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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 09 2007
WAC 02 027 57935

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:

SELF-REPRESENTED

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, California Service Center. The beneficiary's Application to Register Permanent Resident or Adjust Status (Form I-485) was then denied on February 17, 2005 for lack of prosecution.¹ The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a rough framing construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter/labor supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. In his revocation notice, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and that the petitioner had not established that the beneficiary had the requisite two years of work experience in the proffered position or in the related position of layout carpenter. The director also stated he was revoking the petition based on inconsistencies in the record. He revoked the petition accordingly.

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 record shows that the appeal is properly filed and 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, as necessary.

As set forth in the director's September 8, 2005 NOR, the three issues in this case are 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; whether the petitioner established that the beneficiary had the requisite two years of work experience stipulated on the Form ETA 750 prior to the 2001 priority date; and whether the petitioner can overcome the inconsistencies noted by the director in his NOR. The AAO will first address whether the petitioner established its ability to pay the proffered wage.

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:

¹ The I-485 interview was postponed twice at the request of counsel due to "unforeseen circumstances" prior to the I-485 petition being denied.

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).

Here, the Form ETA 750 was accepted on April 24, 2001. The proffered wage as stated on the Form ETA 750 is \$29.84 an hour, or \$62,067.20 per year.² The Form ETA 750 states that the position requires two years of experience in the proffered job of carpenter/labor supervisor, or two years in the related occupation of lay-out carpenter.

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 appeal³. On appeal, counsel⁴ submits the petitioner's Federal income tax returns, IRS Forms 1120, for tax years 2001, 2002, and 2003.⁵ Counsel

² Both the director and counsel identify the proffered wage as \$57,293. The AAO took the beneficiary's proposed hourly wage and multiplied it by 2080 annual work hours to arrive at its proffered wage figure.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁴ On October 25, 2007, the BIA ordered [REDACTED] petitioner's counsel at the time of filing the instant I-140 petition who also prepared the petitioner's appeal, immediately suspended after having pleaded guilty to serious crimes related to his immigration law practice. Therefore for purposes of these proceedings, the petitioner is considered self-represented.

⁵ It is noted that these relevant tax returns were not requested by the director in the previous consideration of the instant I-140 petition or during deliberations with regard to the director's intent to revoke the instant petition. In a request for further evidence dated February 16, 2002, the director requested the petitioner's 2000 tax return with all schedules and tables. In response to this request, counsel submitted a copy of the petitioner's tax return for tax year 2000, with Schedule L. As of the date of the petitioner's response, the petitioner would not have had its 2001 tax return available. The petitioner's 2003 tax return was referenced in counsel's response to the director's notice of intent to revoke the petition, but there is no earlier submission of this 2003 tax return found in the record. Therefore since the director submitted no request for further evidence

also submits a state of California DE-6 Quarterly payroll for the third and final quarters of 2004 that indicates the petitioner paid the beneficiary, whose social security number is identified as [REDACTED] \$10,740.60 during the third quarter of 2004 and \$11,037.60 during the final quarter of 2004. Counsel and the petitioner also submitted W-2 forms for the beneficiary for tax years 1998, 1999, 2000, 2001, and 2004.⁷ The petitioner prepared the 1998 W-2 Form submitted which indicates [REDACTED] with social security number [REDACTED] earned \$14,679.20 in 1998. The petitioner also submitted what it claims to be the beneficiary's Form 1040, for the individual named [REDACTED] with a social security number of XXX-[REDACTED] that indicated wages of \$14,679. For tax year 1999, the petitioner submitted evidence that indicated American Employers Group, Inc., Omaha, Nebraska,⁸ prepared a W-2 Form for [REDACTED] and social security number [REDACTED], for wages of \$23,410.⁹

For tax year 2000, the petitioner submitted a W-2 form for [REDACTED] social security number [REDACTED] that indicated that American Employers Group, Inc. paid the beneficiary \$17,992.50.¹⁰ In tax year 2001, the record reflects a W-2 Form prepared by AEG Processing Center No. 35, Inc., Omaha, Nebraska for Adrian Fernandez, social security number [REDACTED] for \$29,716.98.¹¹ For tax year 2004, the record reflects that the petitioner, rather than American Employers Group, Inc., paid the beneficiary, utilizing the

requesting all relevant tax returns, these returns are accepted on appeal.

