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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: [Redacted]
LIN 06 170 50031

Office: NEBRASKA SERVICE CENTER

Date: **MAR 03 2009**

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.

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).

John F. Grissom, Acting 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's business is the hotel industry. It seeks to employ the beneficiary permanently in the United States as a management accountant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. 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.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated February 5, 2007, an 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.

Beyond the decision of the director, an issue in this case is whether or not the petitioner established during the entirety of the period from the priority date onwards that it would have been the beneficiary's actual employer in control of the proffered position.

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 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 Form ETA 750 Application for Alien Employment Certification,

was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on June 6, 2000. The proffered wage as stated on the Form ETA 750 is \$40,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 46 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The gross annual income stated on the petition is \$40 million. On the Form ETA 750, signed by the beneficiary on June 1, 2000, the beneficiary did claim to have worked for the petitioner from October 1999 to present (i.e. June 1, 2000).

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.¹

Relevant evidence in the record includes: the original Form ETA 750, Application for Alien Employment Certification, approved by DOL; a letter dated January 26, 2005, by [REDACTED] director of operations for the petitioner; and approximately 81 pages of ADP "Master Control Company Options" data for [REDACTED] for the last pay period of each year from December 24, 2000 to December 29, 2005.

According to the petition and the labor certification (FEIN [REDACTED]) is the petitioner and employer in this matter.

The ADP "Master Control Company Options" data statements for the time period December 24, 2000 to December 29, 2005, submitted by the petitioner state the following concerning the beneficiary's work history with the petitioner:

¹ The submission of additional evidence on appeal is allowed by the instructions to the USCIS 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).

- According to a statement, for the period ending December 24, 2000 (Week 52), the beneficiary was hired on July 10, 2000, her hourly rate was \$11.00 per hour and on that statement is marked "Stat" "terminated." No "Scheduled Amounts" or pay "Accumulations to Date" are shown.
- For the period ending December 23, 2001, (Week 52) the beneficiary's name does not appear.
- For the period ending December 22, 2002, (Week 52) the beneficiary's name does not appear.
- For the period ending December 28, 2003, (Week 52) the beneficiary's name does not appear.
- For the period ending December 26, 2004, (Week 52) the beneficiary's name does not appear.
- For the period ending December 25, 2005, (Week 52) the beneficiary's name does not appear.

The petitioner also submitted ten ADP prepared earning statements for the period February 5, 2006 to April 9, 2006, in the name of the petitioner stating wages paid to the beneficiary year-to-date of \$12,433.29.

Along with this submittal the petitioner submitted four Wage and Tax Statements (W-2) naming the beneficiary summarized as follows:

- For 2004, an employer, [REDACTED], FEIN [REDACTED] paid wages to the beneficiary, of \$44,376.91.
- For 2004, an employer, [REDACTED], FEIN [REDACTED] paid wages to the beneficiary, of \$42,000.40.
- For 2005, an employer, [REDACTED], FEIN [REDACTED] paid wages to the beneficiary, of \$40,423.91.
- For 2005, an employer, [REDACTED], FEIN [REDACTED] paid wages to the beneficiary, of \$44,154.16.

According to prior counsel's letter dated October 30, 2006, the beneficiary did not "perform services for the petitioner in the year 2000, 2001, 2002, 2003, 2004 or 2005."

The petitioner also submitted its U.S. Internal Revenue Service (IRS) Form 1120S tax return for 2002, 2003 and 2004. Lines 1c through line 27 of the Form 1120s returns, Schedules A, B and K were submitted with no figures stated whatsoever with the exception that tax due is stated as zero. Schedules L were provided with financial information along with three statements for each year. As the income tax returns did not state any figures, the petitioner's tax returns do not reflect any gross receipts or net income.

Where an S corporation's income is exclusively from a trade or business, USCIS 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).

The petitioner also submitted U.S. federal income tax returns (Form 1040) for the beneficiary for 2004 and 2005.

Along with the above, the petitioner submitted 63 pages of its business checking account statements for the period January 1, 2000, to January 31, 2005.²

The director requested additional evidence from the petitioner on September 20, 2006 including its annual reports or audited financial statements.

