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

[redacted]

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DATE: DEC 19 2012 Office: TEXAS SERVICE CENTER File: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[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, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a laboratory equipment sales and service business. The petitioner seeks to employ the beneficiary permanently in the United States as a technician. As required by statute, the petition is accompanied by 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 established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to 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.

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 either 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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $640.00 weekly based upon a 35 hour work week ($33,280.00 per year). The Form ETA 750 states that the position requires eight years of grade school education and one year of training and one year of work experience in the job offered.

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 and on motion.[1]

The evidence in the record of proceeding shows that the petitioner was structured as an S corporation from 2001 to 2003, and has been structured as a single member Limited Liability Company since 2004. On the petition, the petitioner claimed to have been established in 1995 and to currently employ three workers. On the Form ETA 750, signed by the beneficiary on April 12, 2001, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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, 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. Comm. 1967).

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. The petitioner did not submit any evidence of wages paid to the beneficiary in 2001, 2002, and 2003. The record of proceeding contains copies of IRS Forms W-2, Wage and Tax Statements, issued to the beneficiary by Jendalab Products LLC (JP LLC) as shown in the table below:

- In 2004, the IRS Form W-2 stated total wages of $14,266.75 (a deficiency of $19,013.25).
- In 2005, the IRS Form W-2 stated total wages of $24,568.82 (a deficiency of $8,711.18).
- In 2006, the IRS Form W-2 stated total wages of $27,112.49 (a deficiency of $6,167.51).
- In 2007, the IRS Form W-2 stated total wages of $28,700.90 (a deficiency of $4,579.10).
- In 2008, the IRS Form W-2 stated total wages of $32,579.96 (a deficiency of $700.04).
- In 2009, the IRS Form W-2 stated total wages of $33,618.00.

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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 at 8 C.F.R. § 103.2(a)(1).

Therefore, the petitioner has failed to establish its ability to pay the entire proffered wage in 2001, 2002, and 2003 through wages paid to the beneficiary; or its ability to pay the difference between wages paid to the beneficiary and the proffered wage in 2004, 2005, 2006, 2007, and 2008.

If, as in this case, 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 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, the petitioner showing that he 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. *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).

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).

The proffered wage is $33,280.00. The petitioner's predecessor is named Jenda Scientific Inc. on the IRS Forms 1120S. The predecessor's Forms 1120S[2] tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120S stated net income of $12,430.00.
- In 2002, the Form 1120S stated net income of $17,176.00.
- In 2003, the Form 1120S stated net income of $19,416.00.

Therefore, for the years 2001, 2002, and 2003, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary. It is noted that although the petitioner submitted it predecessor's Forms 1120S for the 2004 and 2005 tax years, the record of proceeding shows that Jenda Scientific Inc.'s business transferred to Jendalab Products LLC in 2004. In addition the record contains evidence which shows that the beneficiary was paid wages in 2004 and 2005 by Jendalab Products LLC; therefore, the Schedules C to the petitioner's owner's IRS Forms 1040 for 2004 and 2005 will be considered by the AAO. Regardless, even if the AAO were to consider the net income amounts from Jenda Scientific Inc.'s tax return for 2004, the amount is insufficient to demonstrate its ability to pay the difference between the wages actually paid to the beneficiary and the proffered wage in that year.

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.[3] A corporation's year-end current assets are

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[2] 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) 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.).

[3] 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

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. In the instant matter, the petitioner failed to provide copies of the predecessor's Form 1120S, Schedules L; therefore, the petitioner has failed to demonstrate its predecessor's ability to pay the proffered wage through its net current assets in 2001, 2002, and 2003.

