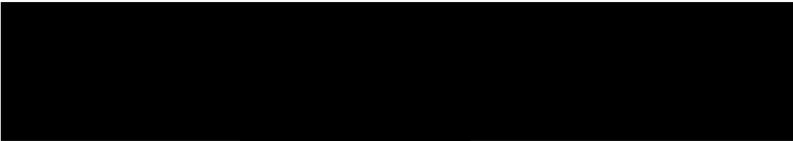




U.S. Citizenship
and Immigration
Services

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B6



FILE: [REDACTED]
WAC 99 252 50278

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 10 2008**

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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 Director, California Service Center, initially approved the preference visa petition. Subsequent to obtaining information regarding the petition, the director served the petitioner with a 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, and the visa petition will remain revoked.

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 petitioner is a dental laboratory. It seeks to employ the beneficiary permanently in the United States as a dental ceramist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date of May 15, 1996 and revoked the petition’s approval 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director’s September 4, 2002 NOR, the issue in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date of May 15, 1996.

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

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed with the California Service Center on September 23, 1999. It was initially approved on March 23, 2001. Following the receipt of information from the beneficiary’s filing of a Form I-485, Application to Register Permanent Residence or Adjust Status, on April 18, 2001, the director concluded that the I-140 was approved in error and issued a NOIR on July 3, 2002.¹ The director specifically requested that the petitioner submit the following:

- 1) The complete Forms 1120S, along with all Schedules and Attachments, for the 1999 and 2001 tax years.

¹ It is noted that the director requested additional evidence with regard to the I-485 on December 19, 2001 and again on March 14, 2002. Those requests for evidence sought copies of the petitioner’s 1997 through 2000 tax returns and a list of the sole proprietor’s monthly recurring personal expenses. In response to the requests for evidence, copies of the petitioner’s 1997 through 2000 tax returns were submitted, but the sole proprietor’s living expenses were not.

- 2) The petitioner's complete payroll summary (W-2s & W-3s), evidencing wages paid to all employees for years 1996 through 2001.
- 3) The petitioner's complete Forms 1040, along with Schedules C, for the 1996 year.
- 4) The petitioner's Forms DE-6 (quarterly wage statements) for the eight most recent quarters.
- 5) A Statement of Monthly Expenses for the petitioner's family. This statement must indicate all of the family's household living expenses. Such items should include (but are limited to) the following: housing (rent or mortgage), food, car payments (whether leased or owned), insurance (auto, homeowner, health, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expense.

In response to the NOIR, the petitioner submitted the documentation requested by the director. The petitioner's 1999 and 2001 Forms 1120S, U.S. Income Tax Returns for an S Corporation, reflect ordinary incomes or net incomes from Schedule K of -\$36,039 and \$40,641, respectively. The petitioner's 1999 and 2001 Forms 1120S also reflect net current assets of -\$2,372 and \$42,245, respectively.

The sole proprietor's 1996 Form 1040, U.S. Individual Income Tax Return, including Schedule C, Profit of Loss From Business, reflects an adjusted gross income of \$71,990, and Schedule C reflects gross receipts of \$633,639, salary and wages of \$212,596, and a net profit of \$72,600.

The sole proprietor's previously submitted 1997 Form 1040 reflects an adjusted gross income of \$84,771, and Schedule C reflects gross receipts of \$674,996, salaries and wages of \$247,792, and a net profit of \$76,294.

The sole proprietor's previously submitted 1998 Form 1040 reflects an adjusted gross income of \$68,825, and Schedule C reflects gross receipts of \$629,927, salaries and wages of \$217,205, and a net profit of \$77,285.

The sole proprietor's previously submitted 1999 Form 1040 reflects an adjusted gross income of \$70,853, and Schedule C reflects gross receipts of \$652,015, salaries and wages of \$195,662, and a net profit of \$112,572.²

The petitioner's 2000 Form 1120S reflects an ordinary income or net income from Schedule K of \$17,328 and net current assets of -\$2,916.

