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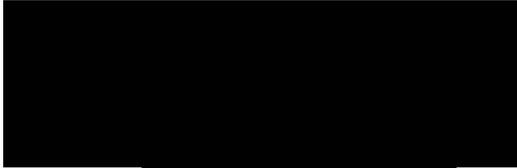
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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FILE: [Redacted]  
SRC 800 375 3289

Office: TEXAS SERVICE CENTER

Date: OCT 16 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).

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a custom tailoring business. It seeks to employ the beneficiary permanently in the United States as a custom tailor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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.

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 October 10, 2007 denial, the single issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date. The AAO will also examine whether the petitioner has established that the beneficiary has the requisite five years of work experience as a custom tailor prior to the 2004 priority date, and whether a familial relationship exists between the petitioner and the beneficiary that would raise questions as to the bona fide nature of the job offer.

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 the 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, as certified by the 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 August 2, 2004. The proffered wage as stated on the Form ETA 750 is \$27,000 per year. The Form ETA 750 states that the position requires four years of work 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>1</sup> With the petition, the petitioner submitted copies of its Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2003 and 2004, with partial tax documentation for tax years 2002 and 2003. The petitioner also submitted a Small Business Administration (SBA) Form 4B, Personal Financial Statement, dated October 10, 2006, that lists the financial resources of [REDACTED]. In addition, the petitioner submitted a copy of a document entitled "Texas Franchise Tax Public Information Report" for tax years 2002, 2003, 2004, and 2005 signed by the beneficiary as the petitioner's registered agent. The same documents indicate that [REDACTED] term as the petitioner's president expired on December 31, 2002.<sup>2</sup>

In response to the director's RFE dated July 5, 2007, the petitioner submitted its Forms 1120S for tax years 2005 and 2006 that indicate [REDACTED] is the petitioner's sole shareholder. Finally the petitioner submitted a copy of IRS Form W-3 for tax year 2004 that indicates the petitioner paid \$24,000 in wages, tips and other compensation. No employee is identified on this form, and the beneficiary is identified as the petitioner's contact person.

On appeal, counsel submits Forms 1040 for tax years 2004, 2005, and 2006 for [REDACTED] and [REDACTED] with accompanying New Jersey state income tax returns and W-2 Wages and Tax Statements for both husband and wife.<sup>3</sup> In Exhibit Three, the petitioner submits a letter dated November 30 2007 from [REDACTED], who states that the petitioner has filed as an S corporation, but that since [REDACTED] is the one hundred percent owner of the petitioner, the result of her activity is included in line 17 of the couple's Form 1040. [REDACTED] lists six companies, including the petitioner, and indicates that [REDACTED] is 100 percent owner of [REDACTED] and [REDACTED]. He also indicates that [REDACTED] and [REDACTED] are 50 percent shareholders in [REDACTED], and [REDACTED] and that the petitioner is the only corporation that [REDACTED] is 100 percent owner. [REDACTED] also notes that although the different business entities are paying [REDACTED] and [REDACTED] as employees, they are one hundred percent owners of these

<sup>1</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).

All tax returns indicate that [REDACTED] is the petitioner's sole shareholder.

<sup>3</sup> These tax returns are jointly filed by [REDACTED] and [REDACTED]

business entities. [REDACTED] also notes that [REDACTED] and [REDACTED] must be considered as the parent company and all their S corporations and partnerships are considered as branches of the company that are reported in the summary totals for the parent company. [REDACTED] states that while [REDACTED] (being a branch) is relevant, it is not crucial in the evaluation of the overall activities of the parent company [REDACTED] and [REDACTED]. He calculates the average total income of the couple during tax years 2004 to 2006 as \$99,805, which he states is greater than the proposed wage. [REDACTED] also notes that the total income for the couple is \$62,237 in 2004; \$127,423 in 2005; and \$109,755 in 2006. [REDACTED] states that these total incomes are all greater than the \$27,000 proffered wage.

