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: AUG 2 0 2013 OFFICE: VERMONT SERVICE CENTER [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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth M'Connack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The approval of the employment-based immigrant visa petition was revoked by the Director, Vermont Service Center (the director). The petitioner appealed the revocation to the Administrative Appeals Office (AAO), and, on September 21, 2009, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reconsider or reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reconsider or reopen will be dismissed; however, the AAO reopened the applicant's case *sua sponte.* The AAO's decision will be affirmed.

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* In this matter, the motion was properly filed on November 2, 2009, 42 days after the AAO's September 21, 2009 decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record. As the record does not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the motion is untimely and must be dismissed for that reason.

The applicant's motion is untimely; however, since the petitioner was not afforded an opportunity to rebut the AAO's finding that it failed to establish the ability to pay the proffered wage, the AAO reopened the petitioner's case *sua sponte*. On February 1, 2013, the AAO notified the petitioner that the immigrant visa petition was reopened *sua sponte* and provided the petitioner 30 days to submit evidence to rebut the finding that it failed to establish the ability to pay the proffered wage. On February 28, 2013, counsel submitted a brief; correspondence from [redacted] incorporation documents for Wendon; public domain information about the petitioner and [redacted] tax returns; and copies of Internal Revenue Service (IRS) Form W-2, Wage and Tax Statements, for the beneficiary.

The petitioner is a sheet metal fabricating business. It seeks to employ the beneficiary permanently in the United States as a sheet metal fabricator. 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 burden of proof required to establish that the beneficiary's marriage was *bona fide* at its inception and was not entered into for the purpose of evading the immigration laws of the United States under section 204(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1154(c), had not been met. Thus, the director revoked the petition's approval. On appeal, the AAO determined that the beneficiary did not enter into a marriage since the marriage documents were fraudulent and therefore the beneficiary, could not be found to have entered into a sham marriage in order to evade immigration laws; however, the AAO determined that the beneficiary is inadmissible for fraud pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), and that the petitioner had failed to establish its ability to pay the proffered wage. 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.

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:

> *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 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 Form ETA 750 was accepted on January 14, 1998. The proffered wage as stated on the Form ETA 750 is $23.00 per hour ($47,840.00 per year). The Form ETA 750 states that the position requires four (4) years of experience in the proffered position or alternate occupation.[1]

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 motion.

The evidence in the record of proceeding indicates that the petitioner is a sole proprietorship. On the petition, the petitioner claimed to have been established in 1965, to have a gross annual income of $2,000,000.00, and to currently employ 22 workers. On the Form ETA 750B, signed by the beneficiary on December 18, 1997, the beneficiary claims to have worked for the petitioner since January 1997.

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, USCIS

[1] The Form ETA 750 does not identify the acceptable alternate occupation(s).

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).

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 Internal Revenue Service (IRS) Forms W-2 submitted on motion stated the following compensation:

- Compensation of $40,496.73 in 1998.
- Compensation of $41,062.24 in 1999.
- Compensation of $43,638.05 in 2000.
- Compensation of $40,503.82 in 2001.
- Compensation of $44,513.06 in 2002.
- Compensation of $41,642.14 in 2003.
- Compensation of $42,883.39 in 2004.
- Compensation of $52,819.32 in 2005.
- Compensation of $44,414.83 in 2006.
- Compensation of $46,154.58 in 2007.
- Compensation of $47,959.19 in 2008.
- Compensation of $57,295.06 in 2010.
- Compensation of $52,595.82 in 2011.
- Compensation of $53,486.40 in 2012.

The beneficiary's Forms W-2 issued by the petitioner bear a social security number (SSN) associated with another individual for years 1998 through 2001 and an individual taxpayer identification number (ITIN) for year 2002. As such, the Forms W-2 do not show that the petitioner actually paid the instant beneficiary the proffered wage or a partial proffered wage in 1998 through 2002. The record contains a letter from the beneficiary admitting to the IRS that he had utilized XXXX[2], another person's Social Security Number (SSN), and at [redacted], on some

[2] The beneficiary's Forms W-2 issued by the petitioner for 1998 through 2001 bear a SSN belonging to another person. If the petitioner wishes to establish partial payment of the proffered wage in 1998 through 2001, in any further filings, the petitioner must submit evidence to establish that the SSN was issued to the beneficiary by the Social Security Administration (SSA) or that the wage was actually paid to the instant beneficiary.

[3] The beneficiary's Form W-2 issued by the petitioner for 2002 bears an ITIN. An ITIN is a tax-processing number issued by the IRS to those individuals who do not have a SSN for filing tax returns and other tax-related documents. The petitioner failed to submit documentation to establish that the ITIN listed on the Form W-2 was validly issued to the beneficiary by the IRS, or other evidence which shows that the petitioner actually paid the instant beneficiary the $44,513.06 indicated on the 2002 Form W-2.

of his Forms W-2 and tax returns. The beneficiary indicated that he had contacted the Social Security Administration (SSA) who had reissued the Forms W-2 under the SSN assigned to the beneficiary by the SSA, however, the record does not contain those documents or confirmation that the salaries paid to were indeed paid to the beneficiary.

