, More Than Brakes, Inc., filed the instant Form ETA 750 for the beneficiary.

[3] In her decision, the director described net assets as the difference between the petitioner's current assets and current liabilities. The AAO describes this figure as the petitioner's net current assets, and will discuss the petitioner's ability to pay the proffered wage based on its net current assets more fully further in these proceedings.

[4] The record does not contain the I-140 petition cited by the director in her decision, although documents from the state of Georgia Department of Labor obtained by CIS are included in the record with regard to an investigation of the petitioner's other I-140 petition beneficiaries. The director appears to refer to the petitioner's Forms 941 Employer's Quarterly Federal Tax Return for three quarters, submitted in the instant petition on appeal. Since the record does not contain the I-140 petition to which the director referred in her decision, the AAO cannot determine the validity of the director's comments on this issue. The AAO will not address this issue further.

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 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the 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 October 21, 2001. The proffered wage as stated on the Form ETA 750 is $38,210 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered job of auto mechanic.

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). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.[5] Relevant evidence submitted on appeal includes current counsel's brief, and a copy of the original Form ETA 750 applicant's Form 1120, for tax year 2001 that indicates taxable income before net operating loss deduction and special deductions of -$1,302.[6]

Counsel also submits a copy of the instant petitioner's Form 1120S for tax years 2004 and 2005, and a balance sheet and statement of income document signed by [redacted] C.P.A., P.C., Duluth, Georgia dated November 17,

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[5] 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).

[6] This tax return is for [redacted]., Employer Identification Number [redacted] Lawrenceville Highway, Lilburn, Georgia. More Than Brakes, Inc. filed the Form ETA 750 submitted to the record.

2006. In his letter [redacted] states that his firm had compiled a balance sheet for the instant petitioner as of September 30, 2006. A separate document submitted with the accountants' report is entitled Earnings Report and indicates that as of October 31, 2006, the beneficiary earned $10,666.67. Counsel also submits Forms 941, Employer's Quarterly Federal Tax Return, for the third quarter of 2004 for two employees that do not include the beneficiary, for the fourth quarter of 2004 for four employees that do not include the beneficiary, and for the first quarter of tax year 2005 for three employees. This document also does not list the beneficiary as an employee.

Counsel also submits a W-2 Form for the beneficiary for tax year 2005 that indicates the petitioner, with an address of [redacted] Duluth, Georgia, paid the beneficiary wages of $32,000 in tax year 2005. Finally counsel also submits a copy of an interoffice memorandum written by Mr. William Yates, [7] former Citizenship and Immigration Services (CIS) Associate Director for Operations entitled "Determination of Ability to Pay under 8 C.F.R. § 204.5(g)(2)."

With the initial I-140 petition, the petitioner submitted an IRS Form 1120S for tax years 2002 and 2003 for Total Merchant Services, Inc, Brakes & More, [redacted]
The petitioner also submitted the petitioner's owner's Forms 1040 for tax years 2002 and 2003, as well as the Commercial Purchase and Sale Agreement dated October 20, 2003.[8] The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel refers to the Yates Memo and the three-prong analysis provided in this memo to help adjudicators determine whether a petitioner has the ability to pay the proffered wage. Counsel then refers to three unpublished AAO decisions in which the AAO considered the petitioners' depreciation expenses and cash on hand and determined that the petitioner had established its ability to pay the proffered wage. Counsel also refers to another unpublished AAO decision for the premise that the petitioner could prorate the share of the annual wage that would have been owed the beneficiary in the priority year to establish its ability to pay the proffered wage.

Counsel then states that examining the beneficiary's proffered wage for tax year 2001, the prorated share of the wage would be $7,143.75. Counsel states that based on the salaries paid by the petitioner, its net assets and its inventory, the petitioner was able to pay this prorated wage as of the 2001 priority year. For tax years 2002, 2003, 2004 and 2005, counsel examines the petitioner's total income as indicated on line 6 of the tax return, the petitioner's net income, and the petitioner's net assets. Based on these sums, counsel asserts that the petitioner had more than sufficient resources to pay the proffered wage of $32,210[9] during these years. With regard to tax year 2005, counsel points out that the beneficiary was employed by the petitioner and was paid $32,000. Counsel also states that the petitioner was able to pay the proffered wage of $32,210 in tax year 2005. With regard to tax year 2006, counsel again examines the petitioner's total income and net income, and notes that the petitioner paid the beneficiary $9,850.67. Counsel states that the petitioner was more than able

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[7] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

[8] The petitioner's 100 percent shareholder and owner is identified as [redacted] and the Forms 1040 submitted to the record indicates that she has two parents as dependents, who are identified as [redacted] and In [redacted]. The AAO notes that the seller of More Than Brakes, Inc, the original petitioner on the Form ETA 750 is listed as [redacted] Thus, the former owner of the current petitioner appears to have sold his business to his daughter.

