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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 0 4 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 (the director), and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a gas station and convenient store.[2] It seeks to employ the beneficiary permanently in the United States as a foreign specialty cook. The director denied the petition, finding that the petitioner failed to establish that it has the continuing ability to pay the proffered wage from the priority date of the visa petition.

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

As set forth in the director's April 24, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.[3]

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] The AAO notes that the petitioner filed two Forms I-290B, Notice of Appeal or Motion, after the director denied the petition on January 26, 2010. One I-290B was received on February 25, 2010; and the other on March 1, 2010. The director accepted the February 25, 2010 appeal and forwarded it to the AAO and rejected the other as untimely filed.

[2] We note that the petitioner identified the type of business on the Form I-140 petition as "Food and Gas," but it listed the nature of its business activity on the Form ETA 750 Application for Alien Employment Certification as "Restaurant." Based on the tax returns submitted, we conclude that the petitioner is an operator of [redacted] gas station with a small eatery place.

[3] 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).

> *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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the Department of Labor (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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the instant proceeding, the Form ETA 750 was filed for processing and accepted by DOL on April 30, 2001. The proffered wage specified on the Form ETA 750 is $10 per hour or $20,800 per year. The Form ETA 750 states that the position requires a minimum of two years of work experience in the job offered.

To show that the petitioner has the continuing ability to pay $10 per hour or $20,800 per year from April 30, 2001, it submitted the following evidence:

- A copy of its Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, for 2002;
- Copies of its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for the years 2003 through 2008;
- IRS Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary for 2006; and
- IRS Forms 1040EZ, Income Tax Return for Single and Joint Filers with no Dependents, filed by the beneficiary for the years 2005 and 2006.

The petitioner also submitted these tax returns as evidence of the petitioner's ability to pay:

- Copies of IRS Forms 1120S filed by [redacted] for the years 2000 and 2002;
- IRS Forms 941 filed by [redacted] for tax periods March 31, 2001; June 30, 2001; September 30, 2001; and December 31, 2001;
- Bank statements of [redacted] for 2001;
- IRS Forms 1220S filed by [redacted] for the years 2000 through 2002;
- IRS Forms 1120S filed by [redacted] for the years 2000 through 2002; and

- IRS Forms 1040, U.S. Individual Income Tax Return, filed by [redacted] and [redacted] for the years 2000 through 2003.

The petitioner noted that those businesses above are partly owned by [redacted], who along with his wife own 70% of the petitioning business.

On appeal to the AAO, the petitioner submits the following additional evidence:

- A letter dated February 15, 2010 from the petitioner's certified public accountant urging this office to consider net income of the petitioner and [redacted] without including depreciation expenses; and
- Various documents relating to the real property where the petitioner's business is located.

On the petition, the petitioner claimed to have been established on October 15, 2001, to currently employ four workers, and to have gross annual income and net annual income of $1,767,898 and $248,664, respectively. The petitioner's tax returns indicate that it was structured as a corporation in 2002 and as an S Corporation from 2003 onwards and that its fiscal year is the calendar year.[4]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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.

In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in April 2001 or

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[4] The AAO notes that even though the petitioner's organizational structure changes in 2003, its Federal Employer Identification Number (FEIN) remained the same. As such, we will accept and consider all of the petitioner's tax returns in the record.

subsequently. Based on the evidence submitted, the beneficiary only received $6,500 in 2006 from the petitioner, which is $14,300 less than the full proffered wage of $20,900 per year.

Further, we cannot accept the beneficiary's individual tax returns (IRS Forms 1040EZ for the years 2005 and 2006) as evidence of the petitioner's ability to pay, because we do not know how much of the amount shown under wages, salaries, and tips of the beneficiary's IRS Forms 1040EZ, if any, represented the beneficiary's earnings from the petitioner.

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 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). 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. *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 record before the director closed on March 31, 2009 with the receipt by the director of the petitioner's submissions in response to the director's Request for Evidence (RFE) dated February 17, 2009. As of that date, the petitioner's 2008 federal income tax return was the most recent return available. The petitioner's tax returns demonstrate its net income (loss) for the years 2002 through 2008, as shown below:[5]

Tax Year	*Net Income (Loss) – in $*	*Proffered Wage – in $*
2002[6]	(20,392)	20,800
2003[7]	(13,131)	20,800
2004	(8,846)	20,800
2005	(6,624)	20,800
2006	11,212	20,800
2007	(18,065)	20,800
2008	(6,577)	20,800

Therefore, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage in any of the relevant years as shown above.

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[5] The petitioner filed IRS Form 1120 in 2002, and IRS Form 1120S from 2003 onwards.

[6] For a C corporation (2002), USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

[7] For an S Corporation (2003-2008), 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 if the S corporation's income is exclusively from a trade or business. 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 (2003) line 17e (2004-2005) line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2007, at http://www.irs.gov/pub/irs-prior/i1120s--2007.pdf (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income is found on line 23 (2003), line 17e (2004-2005), and line 18 (2006-2008) of schedule K.