⁶ Counsel in its response to the NOIR and on appeal correctly notes that the director incorrectly identified the beneficiary's social security number on the 2004 DE-6 Forms, by using the social security number of the employee listed above the beneficiary on the DE-6 form. As stated, the actual social security number used by the beneficiary in the DE-6 Forms is [REDACTED].

⁷ The record does not contain any evidentiary documentation as to any wages paid to the beneficiary by the petitioner using either the name [REDACTED] or [REDACTED] in tax years 2002 and 2003. Based on a Lexis.Nexis search of the California Contractors State License Board, Department of Consumer Affairs, the petitioner was not in good standing and had an expired contractor's license as of July 31, 2002 and December 31, 2002, which may explain the lack of 2002 wages. See <https://w3.nexis.com/lawenfsolutions-secured/RptGen/SourceRpt.aspx>.

⁸ On appeal, counsel appears to state that American Employers Group, Inc., as a union, paid the beneficiary's wages in 1999, among other years. However, the W-2 forms prepared by the American Employers Group Inc. do not establish that a union was paying the petitioner's employees' salaries. According to the website of Applied Underwriters, the parent company of American Employers Group, Inc. seen at <http://applieduw.com> on March 26, 2007, is a workers' compensation and financial services company, founded in 1994, headquartered in San Francisco, California, and conducting business nationwide. Its subsidiary, American Employers Group Inc., offers an integrated package for small- to mid-sized companies that includes workers' compensation insurance, employment practices liability insurance, payroll processing, coverage warranties, and loss control services. Thus, the W-2 Forms submitted by the petitioner that were issued by American Employers Group, Inc. do not establish that the petitioner paid these wages to the beneficiary.

⁹ The record contains a Form 1040A, with social security number [REDACTED] that indicates this individual earned \$23,410 in tax year 1999.

¹⁰ An IRS Form 1040A for is also submitted to the record and indicates that [REDACTED], with social security number [REDACTED] earned \$17,993 in tax year 2000.

¹¹ The record also contains a Form 1040A prepared for [REDACTED] social security number [REDACTED], that indicates this individual earned \$29,717 in 2001.

social security number [REDACTED], \$38,522.95 in wages.¹² The AAO will address these W-2 forms further in these proceedings when discussing the petitioner's ability to pay the proffered wage and the beneficiary's qualifications. Finally counsel in response to the director's request for further evidence dated February 16, 2002, submitted the petitioner's 2000 tax return to the record as documentation of the petitioner's ability to pay the proffered wage. 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 a C corporation. On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of four million dollars, and to currently employ 80 workers. On the Form ETA 750B, signed by the beneficiary on April 20, 2001, the beneficiary claimed to have worked for the petitioner as a lay-out carpenter from April 1997 to March 2000, and as a carpenter-labor supervisor from April 2000 to the date that the Form ETA Part B was signed on April 20, 2001.¹³

On appeal, counsel states that the petitioner's tax returns indicate it is a viable and successful business, with significant gross revenues. Counsel states that although the petitioner's income tax returns for the relevant tax years show net gains, the petitioner possesses significant external financial resources that should be considered in calculating the petitioner's ability to pay the proffered wage. Counsel states that the petitioner only needs to demonstrate its ability to pay the proffered wages as of April 2001. Counsel then notes the petitioner's gross sales, depreciation, and other assets listed on the petitioner's tax returns for tax years 2002 and 2003. Counsel also refers to an interoffice memorandum written by [REDACTED]¹⁴ that states if the initial evidence reflects that the petitioner's net current assets are equal or greater than the proffered wage, Citizenship and Immigration Services (CIS) adjudicators should view the petitioner's ability to pay the proffered wage positively. Counsel states that that on letter "E" of each return at the top of the first page is a box for corporate assets. Based on these figures, counsel states that in each of the petitioner's tax returns for tax years 2001, 2002 and 2003, the petitioner's net assets greatly exceed the proffered salary, and CIS should follow the guidance in the Yates memo.

