U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: DEC 19 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a stucco plastering contractor. It seeks to employ the beneficiary permanently in the United States as a general foreman. The petition is accompanied by a copy of a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted the original labor certification with the Immigrant Petition for Alien Worker (Form I-140) and also failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

In this case, it must be noted that the record contains evidence that the petitioner has filed three Form I-140s, on October 23, 2008, December 12, 2009 and the instant filing on September 15, 2010 on behalf of the present beneficiary. With each, the petitioner has submitted the same copy of a Form ETA 750 indicating that the DOL approved the labor certification on September 16, 2003. With each filing, counsel has contended that this copy of a 2003 certified Form ETA 750 should be

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[1] 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).

accepted in support of the respective Form I-140 because the United States Citizenship and Immigration Services (USCIS) lost the original Form ETA 750 alleged to have been submitted with a Form I-140 in August 2005. As evidence of this 2005 filing, counsel has submitted copies of a 2003 job offer letter, a copy of the Form I-140 stated to have been submitted and a copy of a U.S. Postal Service express mail receipt indicating a mailing on August 4, 2005 and a copy of counsel's July 27, 2005, transmittal letter.[2] The director denied the petition stating that USCIS had no record of the filing and that the labor certification had nonetheless expired because it was not submitted with a Form I-140 within the 180-day validity period. The director dismissed a subsequent motion observing that the Form I-140 petition and the job offer letter signed and dated in 2003 were not consistent with a claim of submission of a 2005 filing.[3]

The second Form I-140 filing in December 2009 was similarly denied by the director on April 27, 2010. The director noted that a photocopy of the Form ETA 750 could not be accepted in support of the Form I-140 and that USCIS had no record of the August 2005 filing and that no evidence of a cancelled check or a receipt had been submitted in order to establish that the 2005 filing was accurate. The director additionally denied the petition because the petitioner's ability to pay the proffered wage had not been demonstrated as the petitioner had only submitted tax returns for 2005 through 2007, not from the 2001 priority date onward.

As noted above, the most recent Form I-140 was filed on September 15, 2010, using the same Form ETA 750 approved in 2003 in support of the job offer as a general foreman. The director denied the petition on August 11, 2011, finding that the original labor certification had not been submitted. The director observed that the petitioner had submitted a copy of a mailing label but had not submitted any type of a mailing receipt notice and that USCIS had no record of the claimed original filing. The director concluded that the copy of the mailing label does not provide sufficient evidence that USCIS received an original labor certification, nor that any additional Form I-140 had been filed that had not already been processed.

It is noted that the director additionally acknowledged counsel's March 10, 2011, response to the director's request for additional evidence, issued in connection with the third filing of the Form I-140, which suggested that the director either accept the copy of the original labor certification that had been lost or request a copy of the original from DOL. It is noted that this is the first time, with the petitioner's 2010 filing, that the petitioner suggested that a duplicate labor certification be sought from DOL. The director found this request to be futile because "[r]equests for duplicate Labor

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[2] Counsel's letter refers to an incorrect priority date of April 30, 2001 rather than April 25, 2001.

[3] In subsequent correspondence, counsel states that the delay in filing from the 2003 labor certification approval until 2005 was based upon availability of visa number in order to file a concurrent adjustment package. He also states that the claimed 2005 submission of a Form I-140 and job offer letter with signatures dated in 2003 was to "preserve original signatures." Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Certifications cannot be made more than 5 years after the Labor Certification was certified. The record shows that the Labor Certification was certified in 2003."

Finally, the director denied the instant case because he found that the petitioner had not established its continuing ability to pay the proffered wage.

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.

At the outset, the AAO notes that contrary to counsel's claim on appeal, submission of the original labor certification is required when a petitioner files a Form I-140.

The regulation at 8 C.F.R. § 103.2(b)(4) states:

> *Submitting copies of documents.* Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with [USCIS].

The regulation at 8 C.F.R. § 204.5(l)(3) states in relevant part:

> *Initial evidence – (i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of labor's Labor Market Information Pilot Program...