Therefore, for the years 2005, 2008, and 2010 through 2012 the petitioner has established that it employed and paid the beneficiary the full proffered wage.[4] The petitioner has established that it paid the beneficiary partial wages in 2006 and 2007. Since the proffered wage is $47,840.00 per year, the petitioner has to establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2003, 2004, 2006 and 2007, which is $6,197.86 in 2003, $4,956.61 in 2004, $3,425.17 in 2006; and $1,685.42 in 2007. For the years 1998 through 2002 and in 2009, the petitioner has not established that it employed and paid the beneficiary the full or partial proffered wage.[5]

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner failed to submit any evidence which would illustrate the sole proprietor's adjusted gross income, yearly household expenses and thus the sole proprietor's ability

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[4] Forms W-2 reflect that the wages in 2005, 2008 and 2010 through 2012 were paid to a Social Security Number (SSN) issued to the instant beneficiary.

[5] Even if the petitioner established that the wages claimed on all of the Forms W-2 were actually paid to the instant beneficiary, for the years 1998 through 2004, the petitioner would only have established that it paid partial wages in those years. Since the proffered wage is $47,840.00 per year, the petitioner would have to also establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1998 through 2004, which is $7,343.27 in 1998; $6,777.76 in 1999; $4,201.95 in 2000; $7,336.18 in 2001; $3,326.94 in 2002; $6,197.86 in 2003; and $4,979.32 in 2004.

to pay a proffered wage. 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)). Accordingly, for the years 1998 through present the petitioner did not establish that it had sufficient adjusted gross income to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage plus the sole proprietor's yearly household expenses.

In addition, USCIS records indicate that the petitioner has filed at least one other petition, including an I-140 petition on behalf of another beneficiary. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The evidence in the record does not document the priority date, proffered wage or wages paid to the beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiary of its other petition.

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. 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 proprietor failed to submit a list of yearly household expenses or tax returns for any of the relevant years, precluding the AAO from making a determination as to whether the petitioner has the ability to pay the proffered wage for those years. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the

proprietor's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

On motion, counsel contends that the petitioner (Stamford) had access to $91,987 in 1998, $113,125 in 2000, $90,103 in 2001, $97,174 in 2002 and $141,246 of net income generated by a company whose business is closely intertwined with Counsel submits a letter from is a sole proprietorship which was owned by an individual up until 2001 and then owned by the individual's estate thereafter. The letter states that the same individual and her estate held controlling shares in . Counsel argues that the financial condition of both companies is most accurately reflected in corporate tax return, which establishes the ability to pay the proffered wage. There is no evidence in the record and there are no public records establishing that " are the same entity or that the has been doing business as " In fact, counsel freely admits that Wendon is a separate corporation from sole proprietorship.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of a 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'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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. Therefore, it follows that net income cannot be considered in determining ability to pay the proffered wage.[7]

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job

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[6] Current incorporation documents reflect that " was incorporated in Connecticut in 1961 and is located at the same address listed for the petitioner and has been issued a FEIN separate from that issued to the petitioner and listed on the Forms W-2.

[7] Moreover, even if the AAO accepted net income to establish ability to pay the proffered wage, the petitioner has failed to submit copies of all the relevant portions (Page 1, Schedule K and Schedule L) of tax returns for 1999 through the present or documentation of the proprietor's adjusted gross income for any relevant year.

opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.[8]

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. In any further filing the petitioner should address this issue.

Beyond the prior decision of the AAO and 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)(1), (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 four (4) years of experience in the proffered position. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a sheet metal worker for [redacted] from July 1988 to November 1996; and as a sheet metal worker for the petitioner from January 1997 until December 18, 1997, the date on which the labor certification was approved.

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[8] In addition, if [redacted] was the petitioner's successor-in-interest, USCIS records indicate that [redacted] has also filed other petitions, including I-140 petitions on behalf of other beneficiaries. If [redacted] is a successor-in-interest, [redacted] would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence.

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 undated letter from , President, on c. letterhead, which states that the beneficiary started working for the company in July 1988 as machine operator and worked his way up to the position of precision sheet metal fabricator capable of setting up programming and running all machinery by the time he left the company in October 1996; however, the letter does not provide a sufficiently detailed description of the beneficiary's duties and experience, indicating over what periods of time he performed those duties or state whether the beneficiary was employed on a full time basis.

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. *See* 20 C.F.R. § 656.21(b)(5) [2004]. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirement for the offered position is four (4) years of experience in the job offered and that experience in an alternate occupation is not acceptable. In the instant case, the beneficiary did not represent on Form ETA 750, Part B that he had been employed with the petitioner in any position other than the proffered position. As discussed above, in order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton,* 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

The evidence in the record does not establish that the beneficiary possessed the required 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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is denied. The applicant's case is reopened *sua sponte* and the AAO's decision is affirmed. The petition remains denied.