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

¹² On the 2004 W-2 Form, the beneficiary is identified as [REDACTED] and his social security number is identified as [REDACTED]. The beneficiary's Form 1040 for tax year 2004 submitted to the record contains the same name and social security number.

¹³ As noted in the director's revocation notice, the beneficiary also indicated on Form G-325 that accompanied his I-485 petition that he had worked for the petitioner from April 1997 to September 21, 2002, the date the beneficiary signed the G-325, as a carpenter-labor supervisor.

¹⁴ 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).

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 appeal, counsel asserts that since the petitioner has assets in excess of the proffered wage, according to the language in the [REDACTED] memorandum, it has established its continuing ability to pay the proffered wage. The Yates memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay based on the petitioner's net current assets when "the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage. The AAO consistently adjudicates appeals in accordance with the [REDACTED] memorandum. However, counsel's interpretation of the language in that memorandum and his interpretation of net assets being synonymous with a petitioner's net current assets are not correct. Furthermore line E on the first page of the IRS Form 1120 does not describe a petitioner's assets, but, as stated previously, rather provides spaces for the respondent to identify what kind of return is being submitted.¹⁵ The AAO will examine further in these proceedings how it analyzes the petitioner's net income and net current assets.

On appeal, counsel also states that gross sales, depreciation expenses and funds identified as "other assets" can be utilized to establish the petitioner's ability to pay the proffered wage. However, the AAO does not consider depreciation expenses in its consideration of the petitioner's net income, as will be discussed further in these proceedings. Similarly, the AAO would not examine the petitioner's gross sales or receipts, without an examination of the petitioner's financial liabilities, prior to identifying either the petitioner's net income or net current assets. With regard to the use of "other assets", the AAO will examine this issue, as well as depreciation expenses and gross sales further in its examination of the petitioner's net income and net current assets.

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 petition, the petitioner submitted the beneficiary's alleged W-2 forms for tax years 1998, 1999, 2000, 2001, and 2004. In the instant case, the priority date for the Form ETA 750 is April 20, 2001. Therefore, as counsel notes, the wages that the petitioner claimed it paid to the beneficiary or had a union pay to the beneficiary in the years 1998, 1999, and 2000 (prior to the 2001 priority year) are not dispositive in these proceedings.

With regard to any wages paid to the beneficiary during the relevant years in question, namely, 2001, 2002, 2003, and 2004, the petitioner has established that the beneficiary received wages in tax years 2001 and 2004; however, since neither the petitioner nor counsel has provided any evidentiary documentation as to whether the American Employers Group, Inc. did indeed handle the payment of the petitioner's employees, the record is not complete as to whether the petitioner paid the beneficiary's wages in 2001. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*,

¹⁵ Counsel refers to line D, of the tax form that identifies the petitioner's total assets.

17 I&N Dec. 503, 506 (BIA 1980). It is further noted that the state of California employer identification numbers and the federal employer identification numbers listed on the W-2 Forms differ in tax years 2001 and 2004, which suggests that beneficiary was paid by two distinct employers in these years.¹⁶ Thus, the W-2 Form from AEG submitted to the record to establish the wages paid by the petitioner to the beneficiary in tax year 2001 is given no weight, and the petitioner has not established that it paid any wages to the beneficiary in tax year 2001. With regard to tax years 2002 and 2003, the petitioner presented no evidence as to any wages paid to the beneficiary in tax years 2002, and 2003. In tax year 2004, the petitioner established that it paid the beneficiary \$38,522.95.¹⁷ Thus the petitioner has not established that it paid the beneficiary wages that are equal or greater than the proffered wage of \$62,067.20 as of the 2001 priority year date and continuing until the beneficiary obtained permanent residency. Thus, the petitioner has to establish it has the ability to pay the entire proffered wage in tax years 2001, 2002 and 2003, and the difference between any actual wages paid to the beneficiary and the proffered wage in tax year 2004.

