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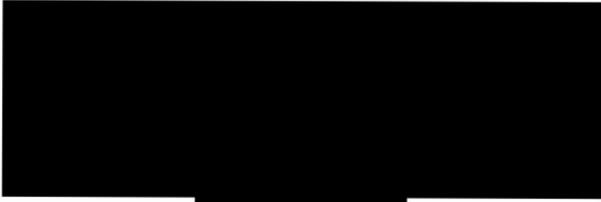
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: FEB 02 2009  
SRC 06 149 52148

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

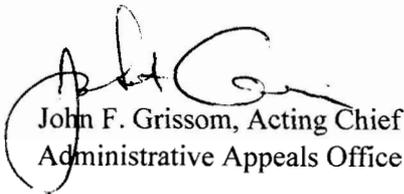
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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.

  
John F. Grissom, Acting Chief  
Administrative Appeals Office



**DISCUSSION:** The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting and insurance company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant.<sup>1</sup> As required by statute, the petition is accompanied by a Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's August 24, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form 9089 Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications

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<sup>1</sup> The AAO notes that counsel for the petitioner's I-140 petition is distinct from counsel for the beneficiary's proceedings and motions to the Executive Office of Immigration Review (EOIR). For more efficient processing of any pending motions or other deliberations, the AAO will send the instant decision to both attorneys of record.

stated on its Form 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form 9089 was accepted on January 13, 2006.<sup>2</sup> The proffered wage as stated on the Form 9089 is \$43,202 per year. The Form 9089 states that the position requires an Associate's degree in business administration or business management and twenty-four months of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup> On appeal, counsel submits a brief and the following documents:

A letter from [REDACTED], the petitioner's Chief Executive Officer, dated September 30, 2006. In his letter [REDACTED] states that two people have worked with the petitioner for the last year and a half and that the petitioner paid a monthly contract worker salary of approximately a thousand dollars to each person for the individual's part-time assignment and respective consultancies. [REDACTED] identified the two individuals as [REDACTED] and [REDACTED]. He also states that the disbursements to these two employees are in addition to other casual payments and to "IDSs"<sup>4</sup> documented in materials submitted on appeal;

Copies of bank statements from Charter One Bank for the petitioner's commercial checking account for the months February, April, May, June and August of 2006,<sup>5</sup> with copies of checks written on this account for each month; and

Copies of three monthly statements with accompanying check copies for the petitioner's small business checking account with TCF National Bank, Willowbrook, Illinois, for the months June to August 2006.

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<sup>2</sup> The director in her decision incorrectly stated that the priority date for the instant petition is April 30, 2001.

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

<sup>4</sup> The checks submitted with the petitioner's bank statements show payments to an entity identified as I.D.E.S.

<sup>5</sup> These Charter One bank statements indicate monthly ending balances of \$5,744.88, \$3,319.35, \$3,428.67, and \$3,076.02, and \$54.09, respectively, for February, April, May, June and August 2006.

Other relevant evidence in the record includes the petitioner's IRS Form 1120-A for tax year 2005 submitted with the initial petition, as well as a second Form 1120-A for tax year 2005 submitted in response to the director's Request for Evidence (RFE) dated May 25, 2006. In its response to the director's RFE, the petitioner also submitted an IRS Form 7004, Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information, and Other Returns. This document appears to be a partial document with no signature or date. It does state that the 2005 return is the petitioner's initial return for 2005 and is for a short tax year. The second Form 1120-A provided a breakout of a claimed figure of \$110,200 on Line 6, Part III of Form 1120-A, All Other Current Assets. This breakout of other current assets includes the petitioner's furniture/computer/office fixtures with value of \$45,500 and the petitioner's automobile valued at \$65,000. The record also contains a database list with 434 name and address entries. In an accompanying letter, [REDACTED] stated that the list represented his individual and corporate clients. The record also includes a one-page Balance Sheet as of June 2006 for the petitioner and [REDACTED] and [REDACTED] and a one-page financial statement for the petitioner for the period January to June 2006.<sup>6</sup>

