U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 01 2009
SRC 07 166 51665

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director subsequently denied a motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Thai restaurant. It seeks to employ the beneficiary permanently in the United States as an executive chef. 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 and denied the petition accordingly.

The director additionally denied a motion to reconsider filed by former counsel. On appeal, current counsel contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

Current counsel indicated on the appeal Form I-290B that she would submit a brief and /or additional evidence to the AAO within 30 days. Nothing further has been received to the record. Therefore this decision will be rendered as the record currently stands.

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 other 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 not available in the United States.[1]

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a United States baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. § 204.5(k)(2).

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[1] The regulation at 8 C.F.R. § 204.5(g)(1) provides that "[e]vidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. . ."

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. Therefore, 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. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).[2] The proffered wage is stated as $8.75 per hour, which amounts to $18,200 per year.

The visa preference petition was filed on May 2, 2007. Part 5 of the petition indicates that the petitioner was established on September 23, 1998, claims a gross annual income of $134,954, an annual net income of $104,985 and currently employs three workers. On Part B of the Form ETA 750, signed by the beneficiary on April 6, 2001, the beneficiary claims to have worked for the petitioner forty hours per week since 1998 to the present (date of signing).

In support of its continuing financial ability to pay the certified wage of $18,200 per year, and in response to the director's request for evidence issued on August 6, 2007, the petitioner provided copies of its Form 1120-A, U.S. Corporation Short-Form Income Tax Return for 2001, 2002, 2003, 2004, and 2005.[3] The tax returns reflect that the petitioner uses a fiscal year

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

[3] The petitioner is a C corporation. For the purpose of this review of the petitioner's Short-Form 1120 corporate tax returns, the petitioner's net income is found on line 24 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net

running from October 1st to September 30th of the following year. Thus, the 2001 return contains its financial data covering October 1, 2001 through September 30, 2002. The entire period covered by the tax returns dates from October 1, 2001 through September 30, 2006. The petitioner failed to submit a federal tax return, audited financial statement or annual report covering the priority date of April 30, 2001 or the period of time until October 1, 2001. The returns indicate the following:

	2001	2002	2003	2004	2005
Net Income	$ 2,258	- $ 2,059	$ 1,235	$ 4,132	$24,191
Current Assets	$ 11,566	$ 5,888	$ 4,504	$ 5,157	$29,845
Current Liabilities	$ 511	$ 511	$ 511	$ 651	$ 752
Net Current Assets	$ 11,055	$ 5,377	$ 3,993	$ 4,506	$29,093

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Part III of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 13 and 14. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[4]

The petitioner also provided copies of Wage and Tax Statements (W-2s) issued to the beneficiary. They indicate the following wages paid:

Year	Amount of Wages	Difference from Proffered Wage of $18,200
2001	$3,600	$14,600
2002	$3,600	$14,600
2003	$3,600	$14,600

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total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 23 of page 1 of the short-form corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[4]The director misstated that the net current assets were not provided on the tax returns.

2004	$3,600	$14,600
2005	$4,600	$13,600
2006	$6,800	$11,400

The petitioner additionally provided a copies of two unaudited financial statements consisting of a profit and loss statement covering the period from October 2006 through July 2007 and a balance sheet as of July 31, 2007. On motion, former counsel submitted copies of unaudited (compiled) personal balance sheets of the petitioner's principal shareholder in support of the petitioner's ability to pay the proffered wage.

The director denied the petition finding that the petitioner's net income and payment of compensation to the beneficiary failed to establish its continuing ability to pay the proffered wage of $18,200. The director denied the petitioner's subsequent motion to reconsider, noting that the principal shareholder's individual financial statements were not audited as required by regulation.

On the notice of appeal filed in response to the director's denial of the motion to reconsider, current counsel asserts that the beneficiary's contributions were not taken into account and that this could justify the petition's approval. Counsel claims that the beneficiary's contributions had already improved the restaurant's operations.

As no specific evidence was submitted in support of counsel's hypothesis asserted on the notice of appeal, this argument will not be addressed. Counsel's unsupported assertions 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). For the reasons explained below, the AAO concurs with the director's decision.