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, contrary to counsel's assertion, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to counsel's assertions. 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, as asserted by counsel, 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*

¹⁶ The Employer Identification Number (EIN) listed on the Form W-2 for 2001 for AEG Processing Center, Inc., is [REDACTED], while the EIN for [REDACTED] on the 2004 Form W-2 is [REDACTED]

¹⁷ Since the record does not contain the petitioner's 2004 tax return, the AAO will not examine the petitioner's ability to pay the proffered wage during tax year 2004 any further in these proceedings.

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* at 537.

As noted previously, at the time the petitioner filed the petition, the only tax return available to establish the petitioner's ability to pay the proffered wage was the 2000 tax return, which is prior to the 2001 priority year. On appeal, counsel submitted the petitioner's tax returns for 2001, 2002, and 2003. The AAO accepts these returns submitted for the first time on appeal and will examine these tax returns in these proceedings. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$62,067.20 per year from the priority date:

- In 2001, the Form 1120 stated a net income¹⁸ of \$49,940.
- In 2002, the Form 1120 stated a net income of \$31,052.
- In 2003, the Form 1120 stated a net income of \$26,680.

Therefore, for the years 2001, 2002, and 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$62,067.20.

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.¹⁹ 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.²⁰

Net current assets are the difference between the petitioner's current assets and current liabilities.²¹ 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.

¹⁸The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

¹⁹ It is noted that in the NOR, the director did not examine the petitioner's net current assets, but rather ended his analysis after examining the petitioner's net income. In his response to the director's NOIR, counsel also did not examine the petitioner's net current assets.

²⁰ On appeal, counsel refers to the petitioner's assets as establishing the petitioner's ability to pay the proffered wage. However, the AAO examines the petitioner's net current assets, rather than total assets.

²¹According 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.

- The petitioner's net current assets during 2001 were \$145,954.
- The petitioner's net current assets during 2002 were \$91,447.
- The petitioner's net current assets during 2003 were \$131,172.

Therefore, for all three years, the petitioner did have sufficient net current assets to pay the proffered wage.

However, CIS records indicate that the petitioner filed at least three additional I-140 petitions for other beneficiaries in 2002, and a fourth petition in 2006. While the record reflects that the petitioner has sufficient net current assets to pay the proffered wage of the beneficiary in the 2001 priority year and continuing, the record is not sufficient to establish that the petitioner could pay the wages for any additional beneficiaries as well as the beneficiary's wages in tax year 2002, and in the following years.²²

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 ability to pay the beneficiary the proffered wage and meet its personal expenses as of the priority date through an examination of its wages paid, net income, or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel on appeal asserts that the petitioner has significant other financial resources that can be used to pay the proffered wage, and identifies items such as the petitioner's gross sales and depreciation expenses. As stated previously, neither the petitioner's gross sales nor depreciation expenses are considered in the examination of the petitioner's net income or net current assets. They are also not considered as independent sources of financial resources. The AAO can consider the overall circumstances of the petitioner when examining the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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

²² If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As in *Sonegawa*, CIS may, at its discretion consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems relevant to the petitioner's ability to pay the proffered wage.

However in the instant petition, the petitioner has submitted no further documentation as to the longevity of its business operations, reputation of the petitioner within the construction industry and other similar factors. Thus, the circumstances of the instant petitioner are not found to be analogous to those of the petitioner in *Sonegawa*.

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 AAO will now address the issue of the beneficiary's qualifications for the proffered position.

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as skilled worker. 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 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.

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 April 24, 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 carpenter/labor supervisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|---------|
| 14. Education | |
| Grade School | n/a |
| High School | n/a |
| College | none |
| College Degree Required | (blank) |
| Major Field of Study | (blank) |

The applicant must have two years of experience in the job offered or two years of work experience in the related occupation of lay-out carpenter. The petitioner listed no other special requirements in Item 15 of Form ETA 750A. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A as follows:

Supervise and coordinate the work of rough carpenters who are engaged in the building of rough wooden structures according to sketches, blueprints or oral instructions. Supervise and direct work crew to measure boards, and mark cutting lines, saw boards, nail them and place braces, erect scaffolding, install door and window bucks, framework, and install subflooring in buildings. Review quality of finished work. Train or instruct new recruits in performance of duties. Supervise the construction, erection, installation, dismantling and repair of wooden structures and fixtures. Supervise OSHA compliance.