In response to the request for evidence prior counsel³ submitted an explanatory letter dated October 30, 2006, and re-submitted the petitioner's U.S. Internal Revenue Service (IRS) Form 1120S tax return for 2002, 2003 and 2004 and the petitioner's Form 1120S tax returns for 2000, 2001 and 2005. Lines 1c through line 27 of the 2000, 2001, 2002, 2003, 2004 and 2005 Form 1120S returns, Schedules A, B and K were submitted with no figures stated whatsoever with the exception that tax due is stated as zero. Schedules L were provided with financial information along with three statements for each year. Shareholder information is not provided in the returns.

Included with the response were ADP "Statistical Summary Recap" statements for October 8, 2006 to November 2, 2006. The beneficiary's name does appear on these statements prepared for [REDACTED]. Included with the response is one earning statement from [REDACTED] to the beneficiary for the period October 29, 2006 to November 2, 2006, stating year-to-date earnings of \$38,183.42.

Counsel also submitted another ADP prepared statement dated July 29, 2008 for [REDACTED] Inc. which is a Statement of Deposits & Filings for the Second Quarter 2006. Employee names do not appear on the statements.

Along with the above, the petitioner submitted 78 pages of its business checking account statements for the period January 1, 2000, to August 31, 2006.

² The bank statements did not include all the months in each year; some of the petitioner's monthly statements were missing for several of the years.

³ The present counsel took over the petitioner's representation on appeal.

As can be seen from the evidence as submitted above, the beneficiary has received earnings from three corporations [REDACTED], and [REDACTED] (although evidence later submitted raises that number to five companies).

According to counsel in his letter dated October 30, 2006, the petitioner [REDACTED] has a controlling interest in other entities to which it offers management services.

The director in his decision dated February 5, 2007, summarized the business relationship between the petitioner and the other entities based on the petitioner's prior business description. The director stated that the petitioner's business purpose was to centralize common functions of hotels. The expense that the petitioner incurs for this management service is then allocated on a percentage basis to each managed hotel which according to the director "brings that expense to a zero balance." Therefore the petitioner has no expenses or income of its own and its tax returns do not therefore state net income or loss.

According to counsel in his legal brief on appeal "[USCIS], in its denial, seems to have accepted these arguments.

On appeal, counsel asserts:

- That according to U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, since the petitioner has paid the beneficiary at the rate of the proffered wage since January 16, 2006, that this demonstrates the ability to pay the proffered wage.
- That the director erred because he did not accept the petitioner's bank statements and "other documentary evidence" as evidence of the ability to pay the proffered wage.
- That the director erred by failing to consider that the petitioner submitted evidence demonstrating it had a reasonable expectation that it would be able to pay the proffered wage pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes: a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004; a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQ 70/6.2.8) dated December 7, 2000; a Wage and Tax Statement (W-2) issued by [REDACTED] (FEIN 13-2887517) in 2006 to the beneficiary in the amount of \$2,653.86; a Wage and Tax Statement (W-2) issued by the petitioner in 2006 to the beneficiary in the amount of \$48,029.58; eight earning statements from [REDACTED] to the beneficiary for the period January 11, 2007, to March 1, 2007 stating year-to-date earnings of \$48,826.93; and two press releases concerning the petitioner's hotels business (counsel's exhibit F of his legal brief).

Counsel re-submits for year 2004 Wage and Tax Statements (W-2) naming the beneficiary from [REDACTED], and [REDACTED], and the beneficiary's personal Form 1040 U.S. federal

tax returns for 2004 and 2005. The assets of other corporations are not evidence of the petitioner's ability to pay the proffered wage.

For the first time in this matter, and despite the beneficiary's sworn statement in the Form ETA 750, Part B that she was employed by the petitioner commencing on October 2000 (or according to the ADP "Master Control Company Options" data with the petitioner for the period ending December 24, 2000, on July 10, 2000), counsel submits five Wage and Tax Statements (W-2) for 2000 from five corporations naming the beneficiary as an employee for 2000. These are: [REDACTED], wages paid of \$1,408.00; [REDACTED], wages paid \$17,384.50; [REDACTED], \$16,158.73; [REDACTED], \$14,415.05; and [REDACTED], \$12,432.59 along with the beneficiary's personal Form 1040 U.S. federal tax returns for 2001 and 2002.

