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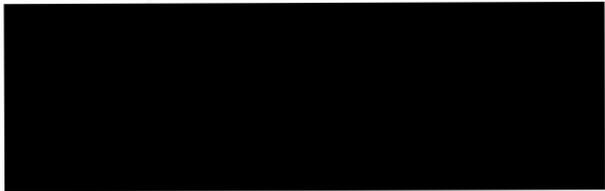


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **DEC 11 2007**
SRC-02-246-50981

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Texas Service Center. The director subsequently revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed and the approval of the petition will remain revoked.

The petitioner is a catering company. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook (cook). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The petitioner filed the instant petition on August 13, 2002 and the director approved the petition on May 30, 2003. In connection with results of the beneficiary's application to adjust status to lawful permanent resident and an interview held at the Orlando District Office, the director subsequently served the petitioner with notice of intent to revoke the approval of the petition (NOIR) on May 26, 2006. In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140) because the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date and failed to demonstrate that a *bona fide* job opportunity is available to U.S. workers in the instant case.

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 July 20, 2006 NOR, the issues in this case are whether or not the petitioner has established its continuing ability to pay the proffered wage and whether or not the petitioner has established that a *bona fide* job opportunity is available to U.S. workers.

On appeal, counsel asserts that the director erred in her review of existing documentation and that the decision is contrary to case law, Citizenship and Immigration Services (CIS) memos and policy. Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). The AAO will review the complete record to determine whether the director had good and sufficient cause to revoke the approval of the petition.

Section 203(b)(3)(A)(i) of 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 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 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 U.S. Department of Labor. *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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$27,300 per year¹). The Form ETA 750 states that the position requires two-year training diploma in cooking and two years of experience in the job offered. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$645,000, to have a net annual income of \$72,000, and to currently employ 3 workers and 27 independent contractors.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal². On appeal counsel submits a brief, a letter dated June 20, 2006 from the petitioner, financial statements of the petitioner for the years 2001 through 2005, corporation documents for Teknik Shipment Dynamics, Inc. and the petitioning corporation, CIS' memorandums, copies of two AAO decisions, an article from Boston Business Journal and printouts from the website at <http://www.ilw.com>. Other relevant evidence in the record includes the petitioner's corporate tax returns for 2001 through 2005 and bank statements of the petitioner's business checking account for the months from May through July 2002, and a 2005 corporate tax return filed by Teknik Shipment Dynamics Inc. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

¹ Based on working 35 hours per week as set forth on the Form ETA 750A. It is noted that the director incorrectly calculated the proffered wage of \$31,200 per year in her NOR. It is also noted that on the petition, the petitioner offered the beneficiary \$560 per week (\$29,120 per year). The petitioner must demonstrate its ability to pay the proffered wage as set forth on the Form ETA 750.

² 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).

On appeal, counsel asserts that the director misused net income in determining the petitioner's ability to pay the proffered wage. The evidence in the record shows that the petitioner in the instant case is [REDACTED], with federal employer identification number 59-3597281; the petitioner is structured as a corporation. The record also contains a copy of a 2005 tax return for [REDACTED]. Counsel claims that the petitioner owns 30 percent of the stock of [REDACTED] (a corporation with federal employer identification number [REDACTED]) and submits corporation documents for both corporations. However, the petitioner did not claim and the record does not contain any evidence showing that [REDACTED] is a part of, the same entity with, or the successor-in-interest to the petitioner. Because a corporation is a separate and distinct legal entity from its 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly in the instant case, the income or assets of [REDACTED] cannot be considered in determining the petitioner's ability to pay the proffered wage. The director's determination that the petitioner did not establish its ability to pay the proffered wage in 2005 based on [REDACTED] tax return for 2005 must be withdrawn. The AAO will determine whether the petitioner had the ability to pay the proffered wage based solely on the petitioner's tax returns and/or other regulatory-prescribed evidence for the relevant years from 2001 through 2005.

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, CIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 beneficiary did not claim to have worked for the petitioner on the Form ETA 750B, however, counsel asserted in response to the director's May 26, 2006 NOIR that the beneficiary had been employed by the petitioner since 2003 and submitted the beneficiary's IRS W-2 forms for 2003, 2004 and 2005 issued by the petitioner. These W-2 forms show that the petitioner paid the beneficiary \$600 in 2003, \$3,022.50 in 2004 and \$9,868.05 in 2005. The petitioner did not submit any IRS 1099-MISC forms or other documents showing the petitioner paid the beneficiary during the relevant years. On appeal counsel asserts that the petitioner offered the beneficiary stock of the petitioner

in the form of compensation in 2005. However, counsel did not document the stock payment. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). In addition, the regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The petitioner may not, therefore, count any offer of stock the beneficiary received during the salient years as evidence of its own ability to pay the proffered wage. The petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$27,300 per year from 2001, the year of the priority date, to 2002, and the difference of \$26,700 in 2003, \$24,277.50 in 2004 and \$17,431.95 in 2005 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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 CIS, 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2000 through 2005. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The petitioner's 2000 tax return is not necessarily dispositive since the priority date in the instant case is April 17, 2001 and the regulation requires the petitioner establish its ability to pay the proffered wage from the priority date. The petitioner's tax returns for 2001 through 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage or difference between wages actually paid to the beneficiary and the proffered wage from the year of the priority date:

- In 2001, the Form 1120 stated a net income³ of \$12,067.
- In 2002, the Form 1120 stated a net income of \$(102,013).
- In 2003, the Form 1120 stated a net income of \$49,575.
- In 2004, the Form 1120 stated a net income of \$23,141.
- In 2005, the Form 1120 stated a net income of \$19,819.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the proffered wage of \$27,300 per year, and for 2004, the petitioner did not have sufficient net income to pay the difference of \$24,277 between wages actually paid to the beneficiary and the proffered wage; however, the petitioner had sufficient net income to pay the difference of \$26,700 in 2003 and \$17,431.95 in 2005 between wages actually paid to the beneficiary and the proffered wage respectively.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ 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.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁴ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets during 2001 were \$12,345.
- The petitioner's net current assets during 2002 were \$0.
- The petitioner's net current assets during 2004 were \$0.

Therefore, for the years 2001, 2002 and 2004, the petitioner did not have sufficient net current assets to pay the proffered wage or the difference between wages actually paid to the beneficiary and the proffered wage.

On appeal counsel argues that because the petitioner's total receipts and assets did not total more than \$250,000 each year, the petitioner was not required to complete Schedule L on the corporate tax return, and that simply because there is no information on the Schedule L does not mean the petitioner has no assets. Counsel submits the petitioner's financial statements for 2001 through 2005 to demonstrate that the petitioner had sufficient net current assets to pay the proffered wage.

Counsel's assertion is misplaced for 2001 because, in fact, the petitioner completed the Schedule L of its 2001 tax return with net current assets of \$12,345 (cash of \$345, other current assets of \$12,000 and no current liabilities reported), however, its net current assets in 2001 were not sufficient to pay the beneficiary the full proffered wage of \$27,300. The petitioner failed to establish its ability to pay for 2001 through the examination of its net current assets. For 2002, the petitioner also completed the Schedule L of its tax return. The petitioner submitted two different versions of the Schedule L, which contain inconsistent information pertinent to the petitioner's assets: other investments of \$11,437 and loans from shareholders of \$103,000 were reported on line 9 in one version while other current liabilities of \$100,000 were reported on line 18 in the other version (with no reported other investments and loans from shareholders). 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). The inconsistencies raise a question whether the petitioner submitted the copies of its tax returns that were filed with the Internal Revenue Service. Furthermore, 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. *Id.* The record does not contain such independent objective evidence to resolve the inconsistencies. Nonetheless, either version of the Schedule L shows that the petitioner did not have sufficient net current assets to pay the full proffered wage of \$27,300 in 2002.

As counsel asserted, the petitioner did not complete the schedule L for its 2004 tax return. Although the petitioner is not required to complete Schedule L of the tax return since its gross receipts was not greater than \$250,000 that year, the petitioner is still obligated to submit regulatory-prescribed evidence to demonstrate that it had sufficient net current assets to pay the beneficiary the proffered wage beginning on the priority date. On appeal counsel submits the petitioner's financial statements for the years 2001 through 2005. However, these financial statements are not audited. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO

cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, these financial statements do not reflect the petitioner's current assets, current liabilities and net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage for 2001, the year of the priority date, 2002 and 2004 through an examination of wages paid to the beneficiary, its net income or its net current assets, although the petitioner established its ability to pay in 2003 and 2005 through wages paid to the beneficiary and its net income.

The record contains bank statements for the petitioner's business checking account covering the months from May to July 2002. Counsel's reliance on the balances in the petitioner's bank checking 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. The submitted bank statements for May through July of 2002 cannot establish the petitioner's ability to pay in 2001 and 2004, and cannot establish the ability in the entire year of 2002. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect net current assets at that time, i.e. additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions), or that were balanced with the petitioner's current liabilities at the same period.

Counsel asserts on appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel's argument concerning the totality of circumstances, cannot be overlooked. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1999 and employs approximately 3 employees. However, its gross income has been between \$13,321 and \$77,412 and it paid salaries and wages of \$600-\$9,868 each year from 2003 to 2005. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its financial strength and viability and has not establish the ability to pay the proffered wage.

Counsel cited *Matter of Sonogawa*, which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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.

