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U.S. Citizenship
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FILE: [REDACTED]
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Office: TEXAS SERVICE CENTER

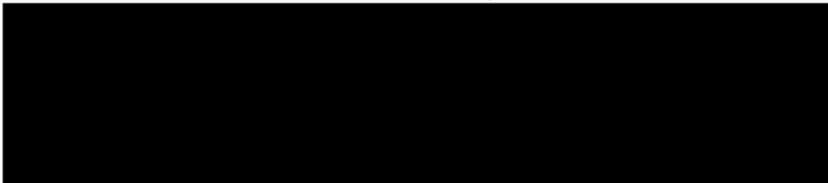
Date: DEC 11 2007

IN RE: Petitioner:
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:



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

The petitioner is a land development, residential and commercial construction company. It seeks to employ the beneficiary permanently in the United States as a residential project manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition and during tax year 2003 based on the petitioner's net income or net current assets. The director denied the petition accordingly.

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 January 11, 2005 denial, the primary 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.

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 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 December 19, 2001. The proffered wage as stated on the Form ETA 750 is \$64,854 per year. The Form ETA 750 states that the position requires six years of grade school, four years of high school, and five years of work experience in the job offered. In Item 15, Other Special Requirements, the Form ETA 750 states the following: "Working knowledge of critical path for governmental approvals and permits in Volusia County, Florida."

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 appeal.¹

On appeal, counsel submits the following documents:

Copies of the petitioner's president's and sole shareholder's Forms 1040, U.S. Individual Income Tax Returns, for tax years 2001 through 2005;

A sworn statement from [REDACTED], the petitioner's president, dated January 4, 2007;

A letter dated December 18, 2006 written by [REDACTED], Certified Public Accountants & Consultants, New Smyrna Beach, Florida. In her letter, Ms. [REDACTED] describes two alternative methods of accounting used by construction contractors, and states that the petitioner's financial statements utilized the completed contract method of accounting;

Copies of bank statements from January 31, 2003 to November 30, 2006 for the petitioner's bank account with Colonial Bank, Birmingham, Alabama. The petitioner's address on these bank accounts is listed as [REDACTED] or [REDACTED] Titusville;^{2 3}

Profit/Loss statements from 2003 for what the petitioner describes as the Winn Plaza Addition and 1048 Clubhouse projects;

Copy of a document filed with the state of Florida Secretary of State on April 25, 2006 entitled "2006 For Profit Corporation Annual Report." This report indicates [REDACTED] New Smyrna Beach, Florida, is the petitioner's president, director and secretary, while [REDACTED], New Smyrna, Florida, is vice-president;

Copy of a document entitled "Employee Journal by Check" along with employee W-2 Wage and Tax Statements and a group invoice for the petitioner's Blue Cross/Blue Shield Group policy for the years 2003, 2004, and 2005. These documents indicate that in tax year 2003, the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² As noted on the cover letter of this decision, the petitioner's address is noted on the I-140 petition filed on March 27, 2006 as New Smyrna Beach, Florida.

³ The petitioner also submitted copies of two monthly statements from a Bank of America checking account, (December 2003 and December 2004) and of a monthly statement for December 2004 for the petitioner's checking accounts held with Harbor Federal, Fort Pierce, Florida, and SouthTrust Bank, Deland, Florida.

petitioner had 15 employees, in tax year 2004, it had 22 employees, and in tax year 2005, it paid wages to 32 employees. The petitioner submitted the same Employee Journal by Check document with Blue Cross/Blue Shield coverage information, minus the employees' W-2 Forms for tax year 2006;

Copy of an unaudited financial statement for December 2003 prepared by [REDACTED] Associates, P.A.. In a cover letter, the accounting firm describes the document as a compiled financial statement;