As evidence of its ability to pay the proffered wage, the petitioner submitted a copy of its Schedule C of the single member's Form 1040 income tax returns for 2004, 2005, 2006, 2007, and 2008. The proffered wage is $33,280.00. The AAO notes that the petitioner is a limited liability company (LLC). As such, the LLC's liability is limited to his initial investment. The business entity's net income is taken from its IRS Form 1040, Schedule C, at line 31. The petitioner's tax returns stated its net income as follows:

- In 2004, the Form 1040 at Schedule C stated net income of -$46,984.00.
- In 2005, the Form 1040 at Schedule C stated net income of -$17,197.00.
- In 2006, the Form 1040 at Schedule C stated net income of $50,574.00.
- In 2007, the Form 1040 at Schedule C stated net income of $69,252.00.
- In 2008, the Form 1040 at Schedule C stated net income of $71,083.00.

Therefore, for the years 2004 and 2005, the petitioner has failed to establish that it had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage.

It is also noted that as a single member LLC, its net current assets are taken from audited balance statements, when such is provided by the petitioner. Here, the petitioner failed to provide audited financial statements. Therefore, for the years 2004 and 2005, the petitioner has failed to establish that it had sufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage.

Accordingly, from the date the labor certification was accepted for processing by the DOL, the petitioner had 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.

On motion, counsel asserts that based upon the totality of the circumstances, the petitioner has established his ability to pay the proffered wage in the relevant years.

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. The petitioning entity in *Sonegawa* had been in business for over 11 years and

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(such as taxes and salaries). *Id.* at 118.

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.

Counsel asserts that the petitioner has cash balances and assets sufficient to pay the proffered wage. In support of this claim, the petitioner submitted copies of the petitioning company's Money Market statements which counsel asserts exceeds the proffered wage for all years except 2007; and submits a copy of a company held Certificate of Deposit for 2007 which counsel asserts, coupled with wages paid to the beneficiary in that year ($28,700.90), exceeds the proffered wage for that year.

Contrary to counsel's claims, in 2001, 2002, and 2003, the petitioner's predecessor was classified as an S corporation. The S corporation's assets will not be considered in the determination of the petitioner's ability to pay the proffered wage during that time period. An S corporation must conform to state laws that specify how a corporation is formed and operated. It is a separate legal entity from its shareholders. Under state law, the S corporation shields its shareholders from personal liability for the debts of the business, while the sole proprietor is personally liable for the debts of the business. Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders 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 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." See *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

Furthermore, 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 M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning company's ability to pay the proffered wage.

With regard to the money market statements for the remaining years, such assets are not readily liquefiable assets. Further, it is unlikely that a petitioner or member would sell such significant business assets to pay the beneficiary's wage. The petitioner also submitted as evidence a copy of the company's Certificate of Deposit (CD) statements and the sole owner's Individual Retirement Account (IRA) statements for 2001 through 2008. However, it is unlikely that a sole proprietor would withdraw funds from such pension accounts, subjecting himself to penalties and early withdrawal fees, in order to pay the beneficiary's salary. USCIS may reject a fact stated in the petition that it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Regardless, even if the AAO were to consider the CD account balances for 2004 onward, it would be insufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2004.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa*. The record is devoid of evidence pertaining to the petitioner's business reputation. The petitioner has not demonstrated any uncharacteristic business expenses or losses which made 2001, 2002, 2003, 2004, or 2005 unusually difficult or unprofitable years. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage. Overall, the record is not persuasive in establishing that the job offer was realist.

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). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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, Madany* 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 labor certification states that the offered position requires eight years of grade school, one year of training and one year of experience in the job offered, technician. On the labor certification, the beneficiary claims to qualify for the offered position based on his experience as a technician.

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 an employment letter from Jorge Ortiz Bazurto, manager of ProenZimas, who stated that the company employed the beneficiary as a technician from February 1994 through December 1998. Contrary to the employment letter, the beneficiary indicated on the Form ETA 750 that he was employed by Importaciones & Esxportaciones Company as a technician from February 1994 to December 1998. This inconsistency casts doubt on the petitioner's proof. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). Furthermore, the ProenZimas letter does not specifically describe the beneficiary's duties as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). Finally, the record is devoid of evidence of the beneficiary having received one year of pertinent training. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The evidence in the record does not establish that the beneficiary possessed the required training or experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 AAO's prior decision, dated November 17, 2009, is affirmed. The petition remains denied.