The beneficiary set forth his 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 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he had attended [REDACTED] in Jerez, Zac. (sic) Mexico from 1983 to 1989 and received a

certificate. On Part 15, eliciting information of the beneficiary's work experience, he represented that he had worked for the petitioner from April 1997 to March 2000, as a lay-out carpenter, performing the following duties:

Construct, erect and install and repair structures made out of plywood, wood wallboard, etc, as per specifications using hand and power tools. Prepare layouts, using rules, framing square and calipers. Mark cutting lines, saw boards, shape materials. Assemble cut or shape materials and fasten them. Erect framework for structures, lay subflooring. Apply paneling, hand window or door frames. Erect scaffolding and ladders.

He also represented that he had worked for the petitioner from April 2000 to the date he signed the Form ETA 750, part B, namely April 20, 2001, as a carpenter-labor supervisor, performing the same duties as those outlined on the Form ETA 750, Part A. He does not provide any additional information concerning his employment background on that form.

With the initial petition, the petitioner submitted a letter of work verification dated March 7, 2002 and signed by [REDACTED], the petitioner's owner. In his letter, [REDACTED] stated that the beneficiary had worked for the petitioner from May 1997 to the date of the letter. [REDACTED] stated that from May 1997 to March 2000, the beneficiary was hired as layout carpenter, and his duties included "construct, erect, repair wood framing structures." [REDACTED] further stated that the beneficiary was promoted to carpenter-labor supervisor in March 2000. [REDACTED] also stated that he understood that experience gained with the petitioning employer could not be used to qualify the beneficiary for the proffered position, except for instances of promotion, which was the case in the instant petition. [REDACTED] also stated that the job of carpenter labor supervisor and carpenter were sufficiently separate and distinct to be considered different occupations. In another letter submitted to the record dated October 4, 2001, [REDACTED] also stated that the beneficiary began working for the petitioner in 1997, and that the last duties performed by the beneficiary were "experienced carpentry, layout."²³

The director in the NOIR dated July 8, 2005, stated that the Form ETA 750 required a minimum of two years experience in the job offered and the director identified the job as first line supervisor, with the rest of the title illegible.²⁴ The director also stated that the petitioner's description of the job duties of the proffered position were insufficient to determine if the beneficiary has the experience of a layout carpenter, the related occupation listed on the Form ETA 750. The director stated that CIS could not attest, based on the letter of experience, that the beneficiary would repair fixtures of wood, plywood, and wallboard, or could read and understand blueprints, sketches or building plans, among other duties. The director also stated that the petitioner had not established whether the beneficiary could erect framework. The director stated that the petitioner previously intended to establish that the beneficiary had the experience in the related occupation of layout carpenter, but that the description of the job duties was vague and general. The director noted that the Forms W-2 submitted to the record were for two employers and found this documentation questionable if the petitioner contended the required employment experience was solely with the petitioner, as indicated by the

²³ The I-140 petition was apparently approved on the basis of this letter of work verification and based on the petitioner's Form 1120, U.S. Corporation Income Tax Return for tax year 2000 that indicated the petitioner had net current assets of \$96,831, a sum greater than the proffered wage. Since the initial I-140 petition was received by CIS on October 19, 2001, the petitioner's 2001 corporate tax return was not available.

²⁴ The record is not clear why the director identified the job title in this manner. The original Form ETA 750 clearly states the title as Carpenter Labor-Supervisor.

letter of work experience and the Form ETA 750. The director then determined that the petitioner had not established that the beneficiary had the requisite two years of work experience stipulated by the Form ETA 750.

