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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JAN 21 2010

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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. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a restaurant. It seeks to permanently employ the beneficiary in the United States as a specialty chef. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's denial, the primary issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the entity that filed the petition is the same entity that filed the labor certification.[2]

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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 pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

In order to obtain classification the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

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[1]Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2]An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 *F.* Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003).

[3]The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the April 30, 2001 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is $13.50 per hour ($28,080.00 per year). The labor certification states that the position requires an individual with "[f]unctional ability as specialty chef for Mexican cuisine." On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $150,000.00, and to employ five workers. According to the tax returns in the record, the petitioner has been structured as an S corporation since 2004 with a fiscal year based on a calendar year.[4]

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, the beneficiary claimed to have worked for the petitioner since December 2000. The record contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2002 through 2008.[5] These documents state the wages paid to the beneficiary by the petitioner, as shown in the table below.

Year	Wages Paid ($)	Remaining Amount ($)
2001	Not provided	28,080.00
2002	13,423.00	14,657.00
2003	11,527.95	16,552.05

[4]The petitioner's tax returns from 2001, 2002 and 2003 indicate that the petitioner was previously structured as a C corporation.

[5]The record contains a 2001 W-2 issued by the petitioner to an individual named [redacted] The labor certification and petition were filed on behalf of a beneficiary named [redacted] The W-2s for 2002 through 2008 were issued to [redacted] The petitioner has not established that the 2001 W-2 issued to [redacted] is evidence of wages paid to the beneficiary, [redacted]

2004	13,556.05	14,523.95
2005	16,511.25	11,568.75
2006	18,700.00	9,380.00
2007	15,453.60	12,626.40
2008	15,483.20	12,596.80

Therefore, for the years 2001 through 2008, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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. 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 sales and wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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 the Service 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.

> 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).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.[6]

Year	Net Income ($)
2001	Not provided[7]
2002	-1,015.00
2003	-194.00
2004	-2,852.00
2005	-9,545.00
2006	-7,298.00
2007	-3,221.00
2008	8,704.00

For the years 2001 through 2008, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

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, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets

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[6]The petitioner filed tax returns as a C corporation in 2001, 2002 and 2003, and filed tax returns as an S corporation in 2004, 2005, 2006, 2007, and 2008. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2004 and 2005). When the two numbers differ, the number reported on Schedule K is used for net income.

[7]The submitted 2001 tax return contains no information about the petitioner's income. 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). 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)).

include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become 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, USCIS 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.[8] 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.

The petitioner's tax returns demonstrate its net current assets[9] for the required period, as shown in the table below.[10]

Year	Net Current Assets ($)
2001	Not provided
2002	Not provided
2003	Not provided
2004	Not provided
2005	Not provided
2006	Not provided
2007	Not provided
2008	15,373.00

For the years 2001, 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not establish that it had sufficient net current assets to pay the difference between the wage paid and the proffered wage.

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[8]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.

[9]On Form 1120 and 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

[10]The petitioner's tax returns for 2001 through 2007 do not include information about the petitioner's assets and liabilities on Schedule L. The record contains a letter from the petitioner's accountant, [redacted], explaining that "until recently, the schedule 'L' was not required to be prepared for the 1120S corporation tax return (not required if assets or income under $250,000)." There is no explanation of why this information was not provided for 2001, 2002 and 2003, when the petitioner's tax returns indicate that it was structured as a C corporation. In addition, there is no other evidence in the record of the petitioner's net current assets.

Therefore, except for 2008, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The record contains the petitioner's bank statements. The petitioner's reliance on the balances in its bank account is misplaced. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. No evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income or net current assets. Finally, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

The record also contains individual tax returns of the petitioner's owner and corporate tax returns for another business owned by the petitioner's owner. These documents do not establish the petitioner's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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."[11]

Counsel's brief claims that, in the State of Washington, owners of a corporation can be individually liable to pay back wages owed to an employee.[12] The brief cites provisions in the Revised Code of Washington and case law in support of the claim that the owner of a corporation may be personally liable for failure to pay wages owned an employee. Even if the AAO accepts counsel's arguments that, in the State of Washington, owners of a business may be individually liable for employees' back wages, the assets of the petitioner's owner and the petitioner's owner's other businesses are still not

[11] There is evidence in the record that another company owned by the petitioner's owner has provided financial assistance to the petitioner. This does not change the fact that the other company had no legal obligation to provide such assistance. This evidence also undermines the petitioner's claim that it has the ability to pay the proffered wage.