Copies of various lines of credit or loans made to the petitioner with Mr. [REDACTED], the petitioner's owner and sole shareholder, listed as guarantor. These documents include a signed commitment letter from Harbor Federal Savings Bank, Melbourne, Florida, dated June 20, 2003, to increase an existing Commercial Revolving Construction Line of \$2,000,000 by \$500,000; a letter from South Trust Bank, Deland, Florida for a revolving Builder's Line of Credit Facility for up to \$1,500,000; a loan letter from Harbor Federal dated March 1, 2005 for a \$5,000,000 loan,⁴ and a document annotated "Wachovia Credit Line" that describes a future advance of funds in the amount of \$1,500,000. These latter two documents are not signed, therefore it is not clear whether the petitioner actually completed these transactions. Mr. [REDACTED] is listed as guarantor on these documents. One final signed document is titled "Re: Annual Review-Port/Line #817 and dated May 17, 2006. This document describes the extension of a commercial revolving builder line of credit for another year for projects in the Great Outdoors Development and the Willow Lakes Development, Titusville, Florida, and identifies the guarantor as [REDACTED] and [REDACTED]

The petitioner's Form 1120S for tax year 2005; and

Copies of pages from the Wikipedia website that graphs the path of hurricanes during the 2004 Atlantic hurricane season, and in particular, the paths taken through Central Florida by Hurricanes Charley, [REDACTED]

With the initial petition, the petitioner submitted the following documents:

A letter written by [REDACTED] the petitioner's president dated December 5, 2005;

The petitioner's articles of incorporation filed on July 2, 1987 with the state of Florida Secretary of State;

The city of Smyrna Beach occupational license dated September 30, 2006. This document lists the petitioner's address as 1848 Renzulli Road, New Smyrna Beach, Florida;

A state of Florida Department of Business and Professional Regulation Construction Industry Licensing Board license for the general contractor identified as [REDACTED] with the corporate address listed as [REDACTED] New Smyrna Beach, Florida;

⁴ The corporate address listed on a page entitled "Authorization to Guaranty" apparently submitted with the paperwork for the Harbor Federal loan is [REDACTED] New Smyrna Beach, Florida, the same address listed on the petitioner's I-140 petition submitted to the record.

The petitioner's Forms 1120S for tax years 2003 and 2004;

A sworn affidavit from the beneficiary dated January 13, 2006 that described the beneficiary's work in Berlin Germany from April 1981 to October 1998 as a land development manager, and his ownership and employment with [REDACTED], a land development company in Florida, from July 1996 to November 2002, as well as his present status as owner/operator of [REDACTED], as of November 2002;

A copy of the beneficiary's profit and loss statement and balance sheet for January through June 2005; and

The petitioner's Form 941 for the third quarter of tax year 2005 that indicated the petitioner paid taxable social security wages of \$182,356.39 during this quarter.

In response to the director's request for further evidence, dated April 27, 2006, the petitioner submitted the following documents:

A copy of the petitioner's Forms 1120S for tax years 2001 and 2002;

A copy of the petitioner's unaudited compiled financial statement for tax year 2005;

A letter of support from [REDACTED] dated July 17, 2006 that noted the petitioner's operating loss for tax year 2005, and described the petitioner's income stream as "cyclical";

A copy of the articles of incorporation for [REDACTED], the beneficiary's business in Florida, as well as Forms 1120 corporate income tax returns for [REDACTED], for tax years 1996 to 2000; and

Two pages of the petitioner's president's Form 1040 for tax year 2005.