In response to the director's NOIR, counsel submitted an additional letter of work experience from the petitioner dated October 11, 2004. In this letter, [REDACTED] the petitioner's vice president, provided further explanation of the beneficiary's work duties as a carpenter-labor supervisor that repeated verbatim the job description contained on the Form ETA 750, Part A. Counsel also submitted a copy of the U.S. Department of Labor (DOL) *Occupational Outlook Handbook (Handbook)* classification of Carpenters, taken from the Internet at <http://bls.gov/oco/ocos202.htm>, as of July 26, 2005. Counsel states that the mere job title and the fact that the nature of the petitioner's business was rough framing construction and the fact that the beneficiary was a layout carpenter made it obvious that the beneficiary had the requisite two years of work experience.

With regard to the beneficiary's promotion to carpenter-labor supervisor, counsel stated that the dates of the claimed experience on the Form ETA 750 were correct and stated that both the petitioner and beneficiary acknowledged that there was an error on the Form G-325, and that the correct work experience information was listed on the certified ETA 750, Part B. Counsel further stated that the petitioner complied with all the requirements in trying to find an available U.S. worker for the position, and that due to the petitioner's inability to find an available U.S. worker, he promoted the beneficiary. Counsel finally stated although the beneficiary may not have had employment authorization, it did not negate the fact that he was employed and was well-qualified for the proffered position that became available after extensive recruitment showed that no U.S. worker was available.

In his NOR, the director again stated that the description of the work duties of layout carpenter performed by the beneficiary in his employment with the petitioner prior to the 2001 priority date was vague and general. The director also noted that the petitioner stated that the beneficiary's employment with the petitioner had been from May 1997 to March 2000 or April 24, 2001; however, the W-2 forms submitted to the record for tax years 1999, 2000 and 2001 showed a different employer. The director again found this documentation questionable as the petitioner contended the required employment was solely with the petitioner prior to the 2001 priority date. The director also questioned whether the experience gained with the petitioning employer could be used to qualify the beneficiary since the beneficiary did not indicate on his G-325 that that he had been promoted to a supervisory position in May 2000. The director also stated that the petitioner violated DOL regulations with regard to the employment of U.S. workers for the proffered position by promoting the beneficiary, rather than a U.S. worker. The director inferred that the petitioner had pre-selected the beneficiary for the position and then failed to comply with DOL regulations.

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.²⁵

²⁵ 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 submits no further evidence with regard to the beneficiary's qualifications. Counsel refers to the more detailed description of the beneficiary's duties, submitted in response to the director's NOIR, and to the basic work of carpenters as outlined in the DOL *Occupational Outlook Handbook*. Counsel reiterates assertions made in the response to the director's NOIR with regard to the job title of the position, the nature of the petitioner's business and the beneficiary's previous experience as a layout carpenter, and the beneficiary's promotion to a supervisory position not preventing a U.S. worker from applying for the proffered position.

The AAO notes that the W-2 Forms submitted to the record lend support to the prior employment of the beneficiary by the petitioner and also by AEG. Contrary to the petitioner's owner's statement, work experience with the petitioner prior to the 2001 priority date can be used to lend support to the petitioner's establishing that the beneficiary has the two years of relevant work experience prior to the 2001 priority date. However, as the director noted, based on the W-2 Forms submitted to the record, the petitioner has not established that the beneficiary's wages received from American Employers Services, Inc. are actually wages for work performed with the petitioner. Counsel on appeal states that these wages were paid by "the union" without providing any further substantiation of his assertion. This assertion is not persuasive as to previous employment with the petitioner as a layout carpenter. First, the assertions of counsel do not constitute evidence. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, the petitioner provided no further corroborative documentation with regard to the actual duties of the beneficiary as a layout carpenter, as requested by the director.

The AAO also notes that based on the beneficiary's description of prior work experience as outlined on the Form ETA Part B, he did not have the two years of layout carpenter-supervisor prior to April 2001. The Form ETA 750 only indicates a year of work experience as a carpenter labor-supervisor from April 2000 to the April 2001 priority date. Therefore the petitioner would have to establish the beneficiary's requisite two years of previous work experience based on his work as a layout carpenter. Nevertheless the letter submitted by the petitioner in response to the director's NOIR, only describes the claimed supervisory job duties and provides no further details on the prior work of the beneficiary as a layout carpenter. While the AAO agrees with counsel that the category of carpenter covers a wide range of duties, the petitioner's lack of relevant response to the director's request for more detailed information on the beneficiary's prior duties, and the lack of clarity as to who was the beneficiary's employer in the year 1997 to March of 2000 prevent the petitioner from establishing that the beneficiary had the requisite two years of work experience as a layout carpenter prior to the 2001 priority date.