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.[8] 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. The petitioner's tax returns demonstrate its end-of-year net current assets for the years 2002 through 2008, as shown below:

Tax Year	*Net Current Assets – in $*	*Proffered Wage – in $*
2002	345	20,800
2003	64,593	20,800
2004	55,333	20,800
2005	94,217	20,800
2006	112,755	20,800
2007	121,593	20,800
2008	118,275	20,800

Therefore, the petitioner had sufficient net current assets to pay the beneficiary's proffered wage from 2003 to 2008. Based on the net income and net current asset analysis above, the AAO agrees with the director that the petitioner does not have the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives legal permanent residence, especially in 2001 and 2002.

On appeal, counsel for the petitioner urges the AAO to consider the tax returns filed by in 2000 and 2002 as evidence of the petitioner's ability to pay. Counsel claims that initially filed the labor certification application for the beneficiary before the business changed its name to (the petitioner). According to counsel, the owner of changed his business plan in 2001 and decided to wind down and started another business. The assertions of counsel 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).

We note that the labor certification application (Form ETA 750) and the petition (Form I-140) were both filed by not Hence, the AAO considers to be the petitioner, not 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'r

[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.

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).

Further, the record does not include any evidence showing that the petitioner was previously known as or that changed its name to in fact based on the evidence submitted and counsel's statement about the winding down of we conclude that the petitioner and are two distinct and separate business entities.

For this reason, we cannot and will not consider the tax returns of or other documents submitted from i.e. IRS Form 941 for 2001 and bank statements as evidence of the petitioner's ability to pay, even though both companies appear to be partly owned by Mr. . USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners 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). 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 same reason stated above, we also cannot and will not accept and consider tax returns of other companies partly or wholly owned by Mr. as evidence of the petitioner's ability to pay. Nor will we accept and consider the individual tax returns of Mr. as evidence of the petitioner's ability to pay.

On appeal, counsel states that depreciation should not be included in calculating the petitioner's net income.

The AAO declines to accept counsel's statement as persuasive, as the court in *River Street Donuts* has held that depreciation represents an actual cost of doing business – "a real expense" – and thus, it should not be added back to boost or reduce the company's net income or loss. *River Street Donuts* at 118.

On appeal, the petitioner submitted various documents showing that Mr. and his wife, the majority owners of the petitioner, own the real property where the petitioner is located. A review of these documents shows that Mr. and Mrs. lease the real property to the petitioner for business activities. Counsel states that Mr. and Mrs. never collect any rent from the business, nor do they pay any mortgage to the bank (lender). The business itself (the petitioner) pays the mortgage, according to counsel, as it is shown in the petitioner's tax returns. For this reason, counsel contends that the AAO must consider the real property as evidence of the petitioner's ability to pay.

Upon *de novo* review, the AAO finds that the real property in this case is not an asset that is readily convertible into cash. Further, it is unlikely that the petitioning corporation or its owner would sell the property to pay the beneficiary's wage. 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).

Finally, 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 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.

Unlike *Sonegawa*, the petitioner in this case has not provided any evidence reflecting the company's reputation or historical growth since its inception. Nor does it include any evidence or detailed explanation of its milestone achievements. Similarly, the tax records submitted do not reflect the occurrence of an uncharacteristic business expenditure or loss that would explain the petitioner's inability to pay the proffered wage particularly from 2001 to 2006.

Assessing the totality of the circumstances in this individual case, the AAO determines that the petitioner has failed to meet its burden of proving by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence.

Beyond the decision of the director, the AAO notes that the Form ETA 750 submitted along with the petition is not stamped, and thus, (probably) not certified, by the DOL. The director issued a

Request for Evidence on February 17, 2009 advising the petitioner to submit an original Form ETA 750 certified by the DOL. In response, counsel for the petitioner responded stating:

> We regret to inform the Service [USCIS] that the Petitioner has already submitted the original Form ETA 750, Application for Alien Employment Certification, certified by the Department of Labor with her original I-140 submission in 2003. Therefore, we are unable to provide the Service with the original Application for Alien Employment Certification certified by the Department of Labor.

The director accepted counsel's explanation and adjudicated the petition as if the Form ETA 750 were certified by the DOL. Upon review of the entire record, this office does not find the original Form ETA 750 certified by the DOL and suspect that the Form ETA 750 probably was never certified by the DOL. Not only that the Form ETA 750 was not stamped by the DOL, but we also observe that the petitioner's business did not exist at the time the Form ETA 750 was submitted on April 30, 2001.[9] No evidence of record shows that the petitioner existed in any type of business form before June 2002.[10]

The regulation at 8 C.F.R. § 204.5(a) specifically states that a petition filed under section 203(b) of the Act (all employment-based petitions) must be accompanied by a required individual labor certification to be considered properly filed. As the petition in this case was apparently not accompanied by a required certified individual labor certification, the petition was therefore improperly filed, and should have been rejected in the first place. However, as the director had accepted the labor certification as if it were certified by the DOL, we will not reject the appeal, but the issue relating to the certification of the Form ETA 750 must be resolved before we can adjudicate the matter in any future proceeding following this appeal.

The appeal will be dismissed 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.

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[9] The petitioner was incorporated on June 26, 2002. This information is based on the tax returns submitted, and it is consistent with the information from the website of the Illinois Department of State, Corporations Division (http://www.ilsos.gov/corporatellc/index.jsp) (last accessed March 26, 2013).

[10] Counsel stated in her appellate brief that Mr. [redacted] dissolved [redacted] on April 1, 2002 and started the petitioner's business – the gas station business – in June 2002.