Counsel, in a cover letter also submitted in response the director's request for further evidence, stated that tax year 2005 had been an aberrational year, but that when accumulated depreciation of \$248,486 are added to the petitioner's assets, current assets exceeded current liabilities by \$245,782. Counsel also referred to a publication, Immigration Law & Procedures, § 43.05(2) that states "depreciation can generally be considered with taxable income in evaluating the ability to pay the additional employee." Counsel also stated that in the case of a sole proprietorship, consideration of the sole proprietor's personal assets and liabilities is allowed. Counsel states that the petitioner is owned solely by Mr. [REDACTED] and that the owner's assets in 2005 were substantially more than the proffered wage. Counsel states that the petitioner's income and expenses flowing through it and being taxed directly to the shareholder is typical for all small to medium size businesses and this indicates that Citizenship and Immigration Services (CIS) should not look only to the corporate entity's ability to pay the proffered wage but also to the substantiality of the sole shareholder. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on October 10, 1994, to have a gross annual income of \$902,000, a net annual income of \$150,000 and to currently employ 18 workers. On the Form ETA 750B, signed by the beneficiary on December 9, 2003, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that since the filing of the I-140 petition, the petitioner has employed no less than 18 persons on a fulltime basis and has provided many employees with exceptional health benefits and maximum-allowed IRA matching contributions. Counsel refers to an interoffice memorandum written by William R. Yates⁵ dated May 4, 2004 and states that this memorandum noted that in certain instances, CIS allows financial statement for small business employers as discretionary evidence. Counsel further states that the memorandum defines discretionary evidence as financial statements such as profit and loss reports, personnel records and bank account records.

Counsel then cites a previous AAO decision, *Matter of ___*, (AAO January 31, 2003), for the proposition that the normal accounting practices of the petitioner must be considered even if the ability to pay is not reflected in a tax return. Counsel states that in this decision, the sole shareholder of a medical corporation routinely minimizes taxable income by taking it as compensation to avoid double taxation, and thus, based on this factor, the net profit on the corporate tax return did not determine the petitioner's ability to pay the proffered wage. Counsel also states that the instant petitioner's industry, namely, the land development and construction business, is cyclical in nature and requires a significant amount of up-front costs and a single corporate return is not a clear or correct indication of the financial health or stability of a petitioner, or of the petitioner's ability to pay the proffered wage. Counsel states that the petitioner used the completed contract method of accounting, which is customary accounting of construction companies, and does not accurately reflect current operating activities.

Counsel also cites *Full Gospel Portland Church v. Thornburg*, 730 F. Supp. 441, 449 (D.D.C. 1988) for the proposition that CIS must consider other sources of income pledged to the petitioner. Counsel also cites another unpublished AAO decision, *Matter of ___*, (AAO July 7, 2004), for the proposition that the AAO examines the totality of the circumstances approach to determine the ability to pay the proffered wage. Counsel states that in the AAO decision, the company's history, its gross income of over \$2 million annually, and the fact that it paid over one million dollars in wages in each of the previous five years were considered even though the petitioner had negative net assets.

Counsel also cites Board of Alien Labor Certification Appeals (BALCA) decision, *Matter of Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the proposition that while the petitioner is not a sole proprietor, the assets of the petitioner's owner and his history of signing personal guaranties on credit lines can be considered.

With regard to the petitioner's ability to pay the proffered wage based on its corporate tax returns, counsel states that in tax year 2001, the petitioner reported an ordinary income of \$67,002 on its 1120S Income Tax Return, a sum greater than the proffered wage of \$64,854. Counsel states that the petitioner thus had the ability to pay the proffered wage in the 2001 priority year. Counsel notes that the director determined that the petitioner had the ability to pay the proffered wage in tax years 2002 and 2004.

With regard to tax year 2003, counsel states that the petitioner's negative net income was due to the completed contract method of accounting and also to two inter-company projects that showed a net loss at year's end. Counsel states under the completed contract method of accounting, the revenue associated with

⁵ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

construction costs is not reflected in operating income until one or two years later, and thus, the completed contract method of accounting is not reflective of current operating activities. Counsel cites a third previous AAO decision, *Matter of X*, EAC 01-018-50413 (AAO January 31, 2003), in which the sole shareholder of a medical corporation routinely minimized taxable income by taking it as compensation to avoid double taxation.