Although counsel asserts that the beneficiary is and has been in the employ of the petitioner, no W-2 was submitted from the petitioner at anytime in these proceedings.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Along with the above counsel submits on appeal copies of web pages from the Internet websites <<http://query.nytimes.com>>, <http://www.allbusiness.com>, <http://www.hotel-online.com>>, <<http://ustoday.printthis.clickability.com>>, <Http://www.washingtonpost.com>>, <Http://members.forbes.com>> all accessed March 5, 2007; three articles downloaded from <http://web2.westlaw.com> all accessed on October 5, 2006; an article downloaded from the website <<http://www.nysun.com>> accessed on October 9, 2006; an article from "The Meeting Professional" March 2006, Volume 26, No. 3) entitled "Accommodating All Angles;" and, U.S federal tax returns for [REDACTED], and [REDACTED]

Ability to Pay the Proffered Wage

On appeal, counsel states the director erred when he did not consider income or wages paid to the beneficiary from the above mentioned separate corporations. Counsel's statement that [REDACTED]

[REDACTED], are separate corporations from the petitioner is correct. Since each of these entities have separate federal employer identification numbers, the income and wages paid to the beneficiary as afore described cannot be considered as proof of the petitioner's ability to pay the proffered wage. Assets of shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

The director determined in his decision that after a review of the evidence that the petitioner was established to centralize common functions of five hotels and to allocate expenses that the petitioner incurs to five hotels. By implication, counsel contends on appeal that the director's recognition of the above mentioned operating arrangement is also recognition that the petitioner has demonstrated its ability to pay the proffered wage by the same arrangement as the beneficiary's actual employer.

Further, USCIS 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).

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, U.S. Citizenship and Immigration Services (USCIS) 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 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 from the priority date.

According to the record, the beneficiary commenced employment with the petitioner on July 10, 2000, listed on the ADP "Master Control Company Options" data for the period ending December 24, 2000. She was paid \$11.00 per hour. However, the labor certification indicates her start date was on October 1999. According to that ADP employee data statement, the beneficiary was terminated by the petitioner as of December 24, 2000. Thereafter the ADP "Master Control Company Options" data submitted through December 25, 2005, for the petitioner does not show the beneficiary as the petitioner's employee.

The next indication of the employment of the beneficiary by petitioner was ten ADP generated earning statements for the period February 5, 2006 to April 9, 2006, in the name of the petitioner stating wages paid to the beneficiary year-to-date of \$12,433.29. According to counsel, the petitioner has paid the beneficiary at the rate of the proffered wage since January 16, 2006.

Other than the above, there is no other evidence the petitioner paid the beneficiary only that the beneficiary was employed by five other corporations with separate federal employer identification numbers.

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 supported by federal case law. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

If the net income the petitioner demonstrates it had available during the 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, USCIS will review the petitioner's assets.⁴

The petitioner submitted no financial information concerning the petitioner's net income to show that it had the ability to pay other than to assert it had no net income since the priority date.

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, USCIS 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.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

⁴ The petitioner is a cost center created to service five hotel corporations according to the director. The petitioner provided no net income figures presumably because there were none.

⁵ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- The petitioner's net current assets during 2000, 2001, 2002, 2003, 2004 and 2005 were <\$42,766.00>, <\$\$57,584.00>, <\$54,856.00>, <\$42,843.00>, <\$42,587.00>, and <\$94,935.00> respectively.

Therefore, for the period for which tax returns were submitted, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL the petitioner had 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 are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁶ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

As already stated counsel contends that according to USCIS Interoffice Memorandum (HQOPRD 90/16.45) dated May 4, 2004, since the petitioner has paid the beneficiary at the rate of the proffered wage since January 16, 2006, that this demonstrates the ability to pay the proffered wage. Counsel's statement is misplaced. The petitioner is obligated to pay the proffered wage from the priority date which in this case is June 6, 2000. The interoffice memo cannot be read to abrogate the regulatory requirement that the petitioner demonstrates its ability to pay the proffered wage from the priority date. There is evidence that the beneficiary was employed by the petitioner since February 5, 2006, and for a brief period in 2000, but there is no evidence that the petitioner paid the beneficiary the proffered wage from June 6, 2000 to February 5, 2006. A petitioner must establish the elements for the approval of the petition at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

As already stated, counsel contended on appeal that the director erred because he did not accept the petitioner's bank statements and "other documentary evidence" as evidence of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank accounts 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 sustainable 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 Schedule L that will be considered below in determining the petitioner's net current assets.

⁶ 8 C.F.R. § 204.5(g)(2).

Counsel has submitted additional disparate documents in this case, mostly press releases and hotel industry orientated articles as “documentary evidence” of the petitioner’s ability to pay the proffered wage but for the events of September 11, 2001. Since the petitioner is admittedly a cost center, that is a service entity for other hotel businesses which are profit producing entities, and the petitioner has no net income or current assets of its own to show, counsel’s logic is not apparent. The record of proceeding contains no evidence specifically connecting the petitioner’s business service to the hotel industry to the events of September 11, 2001.