In response to the director's RFE, the petitioner also submitted copies of bank statements for the petitioner's commercial checking account with Charter One Bank for the months December 2005, February 2006, April 2006, and May 2006,<sup>7</sup> and copies of bank statements for a second TCF National bank account in the petitioner's owner's name for the month of June 20, 2006. Finally the record contains copies of bank statements for either the petitioner's owner or the petitioner's owner and his wife's joint bank accounts with Devon Bank, Washington Mutual, Chase Bank, and Republic Bank for the month of June 2006. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel states the director referred to the petitioner's assets and described the petitioner's revised Form 1120A as ambiguous and not reflective of the petitioner's financial standing. Counsel states that the petitioner is a tax preparer and is well qualified to revisit and revise financial documents as they pertain to the petitioner's business. Counsel then asserts that based on the revised Form 1120A, the petitioner demonstrates that it can pay the proffered wage. Counsel also states that the director failed to give the petitioner's submitted bank statements sufficient evidentiary weight. Counsel states that the director applied an unreasonably strict standard by stating the petitioner's bank statements could not have supported the beneficiary's monthly wage during every month. Counsel notes that over the majority of the time in question, the petitioner's bank accounts exceeded the amount of the beneficiary's monthly salary. Counsel states that it is irrelevant whether the money reflected in the petitioner's monthly bank statements exceeds the beneficiary's monthly salary by a small or large amount. Counsel also notes that the petitioner has employed on a part-time basis two workers paid with IRS Forms 1099 the monthly payment of \$1,000 for the past half year. Counsel asserts that the beneficiary will replace the part-time workers. Counsel requests that the AAO consider these workers' compensation when considering the petitioner's ability to pay the proffered wage.

On July 28, 2008, the AAO sent a Notice of Derogatory Information (NDI) to the petitioner. The AAO noted that during the adjudication of the appeal, evidence had come to light that the petitioning business, Modern

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<sup>6</sup> The petitioner's partial year balance sheet indicates that the petitioner's car increased in value to \$71,200.

<sup>7</sup> These Charter One bank statements indicate the following respective monthly ending balances: \$5,459.53, \$5,744.88, \$3,319.35, and \$3,428.67.

Accounting and INS, Inc., with [REDACTED] the petitioner's owner listed as agent, was involuntarily dissolved in 2000. The AAO sent the petitioner three printouts from the Illinois Secretary of State, Corporation File Detail Report. With regard to the 1998 incorporation year claimed by the petitioner on its Form 1120S, the Illinois Secretary of State corporation files indicated that the business identified as [REDACTED] c. incorporated on December 28, 1998 was dissolved on May 1, 2000. A second corporation record from the State of Illinois database states that [REDACTED] was incorporated on January 11, 2002 and then involuntarily dissolved June 2, 2003. The third document from the Illinois Secretary of State database indicated that an entity named [REDACTED] incorporated on July 28, 2005 and, as of 2008, is in good standing. The agent for this business entity is Sohan [REDACTED] with [REDACTED] Chicago, named as both president and secretary.

The AAO stated that based on the incorporation date listed on the petitioner's 2005 tax return, the petitioning business may no longer be an active business, and that if this were true, the petition and its appeal to this office may have become moot.<sup>8</sup> The AAO requested that the petitioner provide evidence that the petitioner was incorporated in 1998 as stated on the I-140 petition, on the Form 9089 filed with the I-140 petition, and on the petitioner's tax returns submitted to the record. For this purpose, the AAO asked that the petitioner submit its Federal income tax returns for the years 1998 to 2004. The AAO also noted that the IRS Form 7004 submitted by the petitioner stated that the 2005 tax return was for a short tax year, and that it was the petitioner's initial return. The AAO requested further clarification of the Form 7004 submitted to the record, if the petitioner, as indicated on the documents indicated above, was incorporated in tax year 1998.