In Exhibits Four through Eight, counsel submits various state of New Jersey documents on the filing or incorporation of the other New Jersey corporations or partnerships owned either by the couple, by [REDACTED] or by [REDACTED]. The petitioner also submits Forms 1065, U.S. Return of Partnership Income, for [REDACTED] for tax years 2004 to 2006; Forms 1120S for [REDACTED] Forms 1120S for [REDACTED] for tax year 2004; Forms 1120S for [REDACTED] [REDACTED] for tax years 2005 and 2006; and Forms 1120S for [REDACTED] [REDACTED] for tax years 2004, 2005, and 2006. In Exhibit Nine and Ten, counsel submits a state of New Jersey Certificate of Formation dated October 11, 2006, for [REDACTED] L.L.C., a catering business that indicates [REDACTED] is one of three managers, and a Certificate of Formation for a real estate business identified as [REDACTED], dated October 11, 2006.

The petitioner also submits its state of Texas Employer's Quarterly Reports from the third quarter of 2000 to the final quarter of December 31, 2004. These documents indicate that the beneficiary was paid \$2,500 in the third quarter of 2000; \$3,000 for the final quarter of 2000 and the first two quarters of 2001, and \$5,000 in the third quarter of 2001. As of the fourth quarter of 2001, the petitioner paid the beneficiary \$6,000 a quarter. Finally, the petitioner submitted a Form W-2 Wage and Tax statements for the beneficiary for tax year 2004 that indicated the petitioner paid him \$24,000. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner is a sole proprietorship owned 100 percent by [REDACTED]. Counsel states that the petitioner is submitting the individual tax returns for [REDACTED] and an opinion from a tax attorney to show the sole proprietor has the ability to pay the wage. Counsel cites *Ohsawa America* 1988-INA-240 (BALCA 1988), a Board of Alien Labor certification Appeals (BALCA) decision that held the personal assets of the petitioner's owner, apart from the petitioning company, could be counted in determining whether the employer had the ability to pay the wage. Counsel also cites *Matter of Ranchito Coletero*, 02-INA-104 (2004 BALCA), Counsel states that the Board in this case determined that the entire assets of a sole proprietorship employer should be considered when evaluating the ability to pay. Counsel notes the total income listed on the [REDACTED] Forms 1040, utilizing the figures calculated by [REDACTED] in his letter, and states that these incomes are sufficient to pay the proffered wage. Counsel also notes that in an unpublished AAO decision, the AAO determined that the petitioner is not obligated to demonstrate

the ability to pay the entire proffered wage, but only that portion which would have been due if it had hired the beneficiary on the priority date.

On appeal, counsel states that the petitioner should be viewed as a sole proprietorship since the petitioner has a sole shareholder. Counsel's assertion is not persuasive. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation, based on its Forms 1120S tax returns. On this form, it states "Do not file this form unless the corporation has timely filed Form 2553 to elect to be an S corporation." An S corporation is a corporation that passes-through net income, losses, deductions and credits to its shareholders. The business profits are taxed at individual rates on each shareholder's Form 1040. There is no other evidence in the record, such as the petitioner's articles of incorporation with the state of Texas, or a certificate of status that would establish any other business structure. For purposes of these proceedings, the petitioner is considered to be structured as an S Corporation.

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$60,000, a net income of \$15,000, and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary but not dated, the beneficiary claimed that he had worked for the petitioner since November 1999.<sup>4</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel and [REDACTED] suggest that the petitioner's shareholder and her husband be considered as a parent company and their various S Corporations and L.L.C.s be considered "branches" of the parent company. [REDACTED] states that the couple can use their joint average adjusted gross incomes, which contain revenue from various S Corporations and L.L.C.s in 2004, 2005 and 2006 to establish the petitioner's ability to pay the proffered wage. Contrary to counsel's and the accountant's assertions, 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*,

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<sup>4</sup> The record contains two Forms I797B that approved two L1B petitions that the petitioner submitted for the beneficiary, with periods of validity for September 24, 1999 to April 15, 2002 and April 15, 2002 to April 15, 2004.