Counsel states that despite the petitioner's 2003 tax return, the petitioner had the ability to pay the proffered wage throughout the year. Counsel refers to a profit/loss statement of the Winn Plaza Addition submitted to the record and states that although this project was begun in 2003 and negatively reflected on the petitioner's corporate return that year, it produced a total income of \$445,245.78 by tax year 2006. Counsel also notes that during this period of construction, the petitioner's regular checking bank account from Colonial Bank shows an average balance of over \$148,000. Counsel notes that this is just one of a number of accounts belonging to the petitioner with significant funds. Counsel also notes that the petitioner paid its employees their wages, provided health care benefits and paid IRA matching contributions. Counsel also asserts that the June⁶ 2003 compiled financial report produced by Belote also shows a profit

Counsel then cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that the totality of the petitioner's circumstances should be considered when examining the petitioner's ability to pay the proffered wage. Counsel states, that similar to the petitioner in *Sonogawa*, the petitioner has been in business over a decade and has established a sound business reputation. Counsel states that Mr. Williams is the recipient of the Walmart Corporation Award-2004 Central Florida Businessman of the Year.

Counsel states that the petitioner has included various probative documents beyond those stipulated at 8 C.F.R. §204.5(g)(2); that clearly show the petitioner's ability to pay the proffered wage. Counsel refers to the tax returns of the petitioner's sole shareholder, and states that Mr. ██████████ personal net income in tax year 2003 shows more than sufficient personal wealth to make any necessary contributions to enable the petitioner to establish its ability to pay the proffered wage. Counsel also notes that the petitioner's gross receipts or sales and total income have remained steady during the relevant period. Counsel notes that the petitioner's Form 1120S tax returns since tax year 2001 show the following gross receipts or sales: \$5,364,718 in 2001; \$6,916,280 in 2002; \$7,141,707 in 2003; \$8,760,683 in 2004; and \$8,555,796 in 2005.

With regard to tax year 2005, counsel states that the petitioner did not establish its ability to pay the proffered wage through its net income, net current assets or through wages paid to the beneficiary. Counsel again states that the petitioner's ability to pay the proffered wage is based on numerous other factors that clearly indicate a financially stable and healthy company. Counsel notes the sole shareholder's adjusted gross income of \$2,522,831 on his 2005 Form 1040, and notes that as the sole shareholder and owner of the petitioner, Mr. ██████████, is fully willing and able to provide capital as needed to pay the proffered wage. Counsel also states that in the context of an S corporation, the fact that the petitioner issued a loan to its shareholder has a direct impact on the petitioner's net asset ratio. Counsel states that in 2005, a construction loan was issued to Mr. ██████████ for the purposes of reducing the petitioner's tax liability,⁷ and that the petitioner realized gross

⁶ The record indicates this compiled financial report was produced in July 2004; however, it examines the petitioner's financial status from January to December 2003.

⁷ The record is not clear as to what construction loan counsel refers. On Schedule L, under other current liabilities, Statement 9 indicates construction loans at the beginning of the tax year of \$5,308,404 and ending construction loan liabilities at the end of the year of \$1,203,515. The record has no further indication of any construction loans or any specific construction loan to the sole shareholder.

receipts or sales of \$8,555,796. Counsel states that the construction loan is a discretionary fund available to the petitioner in the event that ready cash is needed, and that by including the discretionary loan amount when calculating the petitioner's assets, the petitioner's net assets are \$1,163,085. Counsel states that this figure is greater than the proffered wage. Counsel also states that the petitioner's regular checking bank account in 2005 shows an average yearly balance of over \$157,000. Counsel asserts that this one checking account alone never was less than the proffered wage for a single month during tax year 2005.

In conclusion, counsel states that the petitioner has been in business for over ten years and is well established. Counsel notes that the petitioner's industry, namely, land development and construction, has been severely affected by the events of September 11, 2001, by the resulting economic downturn that began as a result of the September 11th attacks and by the result of three devastating hurricanes in Florida in tax year 2004.

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).

On the I-290B form submitted to the record, counsel requests oral argument in the instant petition. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

The AAO notes that counsel asserts several times on appeal that the assets of the petitioner's sole shareholder should be considered when examining the petitioner's ability to pay the proffered wage. Counsel's assertion with regard to the assets of shareholders or owners being considered in these proceedings is not persuasive. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On appeal, counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), a decision that involved an agricultural business that failed to show profits and relied on individual or family assets to establish a sole proprietor's ability to pay the proffered wage. Counsel does not state how the Department of Labor's (DOL) BALCA precedent is binding on the AAO. 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, BALCA 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with an S corporation.

