

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

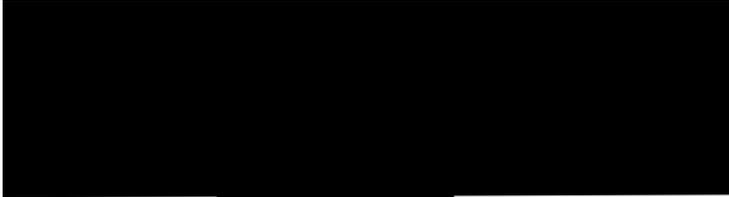
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
LIN 06 176 53151

Office: NEBRASKA SERVICE CENTER

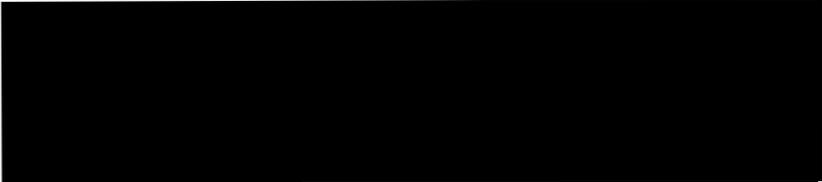
Date: DEC 29 2008

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner, California Kids Development Center, Inc. is a child care center. It seeks to employ the beneficiary permanently in the United States a pre-schoolteacher. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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).

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 or seasonal nature, for which qualified workers are not available in the United States.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

¹ 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.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, the ETA 750 was accepted for processing on April 26, 2001. The proffered wage is set forth as \$29,557 per annum. The beneficiary signed Part B of the ETA 750 on April 17, 2001, indicating that she had worked for "Kids Learn and Play" from April 2001 to the present (date of signing).

Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on May 30, 2006, indicates that the petitioner was established on March 29, 2005, employs 18 workers, claims a gross annual income of \$281,651 and a net annual income of \$122,157. A copy of a California license from the Department of Social Services indicates that the petitioner received its license to operate as a day care center, effective March 29, 2005. The I-140 identifies the beneficiary's social security number as xxx-xx-xxxx.

The Part A of the ETA 750 identifies Kids Learn and Play as the name of the employer with an address of [REDACTED], North Hills, Ca 91343. The petitioner identified on the I-140, (California Kid's Development Center, Inc.) is also located at [REDACTED] North Hills, CA 91343. As suggested by the discussion above and by the record of proceedings, the petitioner is claimed to be the successor-in-interest to Kids Learn and Play. This status requires documentary evidence that a petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor enterprise had the ability to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In this matter, two documents have been submitted to the record to establish that the petitioner is the successor-in-interest to Kids Learn and Play. One is a copy of a bill of sale that is dated February 25, 2005. It reflects that [REDACTED] and [REDACTED] sold personal property, described on an attached inventory, to the petitioner for \$1.00. It does not include a copy of the inventory and does not identify the relationship, if any, of the Steinbrenners to Kids Learn and Play.² Although the location of the inventory was stated to be at the petitioner's address as stated on the I-140, the bill of sale did not reference the sale of any business assets.

The other document was provided on appeal. It is an unsigned copy of a letter from [REDACTED] of The [REDACTED] Company. The date is May 8, 2007. The letter states that the petitioner purchased Kids Learn and Play on February 25, 2005. The [REDACTED] Company was the listing and selling agent in the transaction and the purchase price was \$585,000. The letter claims that the value of the school would currently be approximately \$700,000.

² The tax returns submitted for Kids Learn and Play identify the company shareholders as [REDACTED], and [REDACTED]. The tax returns do not reflect that the [REDACTED] have any corporate ownership interest.

These documents do not effectively establish that the petitioner, California Kids Development Center, Inc. is a successor-in-interest to the initial applicant on the labor certification. As noted above, the copy of the bill of sale was for personal property only, failed to include a copy of the inventory, failed to identify Kids Learn and Play as the business in operation at that address, and failed to identify the Steinbrenners' relationship to Kids Learn and Play. This document may not be considered as probative that the petitioner is the successor-in-interest to the business known as Kids Learn and Play. Further, the unsigned copy of the letter from the [REDACTED] Company carries no evidentiary weight as it is not affirmed by any author's signature to represent the truth of the matters discussed therein and constitutes nothing more than a draft of a letter which may or may not have represented events that actually occurred.

To establish a valid successor-of-interest, the petitioner should have included such documents as copies of the creation and/or dissolution of entities involved, copies of any executed agreements of transfer, escrow statements, deed transfers, and executed copies of the pertinent UCC, fictitious trade name and other state or municipal records that clearly establish the history and transfer of ownership of the business by each of the business entities in order to determine whether a successor-in-interest to the original ownership of the firm has been created. Although the director's request for evidence did not articulate specific items of proof to be submitted related to this issue, it remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. 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)). The petitioner's failure to clarify these defects renders the petition ineligible for approval on this basis.

Notwithstanding this observation, this decision will also review the financial documentation submitted to the record to determine if the ability to pay the proffered wage has been established by the appropriate entities.