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> *Initial evidence.* (1) *General.* Specific requirements for initial supporting documents for the various employment-based immigrant classifications are set forth in this section. In general ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval. However, at the discretion of the director, original documents may be required in individual cases. Evidence 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. If such evidence is

> unavailable, other documentation relating to the alien's experience or training will considered.

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in her through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

Like the director, the AAO finds that petitioner has not presented sufficient evidence to determine how or if the claimed 2005 filing of a Form I-140 with the original labor certification was ever delivered to the Nebraska Service Center and then subsequently lost as counsel asserts. It remains that there is no original labor certification contained in the record and no record of any 2005 filing. The petitioner does not present a filing receipt for this alleged petition, and fails to adequately explain why the petitioner only attempted a second filing three years later in October 2008. As such, because the director denied the petition in part based on the lack of the original labor certification, the AAO does not have jurisdiction to consider this appeal. It is noted that a mechanism for the petitioner to request a duplicate labor certification from DOL has been in place as set forth in 20 C.F.R. § 656.30(e).[4] As noted above, a request for a duplicate labor certification from DOL was not suggested by the petitioner until its March 10, 2011, response to the director's request for evidence, eight years after the labor certification was approved in 2003 and in connection with the third filing of a Form I-140.

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[4] Effective March 28, 2005, the regulation at 20 C.F.R. § 656.30 provides in relevant part:

> (e) Duplicate labor certifications.
>
> (1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request.
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> (2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Office or DHS tracking number.

Counsel asserts on appeal that the director was on notice to obtain a duplicate labor certification from DOL once counsel first asserted that the Nebraska Service Center lost the claimed 2005 filing. Counsel's assertion is unpersuasive. USCIS is under no duty to request a duplicate labor certification from DOL until the petitioner solicits it. *See G&E Florida Contractors, Inc. v. Napolitano,* 2010 WL 894037 (S.D. Fla. 2010).

It is also noted that the regulation at 20 C.F.R. § 656.30(b)(2) provides: "An approved permanent labor certification *granted before July 16, 2007 expires* if not filed in support of a Form I–140 petition with the Department of Homeland Security *within 180 calendar days of July 16, 2007.*" (Emphasis added).

As noted above, the earliest documented Form I-140 petition was filed by the petitioner on October 23, 2008. The instant Form I-140 was filed on September 15, 2010. Both were filed with the same 2003 copy of the Form ETA 750. Even if either of these filings had been submitted with an original labor certification, more than 180 days passed after July 16, 2007 and prior to the filing of this or any petition with USCIS. As the filing of the instant case was after 180 days of July 16, 2007, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

On appeal, counsel asserts that the director should have accepted the copy of the Form ETA 750 in this filing of the Form I-140, as well as previous filings, in lieu of the original labor certification, pursuant to the June 1, 2007, USCIS (HQ 70/6.2) Interoffice [redacted] "Interim Guidance Regarding the Impact of the Department of Labor's (DOL) final rule, *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests," (hereinafter [redacted] Specifically [redacted] states that "USCIS will continue to accept amended or duplicate Form I-140 petitions that are filed with a copy of a labor certification that is expired at the time the amended or duplicate Form I-140 petition is filed, *if the original approved labor certification was filed in support of a previously filed petition during the labor certification's validity period.*" (Emphasis added) In this case, however, as noted above, the petitioner has not submitted sufficient evidence that the original approved labor certification was ever submitted in support of a previously filed Form I-140.

As the labor certification is expired, the petition is not accompanied by a valid labor certification, and for this additional reason, this office lacks jurisdiction to consider the appeal from the director's decision.

Even if the AAO had jurisdiction to accept the appeal, it is observed that the petitioner failed to establish its continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).[5]

[5]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

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 DOL. *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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the copy of the Form ETA 750 indicates that it was accepted on April 25, 2001, which establishes the priority date. The proffered wage as stated on the Form ETA 750 is $3,789 per month, which amounts to $45,468 per year.[6]

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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, it is claimed on the Form I-140 (as well as the previous Form I-140s) that the beneficiary has no social security number. The petitioner, however, has submitted copies of Wage and Tax Statements for 2002, 2003, 2004, 2005, 2006, 2007,

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> 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.