Counsel also refers to an unpublished AAO decision, in which an officer of a medical corporation took compensation in order to lower the corporate tax liability. Based on this decision, counsel states that the petitioner's sole shareholder's assets can be considered when determining whether the petitioner has the ability to pay the proffered wage. Counsel refers to the AAO decision, but does not provide its published citation. 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). Furthermore, in the instant petition, there is no evidence that the sole shareholder utilized officer compensation to lower the petitioner's tax liability.⁸ To the contrary, the record reflects that the sole shareholder is used as a guarantor for the petitioner's various lines of credit and loans, which is a separate issue from the use of officer compensation to lower a petitioner's tax liabilities. As stated previously, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

The AAO notes that counsel cites another unpublished AAO decision on appeal for the proposition that the AAO should examine the totality of the petitioner's circumstances. Counsel states that in this decision, the petitioner's history, its gross income of over \$2 million annually, and that fact that it paid over one million dollars in wages in each of the previous five years were factors considered in determining the petitioner's ability to pay the proffered wage. Again, the unpublished decisions of the AAO are not binding precedent. 8 C.F.R. § 103.9(a). Furthermore, the AAO will consider the totality of the petitioner's circumstances in these proceedings, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), which is a precedent decision and binding on CIS.

Counsel's assertion with regard to *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441,449 (D.D.C. 1988) for the proposition that other sources of funds can be used to pay the proffered wage is also not persuasive. 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). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of an employee. Here, counsel's assertion is that CIS should treat the petitioner's lines of credit, or the use of the sole shareholder as guarantor for the petitioner's lines of credit and loans as evidence of its ability to pay, even though a line of credit creates an expense and a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the instant petitioner's lines of credit and loans.

Counsel's reliance on the balances in the petitioner's bank account is also misplaced. First, as counsel correctly noted, 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

⁸ The AAO notes that the tax returns in the record indicate that no officer compensation was paid in any relevant year.

at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Further on appeal, counsel asserts that the petitioner's depreciation expenses in 2003 should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. In response to the director's request for further evidence, counsel also stated that there was precedent for such an analysis. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. The AAO will discuss more fully this issue when it examines the petitioner's net income.

Counsel also submitted the petitioner's financial statements for 2003 and 2005. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Thus, the petitioner's compiled financial reports are given no weight in these proceedings.

Counsel, on appeal, refers to the impact that a loan to its shareholder has on the petitioner's net asset ratio. The record is not clear whether counsel refers to the concept of financial ratio analysis. 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.⁹

⁹ The observation that a particular ratio is high or low depends on the purpose for which the ratio 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/financial-ratio.html> (accessed March 21, 2006); *Industry Financial Ratios, Financial Ratio Analysis*, http://www.ventureline.com/FinAnal_indAnalysis.asp (accessed March 21, 2006).

Finally on appeal, counsel states that the petitioner used the completed contract method of accounting, which is customary accounting of construction companies, and does not accurately reflect current operating activities. Counsel appears to assert that a different method of accounting would have established the petitioner's ability to pay the proffered wage in tax year 2003. However, this office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, relies on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. For example, if revenues are not recognized in a given year pursuant to the cash accounting, then a petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Thus, counsel's assertion with regard to the specific accounting analysis used by construction companies is not viewed as persuasive.

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 petitioner has not established that it employed and paid the beneficiary during the relevant period of time. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire proffered wage of \$64,854 in all relevant years.

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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. The court 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 director noted in his decision that the petitioner had not established its ability to pay the proffered wage of \$64,458 in the priority year 2001; however he also indicated that the petitioner's net income of tax year 2001 was \$67,002, a sum that is greater than the proffered wage. On appeal, counsel correctly noted that the director's determination of the petitioner's net income for 2001 established that the petitioner had the ability to pay the proffered wage during the priority year. Nevertheless the AAO notes that the petitioner's actual net income in the priority year 2001 and in the subsequent years 2002 to 2004 based on the petitioner's net income identified on Schedule K¹⁰ are lower than the figures stated by the director in his decision. The AAO also notes that the petitioner on appeal submits its corporate tax return for tax year 2005. In its consideration of the petitioner's net income, the AAO will examine all relevant years in question.