The AAO also noted that the petitioner submitted one Form 1120-A with the initial petition and then submitted an amended Form 1120-A that increased the figure on line 6, Part III, Balance Sheets per Books, other current assets by identifying the petitioner's Mercedes Benz car as a current asset and adding the car according to the further breakout of Line 6, Part III, submitted with the amended tax return. The AAO then noted that there was no evidence in the record that the Internal Revenue Service (IRS) received or accepted the amended tax return. The AAO notes that U. S. Citizenship and Immigration Services (USCIS) requires IRS-certified copies of the amended return to establish that the amended return was actually processed by the IRS, and that 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 AAO then asked the petitioner to submit the IRS certified copy of its 2005 tax return.

The AAO then noted that on appeal counsel stated that the organization's furniture, computers and car were to be considered current assets and not fixed assets. The AAO noted that the inclusion of the organization's car on the petitioner's 2005 Form 1120-A increased the value of the petitioner's claimed current assets. The AAO then requested documentary evidence that items such as furniture, computers, and cars, are considered current assets, and not fixed assets. The AAO also asked for an explanation of the increase in the value of the petitioner's Mercedes Benz from tax year 2005 to tax year 2006, as indicated by the petitioner in its Federal income tax return for 2005 and the petitioner's 2006 financial statement. On the 2006 Balance Sheet, the

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<sup>8</sup> Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot.

petitioner indicated that as of June 30, 2006, the “Mer 2005” was worth \$71,200, while the petitioner’s 2005 Form 1120A states the “Auto Merc Banz” [sic] is worth \$65,000.

Finally the AAO requested clarification of the claimed number of the petitioner’s employees. The AAO noted that the Form 9089 submitted to the DOL on January 13, 2006 states that the petitioner has ten employees, while the I-140 petition states that the petitioner has no employees. Again, *Matter of Ho*, 19 I&N Dec. at 591-592 states: “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.” With regard to this issue, the AAO questioned whether any misrepresentation took place at the time of filing the Form 9089 to justify the hiring of an administrative assistant, at a time when the petitioner apparently had no other employees.

The AAO noted that although the organization in its response to the director’s request for further evidence dated May 25, 2006 referred to individuals working for the organization on a part-time consulting basis, this assertion is not sufficient to establish the actual employment or contracting of such individuals. The AAO stated that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

In response, the petitioner, in a letter dated August 25, 2008, stated that from tax year 1998 to the present, the petitioning business has been treated as an ongoing corporation, despite the 1998 dissolution of the corporation, and its 2002 involuntary dissolution on June 2, 2003. The petitioner submitted the following evidence:

Copies of Schedules C for tax years 1998, and 1999, for [REDACTED] the petitioner’s owner;

Copy of a Schedule C for tax year 1998 for [REDACTED], the petitioner’s owner’s wife; and copies of Tax Form 1120-A, U.S. Corporation Short-Form Income Tax Return, for tax years 2003 and 2004; and

Copies of incomplete Forms 1040, U.S. Individual Income Tax Return for 1998, 1999,<sup>9</sup> 2000, 2001, 2002, and 2003.

In its response to the AAO’s NDI, [REDACTED] the petitioner’s president, states that he enclosed the tax returns of the petitioner and the personal tax returns of [REDACTED] and [REDACTED] to bring attention to the fact that the same Employer’s Identification Number (EIN) [REDACTED] is used in the tax returns for tax year 1998 to the present. [REDACTED] further states that the petitioner’s joint personal tax returns from 1998 show profit/loss from the business on the respective K-1 forms. [REDACTED] notes that the petitioner has always remained and operated using its original name and operating in the same location, and that he has remained

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<sup>9</sup> The Form 1040 tax returns for tax year 1999 and 2001 submitted in response to the director’s NDI are stamped “received IRS” and consist of the two page tax form 1040 and the petitioner’s Schedules A.

the agent of the business entity, while he and his wife are officers and only shareholders of all three corporations. ██████ asserts that the petitioner is an active business from tax year 1998 to the present.

With regard to the short tax return submitted by the petitioner for tax year 2005 that the AAO questioned in its NDI, ██████ states that this return was not submitted by the petitioner to the IRS. ██████ appears to suggest that an already submitted 1120A tax return reflects the other questioned short form 1120A.<sup>10</sup> The petitioner's owner then stated that the petitioner never had any employees through the period of its business activity but rather used the services of various consultants based on business necessity and demand. The petitioner's owner states that based on past experience and the reasonable forecast of the future demand of manpower need, an urgent need for the business to hire a fulltime administrative assistant exists to replace, coordinate and train the consultants.