[6] The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in December 1995 and to currently employ 38 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the copy of the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary claims to have worked for the petitioner since September 1997 to present (date of signing April 21, 2001.)

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) 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'l Comm'r 1967).

and 2009 to an individual claimed to be the beneficiary with a social security number of xxx-xx-x967. Additionally, corresponding copies of individual tax returns claimed to have been filed by the beneficiary contain a social security number/tax identification number of [redacted] As this raises doubt as to the employment and payment of compensation to the beneficiary by the petitioner, the amounts set forth on the W-2s cannot be considered as the record currently stands. This discrepancy must be addressed in any further filings. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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, USCIS will next examine the net income figure or net current assets[7] as 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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.[8]

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[7]As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. 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. 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.

[8]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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

In this case, it is noted that the petitioner provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2002, 2004, 2005, 2006, 2007, 2008 and 2009. For 2001 and 2003, copies of Internal Revenue Service (IRS) transcripts were provided. The transcripts, however, show net income only but not net current assets.

- In 2001, the IRS transcript indicated that the petitioner's stated net income was $20,217. No net current assets were indicated. Therefore, the petitioner failed to establish its ability to pay the proffered wage of $45,468 from either net income or net current assets.
- In 2002, the petitioner's stated net income[9] of $32,744 was not sufficient to cover the proffered wage but the petitioner's net current assets of $204,852 were enough to demonstrate its ability to pay for this year.

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 118. "[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).

[9] Where an S corporation's income is exclusively from a trade or business, USCIS 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) line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner

- In 2003, the IRS transcript indicated that the petitioner's stated net income was -$8,775. No net current assets were indicated. Therefore, the petitioner failed to establish its ability to pay the proffered wage of $45,468 from either net income or net current assets.
- In 2004, neither the petitioner's stated net income of -$9,518 nor its net current assets of $35,270 was sufficient to cover the proffered wage or establish its ability to pay for this year.
- In 2005, the petitioner's stated net income was not stated on line 17e of Schedule K, but appeared to be -0-. Its net current assets of $94,266 were sufficient to cover the proffered wage and demonstrate its ability to pay in this year.
- In 2006, 2007, and 2009, the petitioner's net current assets of $166,551 (2006), net current assets of $60,042 (2007) and stated net income of $518,549 (2009) were sufficient to demonstrate the petitioner's ability to pay the proffered wage in these years.
- However, in 2008, neither the petitioner's net income of -$19,004 nor its net current assets of -$50,639 were sufficient to pay the proffered wage of $45,468 or demonstrate its ability to pay in this year.

It is noted that counsel asserts that the petitioner's sole shareholder's other corporate firm's revenue should be able to be considered in reviewing the petitioner's ability to pay the proffered wage in 2008. 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."

For the years 2001, 2003, 2004 and 2008, the petitioner did not have sufficient net income or net current assets to pay the proffered wage. Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, 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.[10]

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had additional income, credits, deductions, or other adjustments as shown on its Schedule K for 2002, 2004, 2005, 2006, 2007, 2008 and 2009, the petitioner's net income is found on Schedule K of its tax return for those years.

[10]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'l 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.

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.[11]

ORDER: The appeal is rejected.

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, similar analogous unique circumstances to Sonegawa have not been presented. The petitioner did not submit evidence of net current assets for 2001 and 2003 and reported losses in both categories in 2008. Further, the petitioner filed a Form I-140 for another beneficiary in July 2004. That beneficiary gained permanent residence in November 2006. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. Without additional information about this beneficiary such as payment of wages and his proffered wage, it is unclear how this would affect the petitioner's ability to pay the instant beneficiary.

[11] Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner failed to submit this evidence in any of its three Form I-140 filings.

In this case, the labor certification states that the offered position requires two years of work experience in a related occupation defined as a crew foreman. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) The record contains no employment verification letters.