In support of the petitioner's continuing ability to pay the beneficiary's proposed wage offer of \$29,557 per year, the petitioner provided copies of the predecessor-in-interest, Kids Learn and Play's Form 1120S, U.S. Income Tax Return(s) for an S Corporation for 2001, 2002, and 2003. The federal employer identification number for these returns is [REDACTED]-xxxx. These returns indicate that this company filed its tax returns using a standard calendar year. They contain the following information:

	2001	2002	2003
Net Income ³	\$ 11,390	\$ 27,718	-\$ 15,482

³ Where an S Corporation's income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an

Current Assets	\$ 95,436	\$111,021	\$158,244
Current Liabilities	\$ 81,940	\$ 79,916	\$182,904
Net Current Assets	\$ 13,496	\$ 31,105	-\$ 24,660

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner did not provide a copy of the predecessor-in-interest's federal tax return, annual report, or audited financial statement for 2004, pursuant to the regulation at 8 C.F.R. § 204.5(g)(2). However, it did provide a copy of its own federal tax return for 2004. The FEIN shown on the petitioner's 2004 tax return is [REDACTED]xxxx. As the purported sale and transfer from Kids Learn and Play to the petitioner did not occur until February 25, 2005, the financial information for 2004 must relate to Kids Learn and Play's ability to pay the proffered wage of \$29,557, not the petitioner's ability. For this reason, the petitioner's 2004 tax return will not be considered.

Relevant information contained in the petitioner's 2005 federal Form 1120, U.S. Corporation Income Tax Return⁵ is shown as the following:

Net income ⁶	-\$80,890
-------------------------	-----------

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 (2001-2003) line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner or its predecessor-in-interest had additional deductions shown on Schedule K for 2001-2005, the petitioner's net income is found on Schedule K of its tax return.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ The petitioner's incorporation date is shown as December 16, 2000. The I-140 date of establishment is reflected as March 29, 2005. It is unclear if the petitioner was operating another child care center in Sun Valley, California, which was the address listed on its 2004 tax return.

Current Assets \$ 9,748
 Current Liabilities \$39,089
 Net Current Assets -\$29,341

The petitioner additionally supplied copies of its quarterly federal tax returns (Form 941) for 2006, as well as copies of its state quarterly wage reports for those quarters. Relevant to the beneficiary's employment, the wage reports for 2006 reflect the following wages paid to the employee listed below:

Wages Paid	Social Security Number (ssn)	Quarter of 2006
\$4,203	xxx-xx-██████	1 st quarter
\$4,248	“ “	2 nd quarter
\$4,815	“ “	3 rd quarter
\$4,320	“ “	4 th quarter
Total		\$17,586

The total wages paid to the employee with social security number xxx-xx-██████ (reportedly the beneficiary) in 2006 is consistent with a Wage and Tax Statement (W-2) issued by the petitioner showing \$17,586 in wages paid to an employee holding a social security number of xxx-xx-██████. However, it is noted that the last four digits of this number are not the same as the social security number listed on Form I-140. The petitioner listed on Form I-140 that the beneficiary's social security number ended in ██████.

Other wage information which may or may not be related to the beneficiary includes a W-2 issued for 2005 by the petitioner to reportedly the beneficiary, shown with an employee social security number of xxx-xx-██████, reflecting \$14,516.25 paid to this employee. Copies of quarterly state wage reports reflect \$1,400 paid to this employee with the social security number ending in ██████ in the first quarter of 2005; \$4,130 paid to this employee in the second quarter of 2005; and \$4,795 paid

⁶ Net income for a C corporation is found on line 28, (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage. Current Assets and current liabilities are generally shown on Schedule L on the same lines as those reflected on Form 1120S.

this employee in the third quarter of 2005. The documentation shows three separate social security numbers for the individual reportedly to be the beneficiary.

The director denied the petition on April 17, 2007. He concluded that the petitioner had failed to demonstrate its ability to pay the proffered wage through either its net income, net current assets or wages paid to the beneficiary.⁷

On appeal, the petitioner, through counsel, asserts that its continuing ability to pay the proffered wage of \$29,557 to the beneficiary is supported by the a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), and by *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in examining the totality of the petitioner's circumstances. Counsel further maintains that the director should consider that the petitioner is an S-corporation and the successor-in-interest in the case. He claims that the tax returns should not be the only basis of denial and that additional evidence relating to the shareholders' individual assets should also be included in determining the petitioner's ability to pay the proffered wage. Counsel also asserts that the only reason that a loss is shown is due to the depreciation in long term capital gains is taken in some of the ownership of properties. Counsel does not indicate which year this discussion refers to as the petitioner reflected a loss in net income in 2005, and the predecessor in interest showed a net income loss in 2003. Additionally, the asserted successor company operates as a C corporation based on the 2005 return submitted.