[9] Counsel is incorrect with regard to the proffered wage. As indicated on the Form ETA 750 in the record, the proffered wage is $38,210.

to pay the proffered wage and refers to the Financial Report as of September 30, 2006 and Earnings Report prepared by [redacted]

With regard to the director's comments regarding the number of employees working for the petitioner in the third and fourth quarter of 2004 and the first quarter of 2005, counsel notes based on the petitioner's Forms 941, the petitioner claimed two employees in the third quarter of 2004, four employees during the fourth quarter of 2004, and three employees in the first quarter of tax year 2005. With regard to the director's statement that the petitioner submitted a fraudulent letter of work verification based on a U.S. Embassy onsite visit to the beneficiary's claimed place of employment in Korea, counsel refers to the third letter of work experience submitted to the record on appeal and notes that the Korean employer reconfirms the beneficiary's employment in this letter.

On appeal, counsel makes no reference to the director's statements with regard to the petitioner filing I-140 petitions for two additional beneficiaries, or the petitioner's ability to pay the proffered wages of all three beneficiaries.

The evidence in the record of proceeding indicates that both the original petitioner was structured as a corporation and the current petitioner is structured as an S corporation. On the petition, the current petitioner claimed to have been established on July 1, 2000, to have a gross annual income of $284,280, a net annual income of $45,844, and to currently have three employees. On the Form ETA 750, signed by the beneficiary on October 17, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel refers to three unpublished AAO decisions, but provides no citations for any of these decisions. 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). Furthermore, counsel cites all three unpublished decisions for the proposition that the petitioner's depreciation expenses can be utilized in determining the petitioner's ability to pay the proffered wage. Counsel's reliance on the findings in these unpublished decisions is also misplaced. The AAO does not examine the petitioner's depreciation expenses as a part of the petitioner's net income in these proceedings, nor does it examine items such as cash on hand and inventory separately, but rather as part of its examination of the petitioner's net current assets. The AAO will discuss the issue of depreciation expenses more fully further in these proceedings.

On appeal, counsel also refers to another unpublished AAO decision for the proposition that the petitioner can establish its ability to pay the proffered wage by prorating the beneficiary's wages from the October 21, 2001 priority date to the end of tax year 2001. Again, counsel provides no citation. The AAO does not consider 12

months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted evidence of the payment of wages to the beneficiary in the 2001 priority year.

On appeal, with regard to tax years 2002 to 2006, counsel refers to the petitioner's total income, net income, and net assets as clear evidence of the petitioner's ability to pay the proffered wage. CIS does not consider the petitioner's total income and net assets in its examination of the petitioner's ability to pay the proffered wage, but rather the petitioner's net income and net current assets. The AAO will discuss these two items more fully further in these proceedings.

Counsel on appeal also submits a compiled accountant's report to document the instant petitioner's financial resources as of September 30, 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner submitted one W-2 Form for tax year 2005, and payroll records for part of tax year 2006. Based on the record, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus the petitioner has to establish its ability to pay the entire proffered wage as of the 2001 priority date and through 2004, and to pay the difference between the beneficiary's actual wages in 2005 and 2006 and the proffered wage. The AAO notes that the petitioner also has to establish its ability to pay the proffered wages for the beneficiaries for three pending I-140 petitions. The director in her decision identified a combined total proffered wage of $105,519 for the beneficiary and the two additional beneficiaries.

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, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's

gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further 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.

In the cover letter submitted by the petitioner, with the petition, former counsel stated that the instant petitioner is a successor-in-interest to the original petitioner that filed the Form ETA 750 for the beneficiary. While the record contains a Commercial Purchase and Sales Agreement, the record is not clear as to when the instant petitioner took over responsibility for the original petitioner's assets, including its employees.