[12] [redacted] filed the instant appeal on behalf of the petitioner. On September 1, 2009, [redacted] informed the AAO that his office no longer represents the petitioner, and that all further correspondence pertaining to the case should be sent to the petitioner's owner directly. Although this decision refers to [redacted] as "counsel," it is noted that he no longer represents the petitioner in this matter.

relevant to the determination of whether the petitioner's had the ability to pay the proffered wage from the priority date and continuing to the present. This is because the petitioner had no legal obligation to pay the beneficiary the proffered wage from the priority date to the present, therefore the petitioner's owner would not be liable for that amount. Instead, at issue is whether the petitioner has established whether it could pay the proffered wage during this period. Accordingly, counsel's argument that the AAO should consider the assets of the petitioner's owner and the petitioner's owner's other business is rejected.

In addition to the preceding analysis, 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 (Reg. Comm'r 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 overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 1997 and to employ five employees.[13] The petitioner's tax returns show its revenues gradually increasing each year from $138,240.00 in 2002 to $291,873.00 in 2008. The record contains letters claiming that the petitioner is important to the local economy, as well as letters claiming that the opening of a nearby gold mine is expected to improve the town's economy.[14] The record also contains evidence that the petitioner has been paying the beneficiary the proffered wage in 2009.

[13]According to the State of Washington, the petitioner was incorporated on February 1, 1996. http://www.sos.wa.gov/corps/search_detail.aspx?ubi=601686787 (accessed December 28, 2009).

[14]The record also contains letters attesting to the character of the beneficiary. These letters are not relevant to the determination of whether the petitioner has established that it has had the ability to pay the proffered wage from the priority date to the present.

However, assessing the totality of the circumstances in this case, it is concluded that the evidence in the record does not establish that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date and continuing to the present. The petitioner employs only a small number of workers, the petitioner does not have substantial revenues, the petitioner has not established the existence of any uncharacteristic business expenditures or losses, and the beneficiary will not be replacing a former employee or an outsourced service.

Beyond the decision of the director, it is concluded that the entity that filed the petition is not the same entity that filed the labor certification. The labor certification in the instant case was filed by the petitioner's owner in his individual capacity, and not the petitioner. Part A, Item 4 of the labor certification states that the employer is "[redacted] The petition was filed by [redacted]." [redacted] is an individual, whereas [redacted]. is a C corporation. This difference is underscored in the affidavit of [redacted], dated May 11, 2009, which states, in part:

> The [labor certification] was made under my name [redacted] . . . My understanding was that I, [redacted] was the Petitioner, and not [redacted] Given my operation of the restaurant as a sole proprietor, I never had to question whether or not I could pay the proffered wage since I had more than sufficient funds to do so. Had I known that the restaurant itself had to show its ability to pay the proffered wage, I would have made the proper adjustments to do so.

Since the petition was filed by a different entity than the one that filed the labor certification, the petition must be denied. The petition is devoid of evidence that the petitioner is a *bona fide* successor-in-interest to the employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Finally, although not a basis of this decision, it is noted that the record contains a statement from the owner of the petitioner that the business will have to close if the petition is not approved, and that "[w]ithout Jose we don't have a business." The letter further states that the success of the petitioner is partially based on the reputation that the beneficiary has developed over the last eight years. The petitioner has the burden to show 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 Summart 374*, 00-INA-93 (BALCA May 15, 2000). Given the fact that the success of the petitioner's enterprise is dependent on the employment of the beneficiary, it does not appear that the position offered to the beneficiary was ever truly made available to U.S. workers.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d at 1043, *aff'd.*

345 F.3d 683.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.