The petitioner's DE-6s and W-3s (with accompanying W-2s) do not show wages paid to the beneficiary until the first quarter of 2002 (\$8,712).

The sole proprietor's monthly personal recurring expenses are listed as \$3,312 per month or \$39,744 annually.

Forms W-2 for 2002 and 2003, issued by the petitioner on behalf of the beneficiary, reflect that the petitioner paid the beneficiary \$34,848 in 2002 and \$19,200 in 2003.

Payroll stubs submitted show that the petitioner paid the beneficiary \$14,400 in 2004 for 18 pay periods.

² The petitioner was organized as a sole proprietorship in 1996 through September 7, 1999, at which time, it became an S corporation. The petitioner has submitted a copy of its Articles of Incorporation which also shows the company began doing business as C [REDACTED] with the same sole proprietor.

The director determined that the evidence submitted did not establish the petitioner's ability to pay the proffered wage of \$34,840 and issued a NOR on September 4, 2002.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). The priority date in the instant petition is May 15, 1996. The proffered wage as stated on the Form ETA 750 is \$16.75 per hour or \$34,840 annually.

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).

Relevant evidence submitted on appeal includes counsel's brief.³ The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel states:

[REDACTED] has owned and operated [the petitioner] since 1985. The tax returns in the record show that the business has been consistently profitable and supports a sizable payroll. The record contains the tax returns regarding the petitioning business for a period of six years from 1996 to 2001, inclusive.

Attached to this brief please find a summary of those returns showing the gross receipts, employee payroll and net profit to the sole owner. Over that six year period, [the petitioner's] average annual gross receipts were \$711,945. Over the same six year period, [the petitioner's] average payroll was \$256,738. Over the same six year period, [the petitioner] generated an average profit for its sole owner of \$75,135.

³ It is noted that the petitioner has filed a subsequent petition for this same beneficiary with additional explanations concerning its ability to pay the proffered wage. Where appropriate, the additional explanations will be considered in this proceeding.

The wage offered the beneficiary is \$16.75 per hour. On a 40 hour week over 52 weeks, this offered wage is \$34,840 per year.

Since the filing of the labor certificate application in 1996, [the petitioner] has changed its legal form of business organization from sole proprietorship to a corporation solely owned by [REDACTED]. The corporate tax returns are filed under a "Subchapter C" election with [REDACTED] being the sole owner. This change in business formation took place concurrent with filing of the I-140 in September 1999. Please note that although the corporation subsequently changed its name, the taxpayer identification number [-----] remains the same.

At all relevant times, [the petitioner] has been owned and operated by [REDACTED]

* * *

The attached summary of the tax returns related to [the petitioner] show that with the exception of the year 2000, the petitioning business has generated no less than \$72,600 in annual profits. However, the one "off" year does not destroy the ability to pay the proffered wage. Under *Matter of Sonogawa*, 12 I&N Dec. 612 (Acting Reg. Comm. 1967), the totality of the circumstances is to be examined. . . . [The petitioner] meets requirements set forth in *Sonogawa*.

* * *

The Service Center does not contest that [REDACTED] has been the sole owner of [the petitioner]. The Service Center does not contest the veracity of the information provided in the tax returns which are part of the record. However, the Service Center disregards the evidence when it revoked the visa petition. The revocation should be reversed and the visa petition reinstated.

The summary of the petitioner's tax returns states:

1996
Information from initial tax return Schedule C
Gross receipts: \$633,639
Payroll expenses: \$212,596
Net profit from business: \$72,600

1997
Information from individual tax return Schedule C
Gross receipts: \$674,996
Payroll expenses: \$247,792
Net profit from business: \$76,294

1998
Information from individual tax return Schedule C
Gross receipts: \$629,927
Payroll expenses: \$217,205
Net profit from business: \$77,285

1999

Information for the calendar year from combining individual tax return Schedule C and 1120S

Gross receipts: \$770,946 [\$652,015 from Schedule C and \$118,931 from 1120S]

Payroll expenses: \$282,682 [\$195,662 from Schedule C and \$87,060 from 1120S]

Net profit from business: \$76,535 [\$112,572 from Schedule C less the <loss> of \$36,036 from 1120S. [redacted] received no salary from the corporation in 1999].