In support of these propositions, a copy of the petitioner's "business fact sheet," is provided on appeal. It appears to be an internally generated document and summarizes the three shareholders percentage of ownership and includes information about the 80% shareholder's interest in an individually held life insurance policy. A second document is a copy of a pay check from the county of Los Angeles to one of the individual's identified as a 10% shareholder in the petitioning business. It reflects his net pay of \$1,569 and does not mention the petitioner. Similarly, a third document represents a payroll record related to earnings of the third 10% shareholder in the petitioning business who appears to be employed by the Calvary Memorial Church of Oak Park as indicated on the pay stub. The petitioner is not mentioned in either of these pay roll documents. An additional copy of loan information related to a mortgage held individually by the 80% shareholder in property located in Santa Clara, California is also provided. Finally, six copies of payroll records from the petitioner have been submitted. They reflect that an employee with the beneficiary's name has been paid year-to-date \$6,297.75 as of April 20, 2007. The social security number shown is xxx-xx-

Counsel's assertions are not persuasive. With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely

⁷The director used figures shown on page 1 of the petitioner's tax returns as its net income and did not address whether the appropriate entity had provided the tax return.

offered as guidance.⁸ The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, such interpretation must comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. Here, the petitioner must demonstrate its continuing ability to pay the proffered wage beginning as of the April 26, 2001, priority date, as established by the labor certification filed by the predecessor-in-interest. Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the entire pertinent period of time.

Even if the petitioner could establish that it is a successor-in-interest to the initial labor certification applicant, which we do not accept, its assertions are not persuasive as to its continuing ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

In this case, none of the wages paid on W-2s, state quarterly wage reports, and the records submitted on appeal, are consistent with the beneficiary's social security number as set forth on the I-140. Moreover, they are not consistent year-to-year as illustrated by the social security number ending with [REDACTED] used in 2006 and the social security number ending with [REDACTED] used in 2005. The AAO will not consider these records as probative of wages paid to the beneficiary. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of

⁸See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

depreciation or other expenses such as the cumulative payments to other workers as argued in this case. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*; 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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Similarly, depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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. (Original emphasis.)

Chi-Feng Chang at 536.

In *Matter of Sonogawa*, cited by counsel on appeal, the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be

conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, 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). Counsel's general assertion that the director did not take into account the petitioner's resources and ownership of properties, as well as investments and securities is misplaced. Moreover, it is unclear to what items counsel specifically is referring to as the documents submitted on appeal only related to individual shareholders and not to the corporate petitioner's possession of such assets.

It is further noted that the evidence submitted on appeal is based on counsel's erroneous assumption that the petitioning corporation is an S-Corporation. As shown on the federal tax returns submitted to the record, the petitioning corporation is a C Corporation that has filed Form 1120 in 2005 and 2006, not an S Corporation, which files Form 1120S. The predecessor-in-interest, Kids Learn and Play, was an S-Corporation. Therefore, counsel's assertions related to the special nature of S corporations do not apply to the petitioner.

Additionally, counsel argues that the shareholders' personal assets are eligible for consideration in determining the petitioning corporation's ability to pay the proffered salary is not supported by legal authority or by the record. 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."

Finally, unlike the *Sonegawa* petitioner, the petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable. The AAO cannot conclude that the petitioner has demonstrated that such unusual circumstances have been shown to exist in this case, which parallel those in *Sonegawa*.

In 2001, neither Kids Learn and Play's net income of \$11,390 nor its net current assets of \$13,496 was sufficient to cover the proffered wage of \$29,557. The petitioner failed to demonstrate the ability to pay the proffered wage in this year.

In 2002, neither Kids Learn and Play's net income of \$27,718 nor its net current assets of \$27,805 was sufficient to pay the proffered salary or demonstrate the ability to pay in this year.

In 2003, Kids Learn and Play's net income of -\$15,482 was not enough to cover the proffered wage. Similarly, its net current assets of -\$24,660 was not sufficient to cover the certified salary of \$29,557. The petitioner did not establish its ability to pay the certified salary in this year.

In 2004, if a sale of the Kids Learn and Play business is assumed to have occurred on February 25, 2005, then the petitioner's financial ability is not relevant to the determination of the ability to pay the certified wage until 2005. As no tax return, audited financial statement or annual report relating to the Kids Learn and Play firm was provided, the petitioner's ability to pay the proffered wage in this year has not been demonstrated.

In 2005, neither the petitioner's net income of -\$80,890 nor its net current assets of -\$29,341 was sufficient to cover the proffered wage or establish its ability to pay in this year.

As indicated above, as wage records submitted in support of payment of wages to the beneficiary cannot be considered as reliable documentation based on the discrepancy of social security numbers used, the petitioner did not establish its ability to pay the proffered wage in either 2006 or 2007. Additionally, no audited financial statements, federal tax returns or annual reports were provided pertinent to the petitioner's financial profile in these years.

As noted above, however, it is found that the petitioner failed to document that a successor-in-interest relationship occurred in this case. Further, the petitioner failed to establish that a continuing financial ability to pay the proffered wage as of the priority date has been demonstrated by either the petitioner or its claimed predecessor-in-interest, Kids Learn and Play.

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).

Based on a review of the evidence in the record and the argument submitted on appeal, the petitioner has failed to establish its *continuing* ability to pay the proffered wage as of the priority date. 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.