While the director's comment as to whether the petitioner appears to have promoted the beneficiary in violation of DOL regulations and without regard for the availability of U.S. workers appears to be conjecture, the petitioner submitted no further documentation as to its extensive efforts, claimed by counsel, to recruit U.S. workers for the supervisory position or further information on the beneficiary's subsequent promotion, including whether there were other U.S. workers also eligible for the position who were also promoted or not promoted. 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)).

With regard to the third issue raised by the director in his revocation, namely, the inconsistencies contained in the record, the director noted that the record contained evidence of three different social security numbers,

and two different employers, based on the W-2 Forms submitted to the record. The director stated that if American Employers Group, based in Omaha, Nebraska, was a second employer, then the beneficiary was possibly offered a position outside the intended employment location identified on the Form ETA 750 as Ventura County.

On appeal, counsel states that CIS incorrectly stated that the beneficiary used three social security numbers. Counsel asserts that the first number [REDACTED] is an invalid number, and that the beneficiary never obtained a social security card with this number. Counsel states that the beneficiary never falsified any document. Counsel states the second number [REDACTED] is a Federal Tax Identification number issued by the Internal Revenue Service²⁷ and that the beneficiary obtained this number to file his tax return. Counsel states that the third number mentioned by CIS, [REDACTED], was incorrectly taken from the petitioner's DE-6 form by CIS and that this number belongs to another employee of the petitioner.²⁸

Upon review of the record, counsel is correct with regard to the third social security number identified by the director in his decision; however, the correct social security number for the beneficiary is distinct from the first two numbers noted. Thus, the beneficiary presented three distinct social security numbers and two different names during the period he claimed to work for the petitioner. The AAO notes that the wages noted in the various W-2 forms submitted to the record reflect the same wages noted on the tax returns submitted by the beneficiary to the IRS, which suggests that [REDACTED] and [REDACTED] may be the same individual. The submission of multiple social security numbers and two identities place conflicting testimony on the record. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." While the director raises the issue of differing prevailing wages to be paid based on the possibility of the beneficiary working in areas other than Ventura County, since the record does not establish that the petitioner employed the beneficiary in other areas, the AAO will not comment further on this issue.

While the petition appeared approvable at the time of initial adjudication, with regard to the petitioner's ability to pay the proffered wage, based on the petitioner's 2000 corporate income tax return, the evidence presented with regard to the petitioner's tax returns for tax years 2001 to 2003, the issue of the identification of the beneficiary's actual employer, and the fact that the petitioner appears to have submitted petitions for multiple beneficiaries, supports the director's findings in his revocation decision. As stated previously, Section 205 of 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

²⁶ This number is listed on the I-140 petition as the beneficiary's social security number.

²⁷ The AAO notes that this social security number may be a Individual Taxpayer Identification Number (ITIN) issued by IRS to taxpayers who are required to have a U.S. taxpayer identification number but who do not have and are not eligible to obtain a social security number from the Social Security Administration (SSA). According to the IRS website, the ITIN always begins with the number 9, and had a 7 or 8 in the fourth digit. See <http://www.irs.gov/individuals/article/0,,id=96287,00.html>. (Available as of October 5, 2007.)

²⁸ Counsel is correct with regard to the CIS error with regard to identifying the beneficiary's social security number incorrectly on the petitioner's DE-6. However, a third social security number distinct from those described by counsel, namely, [REDACTED], is identified as the beneficiary's social security number on this document.

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). In the instant petition, the director had good and sufficient cause to revoke the petition’s approval. Further the AAO also notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). The AAO concurs with the director in his revocation of the petition’s approval.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition is revoked.