2000

Information from 1120S

Gross receipts: \$751,845

Payroll expenses: \$329,538

Net profit from business: \$47,328 [combination of sole owner's salary plus profit]

2001

Information from 1120S

Gross receipts: \$810,314

Payroll expenses: \$251,037

Net profit from business: \$100,769 [combination of sole owner's salary plus profit]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750, signed by the beneficiary on May 6, 1996, the beneficiary does not claim the petitioner as a past or present employer. However, the petitioner has submitted the beneficiary's 2002 and 2003 Forms W-2 and pay stubs for part of 2004 as proof of the beneficiary's employment. Therefore, the petitioner has established that it employed the beneficiary in 2002, 2003, and part of 2004.

The petitioner is obligated to show that it has sufficient funds to pay the difference between the proffered wage of \$34,840 and the actual wages paid to the beneficiary in the pertinent years (2002 and 2003). Since the petitioner has not established that it employed the beneficiary in 1996 through 2001, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$34,840 in those years. In 2002, the beneficiary was paid \$34,848 or \$8 more than the proffered wage. Therefore, the petitioner has established its ability to pay the proffered wage of \$34,840 in 2002. In 2003, the beneficiary was paid \$19,200 or \$15,640 less than the proffered wage of \$34,840. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the difference of \$15,640 between the proffered wage of \$34,840 and the actual wage paid to the beneficiary of \$19,200 in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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.*, the court held that 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054. 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* at 537.

In 1996 through September 7, 1999, the petitioner was organized as a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of approximately \$20,000 where the beneficiary's proposed salary was \$6,000 (or approximately thirty percent of the petitioner's gross income).

In the instant case, the sole proprietor supported a family of five in 1996 through 1999. The petitioner's owner's adjusted gross incomes in 1996 through 1999 were \$71,990, \$84,771, \$68,825, and \$70,853, respectively. The sole proprietor listed his personal monthly recurring expenses as \$3,312 per month or \$39,744 annually. The sole proprietor must show that he had sufficient funds to pay the proffered wage of \$34,840 and his personal monthly recurring expenses of \$39,744 or a total of \$74,584 from his adjusted gross income or other available funds. As no evidence was submitted that establishes that the sole proprietor had

other available funds (personal checking accounts, CDs, rent, money market funds, etc.), to supplement his adjusted gross income, the sole proprietor has only shown that he had sufficient funds to pay the proffered wage of \$34,840 and to pay his personal monthly recurring expenses of \$39,744 in 1997 (\$84,771 adjusted gross income - \$74,584 proffered wage and monthly expenses = \$10,187 more than required). In 1996, the sole proprietor's adjusted gross income of \$71,990 was \$2,594 less than the required amount of \$74,584. In 1998, the sole proprietor's adjusted gross income of \$68,825 was \$5,759 less than the required amount of \$74,584. In 1999, the sole proprietor's adjusted gross income of \$70,853 was \$3,731 less than the required amount of \$74,584. Therefore, the petitioner has established its ability to pay the proffered wage in 1997, but not in 1996, 1998, and 1999.

From September 7, 1999 through 2001, the petitioner was organized as an "S" corporation. Where 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 Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant case, the petitioner's net income from Schedule K in 1999 through 2001 was -\$36,039, \$17,328, and \$40,641, respectively. The petitioner could have paid the proffered wage of \$34,840 from its net income in 2001, but not in 1999 and 2000.

Nevertheless, with regard to Form 1120S, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The petitioner's net current assets in 1999 through 2001 were -\$2,372, -\$2,916, and \$42,245, respectively. The

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.

petitioner could not have paid the proffered wage of \$34,840 from its net current assets in 1999 and 2000, but could have in 2001. However, the petitioner has already established its ability to pay the proffered wage in 2001 from its net income.