Moreover, with regard to the individual assets belonging to the principal shareholder of a corporate petitioner, USCIS has long held that it 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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage. The petitioner who filed the Immigrant Petition for Alien Worker (I-140) in this case is the corporation, not the principal shareholder, individually. Therefore, only the corporate petitioner's assets and liabilities will be considered. It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits

[USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

Further, as noted by the director, the financial statements submitted to the record are not audited. It is noted that according to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), as amended in 1991, where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. As the statements provided to the record are restricted to information based upon the representations of management, they are not probative of the petitioner's continuing ability to pay the certified wage.

In order to determine a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

In this case, as set forth above, the petitioner has not established that it has had the continuing ability to pay the proffered wage of $18,200. Although the calculation is not exact as the petitioner's fiscal year as stated on the tax returns is not a calendar year as reflected on the beneficiary's W-2s, it is clear that except for the 2005 tax return where either the petitioner's net current assets of $29,093 or its net income of $24,191 could cover the $11,400 shortfall resulting from the comparison of the beneficiary's wages and the proffered wage, the petitioner did not evidence sufficient net income or net current assets in any of the other years considered.

Neither the petitioner's net income of $2,258 nor its net current assets of $11,055 was sufficient to cover the $14,600 difference between the beneficiary's wages of $3,600 and the proffered wage in 2001. In 2002, neither the petitioner's net income of -$2,059 nor its net current assets of $5,377 was enough to cover the $14,600 shortfall resulting from comparing the beneficiary's **wages and the proffered salary of $18,200. Similarly, in 2003 and 2004, neither the** beneficiary's net income(s) of $1,235 or $4,132, respectively, nor its net current asset(s) of $3,993 or $4,506, respectively, were sufficient to cover the difference between the beneficiary's compensation and the proffered wage in either of those years. The petitioner has not demonstrated that it had the ability to pay the proffered wage.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in

business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry.

In this matter, although the petitioner's gross receipts have increased from 2001 to 2005, they never exceeded $134,954. As indicated above, except for 2005, the petitioner's reported net income remained modest from 2001 to 2004 and never exceeded $4,132 in those years. Further, except for 2005, the petitioner's net current assets have been consistently modest and declined from $11,055 in 2001 to $4,506 in 2004. Additionally, the petitioner's highest reported salaries paid to all employees is only $13,400, less than the beneficiary total proffered wage. The record does not indicate that the petitioner has established a framework of profitability or reflect the presence of such unique reputational factors or other analogous circumstances that were present in *Sonegawa.*

Finally, as stated above, the petitioner failed to submit a federal tax return, annual report or audited financial statement that covered the complete period under consideration including the priority date of April 30, 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the AAO notes that the petition is not eligible for approval because the petitioner failed to demonstrate that the position's minimum requirements set forth on the approved labor certification were consistent with the visa classification sought. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. Pursuant to the regulation at 8 C.F.R. § 204.5(l), in order to classify the alien as an unskilled worker under section 203(b)(3)(A)(iii) of the Act, the certified position as set forth on

the Form ETA 750 must require less than two years of training or experience. As Part 14 of the labor certification establishes that the position's minimum requirements are an MBA in Business Administration, three years of training at a Thai restaurant, and three years of experience in the job offered, an advanced degree professional under section 203(b)(2) of the Act would be the appropriate visa classification. It may not be concluded that the petitioner established that the certified position required less than two years training or experience in order to approve the petition for the visa classification sought on the I-140.

Even if the petition had sought visa classification under the appropriate category, the petitioner failed to establish that the beneficiary had acquired three years of employment experience as an executive chef and training in a Thai restaurant as of the priority date as set forth on the Form ETA 750. The record contains no evidence in the form of letters from employers or trainers verifying that the beneficiary acquired the requisite three years of full-time work experience and three years of training as pursuant to 8 C.F.R. § 204.5(g)(1).

Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage, that the petitioner adequately documented that the beneficiary had the required experience for the position and that the petitioner established that position's minimum requirements set forth on the approved labor certification were consistent with the visa classification sought.

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, at 1002 n. 9 (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.

ORDER: The appeal is dismissed.