- In 2001, the Form 1120S stated a net income of \$64,550.
- In 2002, the Form 1120S stated a net income of \$335,869.
- In 2003, the Form 1120S stated a net income of -\$395,874.
- In 2004, the Form 1120S stated a net income of \$167,134.
- In 2005, the Form 1120S stated a net income of -\$171,047.

Therefore, for the years 2002 and 2004, the petitioner did have sufficient net income to pay the proffered wage of \$64,854. However, the petitioner did not establish its ability to pay the proffered wage as of the 2001 priority year, or during tax years 2003 and 2005. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the instant petition, the petitioner has not established its ability to pay the proffered as of the 2001 priority date.

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

¹⁰Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for priority year 2001, the petitioner's net income is found on Schedule K of its tax return. With regard to tax years 2002, 2003, 2004, and 2005, the petitioner had either additional deductions, losses, deductions, or income and deductions, respectively, thus, the AAO uses the petitioner's net income as identified on line 23 or line 17e of Schedule K.

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.¹¹ 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 net current assets during 2001 were -\$91,887.¹²
- The petitioner's net current assets during 2003 were -\$104,646.
- The petitioner's net current assets during 2005 were -\$80,430.

Therefore, for the years 2001, 2003, and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

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 as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets in the years 2003 or 2005.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the totality of the petitioner's circumstances should be examined when examining the petitioner's ability to pay the proffered wage. Counsel also refers to the petitioner's method of accounting, the existence of a sole shareholder and owner who is willing to put money into the petitioner, the impact of September 11 on the petitioner's business, and the impact of three hurricanes during tax year 2004.

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, 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,

¹¹According 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.

¹² The director in his decision determined that the petitioner's net assets in tax year 2001 were \$1,449,451, which is incorrect. The petitioner's current assets in tax year 2001 were \$1,831,359. Thus the director's determination of the petitioner's net current assets in tax year 2001 is also incorrect. With regard to the director's calculation of the petitioner's net current assets in tax year 2003, the director's calculations are correct; however, in his decision the director failed to note that the petitioner's net current assets were a negative \$104,646. The director's incorrect figures with regard to the petitioner's net current assets in tax years 2001 and 2003 do not alter the ultimate outcome of the appeal.

2001. The AAO also notes that the petitioner's tax returns suggest that 2001 was its best year in the context of its gross receipts.

Neither the petitioner nor counsel provided any further explanation of how the three hurricanes that impacted the state of Florida in 2004 affected the petitioner's business in 2004. As noted by counsel on appeal, the petitioner's 2004 gross receipts were only slightly less than the petitioner's gross receipts in tax year 2005, and higher than its gross receipts in tax year 2003. 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)). Furthermore as stated previously, the ability of the sole shareholder to act as guarantor for the petitioner's lines of credit and loans, both financial instruments considered debts to be repaid by the petitioner, is not considered a source of additional funds with which to pay the proffered wage.

As noted by counsel, *Matter of Sonogawa* 12 I&N Dec. 612 (BIA 1967), 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001, 2003 and 2005 were uncharacteristically unprofitable years for the petitioner. The AAO notes that counsel's and the petitioner's owner's assertions that the construction business operates in a financially cyclical manner appears accurate; however, such a cyclical business operation does not necessarily include negative net income and net current assets, but reduced net income and net current assets. While the I-140 petition indicates that the petitioner has been in business since 1994, the record does not reflect the petitioner's historical growth. Although counsel asserts on appeal that the petitioner has employed no less than 18 persons on a full time basis since the filing of the instant petition, 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). Further, the record does not support counsel's assertion with regard to the petitioner's historic number of employees. With regard to the petitioner's employee benefits, the record also does not record the extension of such benefits to all employees.¹³ Counsel on appeal also asserts that the petitioner's owner received the Walmart Corporation Award, 2004 Central Florida Businessman of the Year;

