U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DEC 08 2009

FILE: LIN 06 272 52118 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 203 (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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a home health provider. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

On appeal, the petitioner submits additional evidence and asserts that the petition merits approval.

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 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted by DOL on January 3, 2006, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is $8.49 per hour ($17,659.20 per year). On the ETA Form 9089, signed by the beneficiary on August 28, 2006, the beneficiary did not claim to have worked for the petitioner.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on September 25, 2006, the petitioner identified on Part 1 as [redacted] indicates that it was established on March 30, 2002 and currently employs five workers. It claims that its projected gross annual income is $155,700 and that its projected net annual income is $24,000.

Pursuant to 8 C.F.R. § 103.2(b)(8)(iii), the AAO issued a notice of intent to deny, on May 18, 2009. The petitioner was instructed to provide evidence relating to its continuing financial ability to pay the proffered wage of this beneficiary as well as additionally sponsored beneficiaries, pursuant to the requirements of 8 C.F.R. § 204.5(g)(2), as well as to provide evidence relating to its status as an employer. The petitioner was afforded thirty days to respond. The petitioner failed to respond to the notice of intent to deny.[1] The failure to respond to a notice of intent to deny by the required date

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[1]The petitioner provided some packets of information to an investigator relevant to other cases, but nothing has been submitted in response to this notice of intent to deny. None of the information provided would fully respond to the requested items in this case, which were itemized in the notice of intent to deny as follows:

1) Copies of federal tax returns, *audited* financial statements, or annual reports (based on audited financials) of the corporate petitioner as of the priority date to the present.
2) List of all workers employed by [redacted] beginning at its inception and continuing to the present, together with a description of his/her duties, job title, wages, date of hire, date of termination, & whether sponsored as a foreign worker (together with receipt number of petition). If a foreign worker, include the job title, priority date as set forth on the labor certification, proffered wage, date of hire, copies of W-2s or pay stubs indicating past, current, and year-to-date wages, and current pending status of I-140 (i.e., whether pending before USCIS or the AAO).
3) Copies of the corporate petitioner's state quarterly wage reports for all quarters from 2006 to 2009. They must show the identity of the employee and wages paid for the quarter.
4) A copy of the corporate petitioner's articles of incorporation showing its stamped filing date with the state of California, together with copies of all documents received from the state showing its certification.

may result in the petition being summarily denied as abandoned, denied based on the record, or denied for both reasons. 8 C.F.R. § 103.2(b)(13).

The petitioner was also advised that public records indicate that the petitioner, [redacted], was not incorporated in the state of California until February 23, 2007, when it filed its articles of incorporation.[2] Therefore, it could not be considered as a *bona fide* U.S.

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5) A copy of [redacted] application to the IRS to obtain a FEIN number together with a copy of the IRS document issued to this employer identifying the FEIN number. Identify whether the FEIN changed following incorporation.
6) A copy of the corporate petitioner's bylaws.
7) A list of the corporate petitioner's shareholders beginning at inception and continuing to the present.
8) Copy of [redacted] individual tax return (Form 1040) filed for 2006 and 2007.
9) Explanation from [redacted] why she files her individual tax return(s) under her married name (spouse but represents herself as a single person filing the return with the Internal Revenue Service.
10) List of all medical and healthcare provider clients of [redacted] beginning in 2006 and continuing to the present.
11) Submit copies of all contracts and/or agreements with all medical and healthcare provider clients of [redacted] such as [redacted] beginning in 2006 and continuing to the present.
12) Submit copies of any contract and/or agreement between [redacted] and the beneficiary named in this petition.
13) Current photographs of the interior and exterior of [redacted] Inc.'s location at [redacted]
14) Copies of recruitment efforts including all print advertisements and SWA job orders underlying this labor certification as evidence of your organization's intent not already provided to the record concerning the actual minimum requirements of the position as that intent was explicitly expressed to the DOL and to U.S. workers to include the audit file prepared at the time the petitioner submitted Form ETA 9089 to DOL as well as the petitioner's recruitment results.

[2] http://kepler.sos.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C2599495. The California Corporations Code provides in pertinent part:

Section 200. Formation: articles; signatures and acknowledgements; commencement and perpetuity of existence;

(a) One or more natural persons, partnerships, associations or corporations, domestic or foreign, may form a corporation under this division by executing and filing articles of incorporation.