Counsel submits an article from [REDACTED] on June 10, 2002 pertinent to terrorist attacks' affects on the catering industry in Boston area. However, counsel did not explain how the article about the Boston area proves the petitioner's business decline in Orlando, Florida. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry and the race of the business owner, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The AAO also notes that the petitioner's tax returns suggest that 2001 was the best year in the context of its gross receipts or sales reported from 2000 through 2005.

Counsel asserts that the petitioner suffered somewhat in the year 2004 as a result of four devastating hurricanes that hit the central Florida area. The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the four hurricanes in 2004, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the location of the petitioner's business, its business was impacted adversely by the hurricanes, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that the years 2001, 2002 and 2004 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner.

Counsel urges the consideration of the beneficiary's continued employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of CIS for failure to specify a formula used in determining the proffered wage. However, no detail or documentation has been provided to explain how the beneficiary's continuing her existing employment as a cook will significantly increase profits for the petitioner. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently

become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel claims that ratio analysis can be used in determining the petitioner's ability to pay if there is negative net income. However, financial ratio analysis is the calculation and comparison of ratios that are derived from the information in a company's financial statements. The level and historical trends of these ratios can be used to make inferences about a company's financial condition, its operations, and attractiveness as an investment. The AAO notes that there is no single correct *value* for a current ratio, rendering it less useful for determinations of an entity's ability to pay a specific wage during a specific period. In isolation, a financial ratio is a useless piece of information.⁵ In addition, counsel provides no evidence of any industry standard that would allow a comparison with the petitioner's current ratio. Further, counsel has not provided any authority or precedent decisions to support the use of ratios analysis in determining the petitioner's ability to pay the proffered wage.

Counsel referred to decisions issued by the AAO, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel also asserts that legacy INS agreed "pledged funds to the petitioner can be considered as part of ability to pay" citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). However, the decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage in 2001, 2002 and 2004. Therefore, the AAO concurs with the director's determination that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date and finds that the director had good and sufficient cause to revoke the approval of the petition.

⁵ The observation that a particular ratio is high or low depends on the purpose for which the ration is being observed. In context, however, a financial ratio can give a financial analyst an excellent picture of a company's situation and the trends that are developing. A ratio gains utility by comparison to other data and standards, such as the performance of the industry in which a company competes. Ratio Analysis enables the business owner/manager to spot trends in a business and to compare its performance and condition with the average performance of similar businesses in the same industry. Important balance sheet ratios measure liquidity and solvency (a business's ability to pay its bills as they come due) and leverage (the extent to which the business is dependent on creditors' funding). Liquidity ratios indicate the ease of turning assets into cash and include the current ratio, quick ratio, and working capital. See *Financial Ratio Analysis*, <http://www.finpipe.com/equity/finratan.htm> (accessed March 21, 2006); *Financial Management, Financial Ratio Analysis*, <http://www.zeromillion.com/business/financial/business/financial/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, http://www.ventureline.com/FinAnal_indAnalysis.asp (accessed March 21, 2006).

Another issue in the instant case is whether the petitioner demonstrated that a *bona fide* job opportunity is available to U.S. workers in the instant case.

In the director's May 26, 2006 NOIR the director requested the petitioner to answer the following question for the time periods prior to and after April 2001:

Is the petitioner is a closely held corporation, partnership or sole proprietorship in which the alien has an ownership interest or is there a familial relationship between the owners, stockholders, partners, corporate officers, incorporators of the petitioner and the beneficiary?

However, counsel responded the director's NOIR with a statement that "[a]s I am unclear as to how the ownership question under the case facts has any bearing to the I-140 bona fides, I would respectfully defer responding until we receive a follow-up request." The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide the answer to the questions. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The answers to the questions in the director's NOIR would have determined a key issue in an employment-based immigrant petition, i.e. whether or not the petitioner demonstrated that a *bona fide* job opportunity is available to U.S. workers. The petitioner's failure to provide answers to those questions cannot be excused. The petitioner failed to demonstrate that a *bona fide* job opportunity had been available to U.S. workers in the instant case because it failed to answer the questions. In addition, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

On appeal, counsel submits a letter from the petitioner to answer the director's questions in her NOIR. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.⁶ Consequently, the appeal will be dismissed.

⁶ The petitioner states that the beneficiary has 40% ownership interest in the petitioner from August 15, 2005 to November 14, 2005 (in the letter dated June 20, 2006).

In view of the foregoing, the AAO concurs with the director's decision and determines that the director had good and sufficient cause to revoke the petition based on the evidence in the record of proceeding which shows that the petitioner failed to establish its continuing ability to pay the proffered wage and failed to demonstrate that a *bona fide* job opportunity had been available to U.S. workers in the instant case.

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 appeal is dismissed. The director's decision on July 20, 2006 is affirmed. The approval of the petition remains revoked.