On appeal, counsel claims that the petitioner has shown its ability to pay the proffered wage of \$34,840 based on its tax returns and on its longevity.⁵

Counsel is mistaken. With regard to the 1996 through 1999 tax returns (Forms 1040), counsel is only taking into consideration the Schedule Cs of those forms. As discussed above, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In the instant case, the petitioner has shown its ability to pay the proffered wage in one year, 1997.

With regard to the 1999 through 2001 Forms 1120S, counsel notes that the combination of the net profit and the owner's salary is sufficient to pay the proffered wage in 2000 and 2001. As the petitioner's owner did not receive a salary in 1999, there are no monies that can be added to the net income of -\$36,039. In 2000, counsel is correct that a combination of the owner's salary and the net profit (\$47,328) is more than the proffered wage of \$34,840.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income.

⁵ It is noted that with the evidence submitted with the second petition filed by the petitioner on behalf of the beneficiary, counsel requests that depreciation be added to net income when considering the petitioner's ability to pay the proffered wage of \$34,840. However, counsel's argument that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing.

A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to 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 is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated.

Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] holds 100 percent of the company's stock. According to the petitioner's 2000 and 2001 IRS Form 1120S Schedule K-1 (Shareholder's Share of Income, Credits, Deductions, etc.) [REDACTED] elected to pay himself \$30,000 and \$56,000, respectively. These figures are supported by [REDACTED]'s W-2 Forms for 2000 and 2001, which were submitted for the record. We note here that the compensation received by the company's owner during these two years was not a fixed salary.

CIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the petitioner's owners, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of his corporation.

While counsel's reasoning is logical, counsel has not submitted any evidence (i.e., affidavit, etc.) from the petitioner's owner stating that he could or would be willing to forego his salary in order to pay the wages of the beneficiary.⁶ If that were the case, the petitioner would have sufficient funds to pay the proffered wage of \$34,840 in 2000. The petitioner has already established its ability to pay the proffered wage in 2001.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615.

⁶ 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). 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)).

Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage. In this case, the petitioner's tax returns indicate it was established in 1985. The petitioner has provided tax returns for the years 1996 through 2001. However, out of the seven tax returns provided by the petitioner, only 1997 and 2001 establish the petitioner's ability to pay the proffered wage of \$34,840, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, there is another issue that must be addressed before the visa petition can be approved. 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). That issue is whether or not the petitioner has established that the beneficiary met the experience requirements of the labor certification before the priority date of May 15, 1996.

The regulation at 8 C.F.R. § 204.5(l)(3) states, in pertinent part:

(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 occupational designation. The minimum requirements for this classification are at least two years of training or experience.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is May 15, 1996.

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).

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In this case, Block 14 requires that the beneficiary must possess two years of experience in the job offered of dental ceramist. Block 15 does not state any additional requirements.

Based on the information set forth above, it can be concluded that an applicant for the petitioner's position of dental ceramist must have two years of experience in the job offered.

In the instant case, counsel submitted copies of the beneficiary's Forms 1040 and Forms W-2 showing that the beneficiary was employed with Life Dental Lab in 1993 through 1995 and a letter, dated December 10, 2004, from [REDACTED] owner, of [REDACTED] stating that it had employed the beneficiary from October 1, 2004 to the present as a dental ceramist. The letter, dated December 10, 2004, will not be considered as evidence that the beneficiary met the experience requirements of the labor certification because the beneficiary must have met those requirements before the filing date of the visa petition, May 15, 1996. Likewise, the beneficiary's 1993 through 1995 Forms 1040 and Forms W-2 will not be considered as they do not meet the requirements of the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) which states:

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.

The experience letter must come from the beneficiary's prior employer, [REDACTED], must meet the above regulation, and must substantiate the beneficiary's claim of two years experience in the job offered before the priority date of May 15, 1996. As the petitioner has not provided any evidence that meets these criteria, it has not established that the beneficiary met the experience requirements of the labor certification before the filing date of the visa petition, May 15, 1996.

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, and the visa petition remains revoked.