¹³ The W-2 Forms submitted for the petitioner's employees for tax year 2003 identify 15 employees. Based on the wages reported, several employees appeared to work part-time. The Blue Cross Blue Shield insurance documentation for 2003 submitted by the petitioner to the record identify only eight employees or family members of employees covered under the petitioner's group insurance policy.

however, the record does not contain a copy of the award, nor does the record establish that the petitioner's owner received the award based on his work with the petitioner. As such counsel's assertions with regard to the petitioner's overall circumstances are not persuasive.

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 from the day the Form ETA 750 was accepted for processing by the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the AAO finds that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 petitioner must 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 December 19, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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, Mandany 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 Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of residential project manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------|-----------------|
| 14. | Education | |
| | Grade School | 6 |
| | High School | 4 ¹⁴ |

¹⁴ The AAO notes that there is no evidence of the beneficiary's studies submitted to the record. On Form ETA 750, Part B, the beneficiary stated that he attended Peoples School North from April 1956 to March 1957, doing high school studies, and that he received a high school diploma. However, the record does not

College (Blank)
College Degree Required (Blank)
Major Field of Study (Blank)

The applicant must also have 5 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states special requirements, as follows: "working knowledge of critical path for governmental approvals and permits in Volusia County, Florida."

The beneficiary set forth his educational and work experience credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has worked for a company named [REDACTED] New Smyrna Beach, Florida, as a residential project manager from November 2002 until the date he signed the Form ETA 750, namely December 9, 2003.¹⁵ The beneficiary also stated that he had worked as a Residential Project Manager, from July 1996 to November 2002 for [REDACTED], New Smyrna Beach, Florida. The beneficiary also indicated that he had worked at [REDACTED], from April 1995 to the time he signed the Form ETA 750, Part B, namely December 9, 2003, as the owner, operator of a gift and gallery store. Finally, the beneficiary indicated that he had been self-employed in Berlin, Germany, as a developer, project manager from April 1981 to October 1998. The beneficiary also listed earlier employment positions in Germany that are not relevant in the present proceedings.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In a request for further evidence dated April 27, 2006, the director requested evidence to establish the ownership of the beneficiary's former and current businesses.

In response to the director's request for further evidence, counsel stated that the beneficiary was unable to obtain further evidence with regard to his claimed employment in Germany as a land development/project director, and

contain any evidence of the beneficiary's high school diploma.

¹⁵ The beneficiary indicated in the description of job duties for this job that this company had taken over the real estate development entered into by [REDACTED] when the two companies merged in November 2002.

that the petitioner would use the beneficiary's claimed five years of employment as of July 2001 with [REDACTED] as evidence that the beneficiary possessed the requisite five years of work experience as a residential project developer. The petitioner also submitted copies of corporate income tax returns for the beneficiary's previous business in the United States.

Upon review of the record, the AAO notes that all the corporate income tax returns submitted for the beneficiary's business note that the beneficiary was the 100 percent owner of [REDACTED], and that he devoted 25 percent of his time to the business. As established by these corporate records, the beneficiary would only have one and a half years of the requisite five years of work experience as a residential project manager prior to the December 2001 priority date, based on the claimed six years of employment with [REDACTED]. The beneficiary's earlier self-employment with [REDACTED], would not be relevant to the beneficiary's qualifications for the proffered job as his earlier position involved gift and gallery retail sales. The beneficiary's claimed self-employment with Eclectia, Inc. from November 2002 to December 2003 is not considered relevant as this employment occurred after the 2001 priority date. The AAO also notes that the corporate tax returns indicate very little business activity during the tax years of 1996, and 1997, which would also call into question the amount of relevant previous work experience gained by the beneficiary during his employment with this company. Thus, the petitioner did not establish that the beneficiary has five years of previous work experience as a residential project director.

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.