With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant case, it is not clear as to when the current petitioner actually took over responsibility for the assets of More Than Brakes, Inc. The Commercial Purchase and Sales Agreement is dated October 21, 2003, with a closing date of November 14, 2003. Under Special Stipulations listed on the final page of this document, it states that the business More Than Brakes, Inc. shall be merged with the instant petitioner, Total Merchant Services, Inc. at closing. Thus, the instant petitioner would have assumed all business responsibilities as of November 14, 2003. The AAO notes that based on this closing date, the instant petitioner would have to establish the ability of the original applicant, More Than Brakes, Inc., for the Form ETA 750, to have paid the proffered wage as of the 2001 priority date, through tax year 2002 and up until November 2003. Therefore, More Than Brakes, Inc.'s tax returns for tax years 2001, 2002, and a partial return for tax year 2003 would have to be examined to determine whether More Than Brakes, Inc. had the ability to pay the proffered wage from the 2001 priority date to the actual sale of the business to the current petitioner. Since the record only contains More Than Brakes, Inc.'s tax return for 2001, the AAO can only examine More Than Brakes, Inc.'s ability to pay the proffered in tax year 2001. With regard to the current petitioner, the relevant tax returns, based on stipulated November 2003 closing date in the Sales Agreement document submitted to the record, would be the instant petitioner's tax return for tax years 2003, 2004, and 2005.

With regard to the original applicant's ability to pay the proffered wage in tax year 2001, the Form 1120 for More than Brakes, Inc., stated a net income[10] of -$1,302. This sum is not sufficient to pay the proffered wage of $38,210. Thus the instant petitioner cannot establish the original applicant's ability to pay the proffered wage during the 2001 priority year, based on its net income. As previously stated, the original applicant's tax returns for tax years 2002 and 2003 were not submitted to the record. Therefore the AAO cannot determine whether the original applicant had sufficient net income in tax years 2002 and 2003 to pay either the entire proffered wage in tax year 2002, or the proffered wage from January 2003 to November 2003. The current petitioner's Form 1120S tax return for tax years 2002 is not dispositive or relevant in this matter, as the current petitioner was not a successor-in-interest at that time to the original applicant for the Form ETA 750.

With regard to the instant petitioner's ability to pay the proffered wage based on its net income for the tax years 2003, 2004, and 2005, the record indicates the following information:

In 2003, the Form 1120S for the current petitioner stated a net income[11] of $32,319.

- In 2004, the Form 1120S for the current petitioner stated a net income of $36,981.
- In 2005, the Form 1120S for the current petitioner stated a net income of $36,803.

Therefore, for the years 2003 to 2004, the petitioner did not have sufficient net income to pay the proffered wage of $38,210. With regard to tax year 2005, since the petitioner paid the beneficiary $32,000, it only has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage, namely $6,210. Thus, the instant petitioner can establish its ability to pay the beneficiary's proffered wage only in tax year 2005, based on its net income. However, as stated previously, the petitioner has to establish its ability to pay beneficiaries for all three pending I-140 petitions, with an identified total proffered wage of $105,519. Thus, while the petitioner had sufficient net income to pay the instant beneficiary's proffered wage in 2005, it does not have sufficient net income to pay all three proffered wages in this year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become

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[10] The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

[11] Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner in tax years 2003, 2004, and 2005 had no additional income, credits, deductions or other adjustments reported on its Schedule K, the petitioner's net income for these years is found on line 21 of page one, Form 1120S.

funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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.[12] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

As stated previously, the record does not contain the 2001 tax returns for the applicant that originally filed the Form ETA 750. Furthermore, the tax return for the instant petitioner for tax year 2002, as successor-in-interest to the initial applicant, is not relevant to these proceedings because the original applicant was not merged with the instant petitioner until November 2003. Thus the AAO will only examine the original applicant's 2001 net current assets. Based on the tax return submitted to the record, the applicant that filed the Form ETA 750 during 2001 had net current assets of $4,104. This sum is not sufficient to pay the proffered wage of $38,210.

With regard to the current petitioner's ability to pay the proffered wage in tax years 2003 and 2004, based on its net current assets, the record contains the following information:

- In 2003, the current petitioner's net current assets are $8,363.
- In 2004, the current petitioner's net current assets are $11,394.

Therefore, from the date the Form ETA 750 was filed with the Department of Labor, the petitioner identified on the instant I-140 petition had not established that the previous owner of the petitioner's business had the ability to pay the proffered wage in tax years 2001, 2002, and part of 2003, or that it had the continuing ability to pay the beneficiary the proffered wage from the time it merged with the previous owner through tax year 2004. The petitioner only established its ability to pay the beneficiary's proffered wage in tax year 2005 based on its net income. As previously discussed, it has not established its continuing ability to pay the beneficiary and any other beneficiaries of pending petitions, the proffered wage as of the priority date.