* * *

(c) *The corporate existence begins upon the filing of the articles and continues perpetually, unless otherwise expressly provided by law or in the articles.* (Emphasis added).

employer under section 203(b)(3)(A)(iii) of the Act when it filed the I-140 on September 25, 2006. Moreover, as indicated above, the petitioner has also applied to sponsor at least 34 other I-140s for caregivers. Therefore, the petitioner must show that it has had sufficient income to pay all the wages as of the respective priority date established in each case.

Further, other evidence submitted to the record does not directly relate to the petitioner's, a corporate employer's, continuing ability to pay the proffered wage, but rather refers to [redacted] personal taxes, personal holdings or holdings of other corporations or other enterprises. As noted above, the petitioner did not file the application for labor certification as a sole proprietor, but as a corporation. Both the ETA Form 9089 and Form I-140 appear to list a corporate FEIN. Therefore only the corporate petitioner's assets and liabilities will be considered. One of these other documents is an unaudited financial statement for the period ending December 31, 2006 consisting of an income statement on behalf of "[redacted] which was provided on appeal. It is noted that like [redacted] this corporation did not commence its corporate existence until February 23, 2007, when it filed its articles of incorporation with the state of California.[3] Therefore any corporate financial documentation prior to the incorporation date would not be probative of the corporation's ability to pay the proffered wage. Moreover, as a separate entity, this corporation's assets are not relevant to the consideration of the corporate petitioner's ability to pay the proffered salary. 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)).

Additionally, with regard to the individual assets belonging to the principal shareholder of a corporate petitioner or the assets of another corporation, or the shareholder's individual tax returns, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders or other corporations. Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage. Therefore, only the corporate petitioner's assets and liabilities will be considered. It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [United States Citizenship and Immigration Services (USCIS)] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is noted that the petitioner also provided another *unaudited* financial statement in the form of an income statement to the record. It purports to present the financial data as of December 31, 2006, for '[redacted]' However, it is not audited and it is not clear that it applies to [redacted] the petitioner identified on the I-140. It is noted that even if it applied to the I-140 petitioner, the regulation at 8 C.F.R. § 204.5(g)(2), provides that evidence of a petitioner

[3] *See* http://kepler.sos.ca.gov/corpdata/Show List. (Accessed 5/12/09).

continuing ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. Additional evidence may be submitted, but the regulation neither states nor implies that unaudited financial statements are an acceptable substitute for the documentation required by the regulation. The regulation makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As unaudited financial statements are the unsupported representations of management, they are not probative of a petitioner's continuing financial ability to pay the certified wage.

Finally, as mentioned above, USCIS records reflect that the petitioner may have filed at least 34 other I-140s on behalf of beneficiaries designated to work as caregivers. Therefore, the petitioner must show that it has had sufficient continuing net income or net current assets as expressed in a corporate federal tax return, audited financial statement or annual report in order to cover all of the respective wages beginning at the priority date of each sponsored beneficiary.[4] As noted above, the petitioner failed to respond to the AAO's notice of intent to deny relating to its status as an employer or its ability to pay the proffered wage for this beneficiary as well as for multiple sponsored beneficiaries.

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[4] If the petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, USCIS will also examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 profit 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. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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).

Net current assets may be examined as an alternative to the petitioner's net income. It is the difference between a petitioner's current assets and current liabilities. It also 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. A corporate petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax return. 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. Net current assets may also be indicated on an audited financial statement or on an annual report based upon audited financial statements.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS 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. USCIS 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.

In this case, the petitioner includes a statement on appeal that the demand for caregivers is high and attaches two letters from a client facility. One letter, dated March 15, 2007, is from [redacted], a registered nurse in the behavioral unit of [redacted] who states that the petitioner provides workers to the hospital who are being paid privately. The other letter, dated March 15, 2007, is from [redacted], a registered physical therapist, contains identical language. It is unclear from these letters how caregiver workers who are being "paid privately" support the petitioner's ability to pay the proffered wage or whether these individuals are official representatives of this client. This evidence does not overcome the lack of regulatory prescribed evidence in the record of the ability to pay the proffered wage to this beneficiary or multiple beneficiaries, or the filing of the I-140 by a corporate petitioner that public record indicates was not a *bona fide* corporate employer until after the I-140 was filed. Thus, assessing the overall circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The appeal will be dismissed based on the evidence showing that the I-140 petitioner was not a *bona fide* corporate employer at the time of filing the I-140, and based on the lack of sufficient evidence that supports the petitioner's ability to pay the proffered wage of this beneficiary as well as additionally sponsored beneficiaries.

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 at 1002 n. 9.

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.