A mere broad statement by counsel that, because of the nature of the petitioner’s relation to the hotel industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner’s five hotel business customers’ financial status might have appeared stronger had it not been for the events of September 11, 2001. However, it’s the petitioner’s financial status that is the issue here not that of other entities. Further, there is no documentary evidence of the five hotel business customers’ legal obligation to pay the beneficiary wages as the petitioner’s employee. Rather the evidence shows that these five hotel corporations employed the beneficiary directly for five years.

Counsel asserts on appeal that the director erred by failing to consider evidence demonstrating it had a reasonable expectation that it would be able to pay the proffered wage pursuant to *Matter of Sonogawa, Id. Matter of Sonogawa*, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s 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 *Sonogawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. No unusual circumstances exist in this case akin to the facts and holding of *Sonogawa*.

Since the petitioner submitted no evidence of net income whatsoever, no annual returns or audited financial statements, although requested on September 20, 2006 by the director according to the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner has submitted insufficient evidence to demonstrate it had a reasonable expectation that it would be able to pay the proffered wage. 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 failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). notes that the AAO reviews decisions on a *de novo* basis).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The Job Offer as a Realistic Offer

The petitioner must establish that its job offer to the beneficiary is a realistic one. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). 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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even where the director failed to identify such basis for denial in his 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)(which

Although counsel contends throughout that the beneficiary is an employee of the petitioner, the evidence submitted by counsel shows otherwise. Counsel offers no explanation why as the evidence submitted demonstrates the beneficiary was terminated by the petitioner as of December 24, 2000; why the beneficiary was paid after 2000 by five other hotel corporations as their employee, if as counsel states the petitioner is the employer; or why the ADP "Master Control Company Options" data submitted listing all of the petitioner's employees in 2005 does not list the beneficiary.

On one hand counsel contends despite all evidence submitted that the petitioner was the actual employer of the beneficiary but has submitted insufficient evidence to substantiate this assertion.

We do note that counsel has submitted (six and seven years after the priority date) a Wage and Tax Statement (W-2) issued by the petitioner in 2006 to the beneficiary in the amount of \$48,029.58 as well as eight earning statements from [REDACTED] to the beneficiary for the period January 11, 2007, to March 1, 2007 stating year-to-date earnings of \$48,826.93. Therefore it appears from the evidence submitted that the beneficiary was employed briefly by the petitioner in 2000, then terminated from that employment, then thereafter employed by [REDACTED] and [REDACTED], then most recently again by the petitioner.

Further, an undated newspaper release (counsel's exhibit "F" on appeal) found in the record of proceeding lists the beneficiary as the general manager of the [REDACTED]. Since counsel asserts that the petitioner is only a service corporation and does not operate hotels, it is clear that the beneficiary's employment occupation(s) is other than as a management accountant for the petitioner.

The totality of the evidence submitted does not show that the petitioner was the actual employer of the beneficiary from the date of her termination in 2000 until February 5, 2006 when she received \$12,433.29 from the petitioner in wages. Based upon the evidence in the record of the beneficiary's employment since 2000, it is reasonable to assume that the beneficiary is also now on the payroll of other entities besides the petitioner. No evidence was presented that the beneficiary was ever employed full time by the petitioner since she has been commanding a total salary of over \$80,000.00, albeit not only from one employer, and the most the petitioner has paid the beneficiary has been \$48,826.93 in 2007.

No evidence was presented that the petitioner is an outsourcing business or a temporary services organization.

The regulation at 20 C.F.R. § 656.3¹ 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.

In *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would directly pay the beneficiary's salary; would provide benefits; would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* at 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord* at 286, the Regional Commissioner determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was not an employment agency merely acting as a broker in arranging employment between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner was seeking to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner in this instance again determined that where a staffing service does more than refer potential

employees to other employers for a fee, where it retains its employees on its payroll, etc., the staffing service rather than the end-user is the actual employer. *Id.*

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). *See* 8 C.F.R. § 204.5(c).

The petitioner failed to establish that during the entirety of the period from the priority date onwards that it would have been the beneficiary's actual employer in control of the proffered position had the beneficiary accepted the position. Consequently, the petitioner is not eligible to file a visa preference petition on behalf of the beneficiary. The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.