Counsel's assertions on appeal with regard to prorating the beneficiary's wages during the 2001 priority year, cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. Counsel's assertions with regard to the instant petitioner's continuing ability to pay the proffered wage also cannot be concluded to outweigh the evidence presented in the tax returns submitted to the record. Furthermore counsel's lack of further explanation with regard to the issue of multiple beneficiaries diminishes any weight to be given to counsel's assertions submitted on appeal.

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[12] 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.

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

The AAO will now address the second issue raised by the director in his decision, namely whether the beneficiary was qualified to perform the duties of the proffered position.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of auto mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

Grade School	(Blank)
High School	(Blank)
College	
College Degree Required	(Blank)
Major Field of Study	(Blank)

The applicant must have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked at the Orient Express Industries (Co.) 163-32 Daedodong Bukgu Pohang Kyongbuk, Korea, as a repair person from September 1993 to November 1999. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience,

> and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulation at 8 C.F.R. § 103.2(b)(3) provides:.

> *Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

With the initial petition, the petitioner submitted a Korean language letter of work verification dated April 11, 2001, with English translation. The translation stated that the beneficiary worked at Orient Express Industries (Co.) as a repair person from September 20, 1993 to November 21, 1999. **The beneficiary's resident registration number was identified as [redacted] and his** address is identified as [redacted] Daedodong [redacted]. **The letter is signed by [redacted]** Chairman of the Board. The letter contains no information as to the address of the employer, telephone number, other contact information, or any further details about the beneficiary's work responsibilities. There is no translator's certification submitted with this document.

In a request for further evidence, dated February 21, 2005, the director asked the petitioner to submit evidence that the beneficiary possessed the required two years of work experience specified on the Form ETA 750. The director stated that letters of work verification from prior employers include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary.

The petitioner then submitted a second letter of work verification dated May 4, 2005. This letter contains the employer's address and telephone number and again identified the Chairman of the Board as [redacted] The translation stated that the place of work was [redacted] **Pohang City,** Kyongbuk, Korea. The beneficiary's Resident Registration number was noted as [redacted] **and the** description of the beneficiary's work duties states **that the beneficiary was chief of repair technician and** performed the following duties: "repair buses, trucks, all other type of automobile. Supervise auto technician." The letter identifies the beneficiary's address as [redacted][13] There is no certification of translator's competency with the second letter of work verification.

In his denial of the petition, the director stated that the petitioner's owner and the petitioner committed fraud by submitting a false letter of work experience. According to the director, a Department of State investigator had confirmed with the beneficiary's claimed employer in Korea that the beneficiary had worked for Orient Express Industries from September 20, 1993 to November 21, 1999; however he had not worked there as a supervisor chief of repair/technician, but rather as a driver.

On appeal, counsel submits two documents in the English language with a translator's Certification of Competency on the bottom of each document; however, no Korean language documents are submitted to the record. The first document is titled "Proof of Employment" and states that the beneficiary had a position in

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[13] This address is also listed on the original Korean language letter of work verification submitted in response to the director's request for further evidence.

repair and maintenance and notes the employment period as September 20, 1993 to November 21, 1999, and notes the beneficiary's address as [redacted] Kyungsangbuk Province.

The second document titled "Letter of Acknowledgement" is dated November 11, 2006, and indicates that [redacted], President, Orient Express Industries (Co.) wrote the letter. In this letter, it is stated that the beneficiary during his period of employment had a position in repair and maintenance, and states "outside [the beneficiary's] duties, he occasionally provided the transportation arrangement for President when his chauffeur was unavailable." The petitioner provides no explanation for why no Korean language documents were submitted with the two English language translation documents.

While the petitioner submitted English language documents with a translator's Certification of Competency, it did not provide the Korean language document. As stated previously, the regulation at 8 C.F.R. § 103.2(b)(3) provides that any document containing foreign language submitted to CIS shall be accompanied by a full English language translation and by the translator's certification that he or she is competent to translate from the language to English. In the instant petition, the record contains the English language translation with translator's certification, but with no foreign language document. Thus, the AAO gives little evidentiary weight to the third letter of work verification.

The AAO also notes the inclusion of the beneficiary's address listed on the Form ETA 750 on the second letter of work verification. The record is not clear why the second letter of work verification, ostensibly written by a Korean employer, would include the beneficiary's U.S. address as opposed to the address of the company or the beneficiary's home residence in Korea. Thus, the AAO gives little evidentiary weight to the second letter of work verification. With regard to the first letter of work verification submitted with the I-140 petition, the AAO concurs with the director that this letter lacks any detail with regard to the beneficiary's job duties or information on the actual Korean employer beyond its name, and is insufficient to establish the beneficiary's requisite two years of work experience as an auto mechanic.