With reference to the change in value of the petitioner's owner's Mercedes Benz, the petitioner's owner states that the Mercedes Benz model C325 was purchased in 2005 for \$65,000, and that this car was traded for a new Mercedes Benz, model E325, valued at \$71,200. The petitioner's owner states that the businesses' furniture, fixtures, computer and car are considered current assets rather than fixed assets because of the prevailing technology changes and the petitioner's intention to keep them for a shorter period, and replace them with ongoing new technologies based on the petitioner's long-term existence and planned future expansion strategies.

The AAO notes that the petitioner's owner does not provide a coherent explanation of whether the corporations listed on the state of Illinois Secretary of state database are the same sole proprietor businesses identified by the petitioner's submitted Form 1040 for tax years 1998 to 2002. Further, if the petitioner's owner claims that the petitioner was a sole proprietorship for these five years, the AAO notes that corporations and sole proprietorships are two distinct business structures and would not share the same EIN. In fact, the Forms 1040 submitted to the record contain no EIN, while the petitioner's Forms 1120-A do contain the same EIN number of ██████. In sum, the petitioner's evidence appears to support that the petitioner was structured as a sole proprietor for tax years 1998 to 2002, and then was structured as a corporation in 2003, while the petitioner provides no further clarification on this issue. The AAO also notes that ██████ statement that the petitioner's joint personal tax returns from 1998 show profit/loss from the petitioner's operations on the respective Schedule K-1 forms is totally incomprehensible as the record does not contain any copies of Schedules K or K-1. Further, Schedules K are utilized in tax returns of S Corporations to establish a petitioner's net income.

With regard to the petitioner's owner's comments on the changed values of his cars, and the use of computers, furniture and similar items as fixed assets, and the petitioner's use of consultants on an adhoc business basis, the AAO will comment more fully further in these proceedings.

As noted previously, the priority date in the instant petition is January 13, 2006. Although the petitioner has not clarified whether it was established as a sole proprietor or as a corporation in 1998, the record does

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<sup>10</sup> The petitioner's owner appears to refer to the tax return 1120-A submitted to the record in response to the director's RFE.

contain enough evidence to suggest that petitioner was engaged in business since 1998. The AAO further notes that the petitioner did not submit, as requested by the AAO, an IRS-certified 2005 amended tax return. For this reason alone, the petition must be denied. Nevertheless, for illustrative reasons, the AAO will examine the petitioner's ability to pay the proffered wage as of 2006, and will address in depth the issues raised by the director in his decision.

On appeal, counsel submits the petitioner's unaudited financial statement for January 2006 to June 2006. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, the petitioner submitted a balance sheet dated as of June 30, 2006 to the record in response to the director's RFE. However, this document appears to merge the petitioner's assets with the assets of the petitioner's owner and spouse. As of the 2006 priority date, based on the Forms 1120-A for tax years 2003, 2004, and 2005 submitted to the record, the petitioner is a corporation, and not a sole proprietorship. As the director correctly noted, Citizenship and Immigration Services (CIS) 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.

Counsel's and the director's reliance on the balances in the petitioner's Charter One bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustained ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Item 1, Part III, Balance Sheets Per Books, in its Form 1120-A that will be considered below in determining the petitioner's net current assets.

The AAO also notes that even if the petitioner were allowed to use the monthly bank balances to establish the petitioner's ability to pay the beneficiary's monthly wage, this analysis would not be sufficient to do so, as every month in which the beneficiary's monthly wage was subtracted from the ending balance would result in a lower monthly balance, eventually ending in zero at some point, based on the documents submitted to the record. As stated previously, the petitioner's Charter One bank statements indicate monthly ending balances

of \$5,744.88, \$3,319.35, \$3,428.67, \$3,076.02, and \$54.09, respectively, for February, April, May, June and August 2006. As stated previously, the beneficiary's proffered wage is \$43,202. If the beneficiary were paid a monthly salary of \$3,600 through use of the petitioner's monthly balances, the petitioner would have negative monthly balances after paying only two months of wages. The bank statements for the petitioner's account with TCF National bank submitted on appeal indicate monthly balances for June to August 2006 of \$1,445.14, \$2,463.61, and \$2,463, and are similarly insufficient to establish the petitioner's ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form 9089, 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, 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 during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the

argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang*, 719 F. Supp. at 537.

With regard to the two Forms 1120-A for tax year 2005 contained in the record, the director correctly noted in his decision that at the time of filing the instant I-140 petition, the only tax return available was the petitioner's tax return for 2005. In his RFE, the director provided no explanation for why he requested the petitioner's 2005 tax return again, although he did ask for any further documentation as to the petitioner's 2006 financial resources. In his decision, the director stated that the second Form 1120-A submitted to the record reflected sufficient net current assets as of the end of the 2005 tax year to pay the proffered wage of \$43,202, but also noted that the second tax return reflects gross receipts and net income,<sup>11</sup> including current assets, that greatly exceeded those reflected on the initial 2005 1120-A tax return. The director stated that based on the ambiguity surrounding the two tax returns, the issue of which represented the petitioner's 2005 financial standing was unresolved.

The AAO notes that the petitioner in response to the director's RFE submitted an amended tax return that the petitioner ostensibly has submitted to the IRS.<sup>12</sup> *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." The AAO views the petitioner's increase of items on the petitioner's Part III, Balance Sheets Per Books, and the subsequent amended tax return as questionable, specifically with regard to the significant increase in the petitioner's item 6b, net current assets, based on the restatement of the petitioner's other current assets.<sup>13</sup> On appeal, counsel provides

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<sup>11</sup> The director is not correct in his statement as to any change in the petitioner's gross receipts on the revised return greatly exceeding the petitioner's gross receipts on the initial return. Both tax returns report gross receipts of \$158,742. Further the increase in net income from the initial tax return and the second tax return contained in the record is \$3,825. (The petitioner's initial net income of \$1,138, reflected on line 20 of the Form 1120A, subtracted from \$4,963, the petitioner's indicated net income on the revised Form 1120A.)

<sup>12</sup> The amended tax return shows no evidence of submission to the IRS or its receipt or acceptance by the IRS. CIS requires IRS-certified copies of the amended return to establish that the amended return was actually processed by the IRS. 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)).

<sup>13</sup> The petitioner increased item 6b, other current assets, identified as \$45,200 on its initial tax return to \$110,200, the figure found on the revised tax return at item 6b. Further examination of Item 6b on the revised

no explanation for the submission of the two tax returns, and for the increased net current assets. In response to the AAO's NDI, the petitioner's owner merely states that the short tax return submitted for tax year 2005 is not the tax return submitted by us to the IRS. However, the AAO notes that both the initial and amended tax forms for tax year 2005 are short tax forms. Neither of these forms is stamped as received by the IRS, and thus, the AAO cannot determine whether either of the tax returns, or both tax returns were sent by the petitioner to the IRS. Thus, the petitioner's owner's comments in response to the AAO's NDI only add further discrepancies to the record. Thus, the AAO gives no weight to the amended 2005 tax return, and will examine only the 2005 tax return that was initially submitted to the record.

The petitioner's tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,202 per year from the priority date: In 2005, the Form 1120-A submitted with the initial I-140 petition stated net income<sup>14</sup> of \$1,138. Therefore, for the tax year 2005, the petitioner did not have sufficient net income to pay the 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.<sup>15</sup> On Form 1120A, a corporation's year-end current assets are shown on Part III, Balance Sheet Per Books, lines 1(b) through 6(b). Its year-end current liabilities are shown on lines 13(b) through 14(b). 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 tax returns reflect the following information for the following years:

- The petitioner's net current assets on the initial IRS 1120A submitted to the record were \$78,240.

Therefore, for the year 2005, based on the petitioner's initial IRS Form 1120A submitted to the record, the petitioner had sufficient net current assets to pay the proffered wage.