The AAO also notes that the record contains a notice of decision from the Texas Service Center dated September 26, 2005 with regard to the beneficiary's application for a change of status from B-2 visitor to F-1 student status. The beneficiary had submitted an I-539 Application to Extend/Change Non-Immigrant Status on August 14, 2000. The I-539 application was filed in conjunction with an I-20 A-B, Certificate of Eligibility for Nonimmigrant (F-1) Student Status, to study English at the University of St. Louis, St. Louis, Missouri. In her decision, the director denied the change of status based on the submission of a fraudulent I-20.[14]

With the I-539 petition, the beneficiary submitted a letter dated July 24, 2000, in which the beneficiary describes how he came to the United States as a tourist, and then states the following: "Before I came to America, I worked at the exporting company as a sales director. My job duties were managing sales order. I received sales orders from all over the world, so that I must speak good English."

Thus the record contains either undetailed or inconsistent evidence with regard to the beneficiary's claimed duties at Orient Express Industry (Co.), and evidence of fraud in the past proceedings based on the beneficiary's letter accompanying his I-20 petition that describes the beneficiary's former employment in Korea as a sales director. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect

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[14] An earlier CIS investigation had determined that the Designated School official (DSO) who allegedly signed the I-20 for the University of St. Louis was not a University of St. Louis employee and the school codes and address listed for the University of St. Louis on the Form 1-20 submitted by the beneficiary were incorrect.

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." *Ho* also states "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." The AAO determines that all three letters of work verification contain internal inconsistencies with regard to the beneficiary's address, or job duties. The third letter submitted to the record, after the director disclosed the findings of an investigation conducted at the beneficiary's work site in Korea, does not appear sufficient to address the director's findings with regard to the second letter of work verification that noted the beneficiary's Georgia residence. Finally the contents of all three letters conflict with the beneficiary's letter written in support of his I-539 application.

Thus, the AAO, in view of the contents of the beneficiary's Form I-539, gives little evidentiary weight to any of the letters of work verification. The petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. Further the AAO affirms the director's decision that the petitioner and the beneficiary have committed fraud by submitting a false letter of work experience.

Furthermore, should the beneficiary file a Form I-485, Application to Register Permanent Residence or Adjust Status, based on the instant petition or any other petition, he should be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

> [Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Beyond the decision of the director, the petitioner has not established that the proffered position is a bona fide job offer. 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).

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). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). In the instant petition, the translation of the Korean language Family Census Record indicates that the petitioner's owner, Hyo Ji Kim, is the daughter of Rak Hoon Kim and In Hwa Shin, and the beneficiary is also the child of Rak Hoon Kim and In Hwa Shin.[15] The AAO acknowledges that the Korean language and English translation of the Korean family register does not contain a translator's certification, as discussed previously, and thus this document is not given full weight in these proceedings. Nevertheless the contents of the Family Register do raise questions as to the family relationships contained in the instant matter, especially if not revealt to DOL during the labor certification process.

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[15] As previously stated, the petitioner's owner identified her parents as [redacted] on her 2003 Form 1040.

Furthermore, the beneficiary's Form G-325, submitted with his I-485 Application to Register Permanent Resident or Adjust Status, identifies his parents as [redacted] and [redacted] Thus, the petitioner's owner and the beneficiary, based on the Korean Family Register document, have the same mother. They also have the same mother and father, based on other documents submitted to the record by either the beneficiary or the petitioner's owner.

[redacted] the claimed father of both the petitioner's owner and the beneficiary on documents submitted to CIS, is also identified as the president of the original applicant that filed the Form ETA 750 based on a tax return for tax year 2001 submitted to the record. [redacted] also identified as the person who would have immediately supervised the beneficiary on the Form ETA 750. Thus, it appears that the beneficiary's father initially was instrumental in submitting the original Form ETA 750 for his son, while the beneficiary's sister, as the instant petitioner's owner, currently employs her brother. These relationships invalidate the bona fide job offer, if not revealed to DOL during the labor certification process and could result in the invalidation of the labor certification application by CIS.[16] Thus the petitioner has not established that a bona fide job offer exists for U.S. workers.

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 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.

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[16] The regulation at 20 C.F.R. § 656.30(d) provides, in pertinent part,

> After issuance labor certifications are subject to invalidation by the Citizenship and Immigration Services . . . upon a determination . . . of fraud or willful misrepresentation of a material fact involving the labor certification application.