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tax return indicates that the petitioner listed its furniture, computers and office fixtures in this item valued at \$45,200 on both tax returns, and added the figure of \$65,000 for an item listed as "Auto Merc Banz." only on the revised tax return.

<sup>14</sup> Taxable income is shown on line 24, taxable income before NOL deduction and special deductions, on IRS Form 1120-A, U.S. Corporation Short-Form Income Tax Return.

<sup>15</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

However the AAO still would question the inclusion of items such as the petitioner's furniture, computers and office fixtures, in the petitioner's current assets. The petitioner's furniture, computer equipment, and car are assets that will depreciate, and will not be converted into cash as a normal business practice. The AAO examines five main kinds of current assets -- cash and equivalents, short-term investments, accounts receivable, inventories, and prepaid expenses in its analysis of the petitioner's current assets. The items listed by the petitioner as other current assets are fixed assets.<sup>16</sup> If the monies identified at the petitioner's initial tax return for tax year 2005 as "other current assets," namely, the \$45,200 that ostensibly represents the petitioner's furniture, computer and office fixtures on both tax returns submitted to the record, are excluded from the analysis of the petitioner's current assets, the petitioner has net current assets of \$33,042, less than the proffered wage of \$43,202.<sup>17</sup> In response to the AAO's NDI, the petitioner's owner suggests that advances in technology caused the petitioner to consider these assets as current assets rather than fixed assets. The AAO does not find the petitioner's owner's statements to be persuasive. Thus, the petitioner has not established its ability to pay the proffered wage of \$43,202 based on its net current assets.

Therefore, from the date the Form 9089 was accepted for processing by the U. S. Department of Labor, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that the petitioner has submitted evidence of two other part-time workers presently receiving Forms 1099-MISC from the petitioner who will be replaced by the beneficiary. In response to the AAO's NDI, the petitioner's owner also states that it utilizes consultants when business necessitates such assistance. Contrary to counsel's assertions, neither the petitioner nor counsel has submitted any evidence of any compensation provided to any other workers, or the particular jobs that they performed for the petitioner. The assertions of counsel or of the petitioner 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). Although the petitioner's tax return indicates officer compensation of \$15,000 and salaries of \$54,620, no further evidentiary documentation, such as a Form 941 with a list of all employees and their wages, and/or copies of the Forms 1099 received by the claimed part-time workers or consultants is found in

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<sup>16</sup> Non-current assets, also known as property, plant, and equipment (PP&E), is a term used in accountancy for assets and property which cannot easily be converted into cash. This can be compared with current assets such as cash or bank accounts, which are described as liquid assets. In most cases, only tangible assets are referred to as fixed. Fixed assets normally include items such as land and buildings, motor vehicles, furniture, office equipment, computers, fixtures and fittings, and plant and machinery. These often receive favorable tax treatment (depreciation allowance) over short-term assets.

<sup>17</sup> The petitioner's current assets would be \$37,042 minus the petitioner's current liabilities for tax year 2005 of \$4,002, or \$33,042.

the record. The copies of checks submitted to the record on appeal also do not reflect any wages paid to any claimed full-time or part-time employees, contract workers, or consultants.

Furthermore, neither counsel nor the petitioner has established that the job duties of the two claimed part-time employees or the consultants claimed by the petitioner's owner on appeal have job duties similar to those of an administrative assistant, the proffered position. As noted in the AAO's NDI sent to the petitioner, the petitioner on the Form 9089 indicated it had ten employees, while on its I-140 petition it indicated it had no employees. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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."<sup>18</sup> The petitioner's owner's explanation of the petitioner's use of consultants is not sufficient to clarify the question of the validity of the petitioner's offer of employment to the beneficiary.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form 9089 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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

**ORDER:** The appeal is dismissed.

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<sup>18</sup> The number of paid employees can indicate the actual viability of a petitioner's business operations, and further support the validity of the job offer. Further, if the petitioner had no employees at the time of filing its I-140 petition, the petitioner must demonstrate that the job offer for the position of administrative assistant made to an individual with no knowledge or past work experience in tax preparation is bona fide.