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 states that a Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that the case stands for the proposition that the personal assets of the corporate owner can be considered in determining the ability to pay the proffered wage. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder's willingness to fund the company. In the instant petition, the petitioner shows continuing loss of operations, diminishing salaries,<sup>5</sup> and losses in net income in the last two years of operations based on the petitioner's tax returns. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), another BALCA decision. Again, counsel does not state how the BALCA precedent is binding on the AAO. Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not applicable to the instant petition, which deals with an S Corporation.

On appeal, counsel also refers to an unpublished decision issued by the AAO concerning the petitioner's not having to pay the entire proffered wage, but only that portion that would have been due if the petitioner had hired the beneficiary on the priority date. Counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the petitioner has provided evidence as to wages paid to the beneficiary throughout the entire 2004 priority year that are not sufficient to pay the proffered wage. Even if the period of August 2, 2004 to the end of 2004 is considered on a prorated basis, based on the petitioner's Quarterly Wage Reports, it was not paying the beneficiary the proffered wage during this period of time.

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

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<sup>5</sup> The petitioner's salaries are identified on the Forms 1120S as \$24,000 in 2004; \$8,000 in 2005; and \$4,000 in 2006.

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 2004 and subsequently. It did establish that it paid the beneficiary \$24,000 in 2004, \$8,000 in 2005; and \$4,000 in 2006.<sup>6</sup> Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2004, and the difference between the beneficiary's actual wages and the proffered wage in tax years 2005 and 2006.<sup>7</sup>

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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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). 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 USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of

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<sup>6</sup> The AAO notes that the petitioner also established that it paid the beneficiary wages as of tax year 2000; however, the beneficiary's wages prior to the August 2, 2004 priority date are not probative of the petitioner's ability to pay the proffered wage as of the 2004 priority date and onward. The AAO will not examine further the beneficiary's wages in tax year 200 to 2003 in these proceedings.

<sup>7</sup> The difference is \$3,000 in 2004; \$19,000 in 2005 and \$23,000 in 2006.

funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

*River Street Donuts* at 116. “[USCIS] 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.” *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on October 10, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. Therefore, the petitioner’s income tax return for 2006 is the most recent return available. The AAO notes that the petitioner submitted earlier tax returns to the record, including tax years 2002 and 2003. However, the earlier tax returns are not probative of the petitioner’s ability to pay the proffered wage as of the 2004 priority date and onward. The AAO will not discuss further these earlier tax returns in these proceedings. The petitioner’s tax returns demonstrate its net income for the relevant period of time, as shown in the table below.

- In 2004, the Form 1120S stated net income<sup>8</sup> of \$3,588.
- In 2005, the Form 1120S stated net income of -\$4,988.
- In 2006, the Form 1120S stated net income of -\$2,499.

Therefore, in the year 2004, the petitioner did have sufficient net income to pay the difference between the beneficiary’s actual wages and the proffered wage. However, in tax years 2005 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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<sup>8</sup> 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 IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc. The AAO notes that the petitioner in the instant petition did not have additional income, credits, deductions or other adjustments in the relevant period of time.. Therefore, for tax years 2004 to 2006, the petitioner’s net income is found on line 21, of the Form 1120S.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>9</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 to 2006, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$501.
- In 2006, the Form 1120S stated net current assets of \$501.

Therefore, for the years 2005 and 2006, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the 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 except for tax year 2004.

Counsel asserts in her brief accompanying the appeal that the petitioner is actually a sole proprietorship and the assets of both the petitioner's owner and her husband should be considered in determining the petitioner's continuing ability to pay the proffered wage from the priority date. As previously discussed, the petitioner is not a sole proprietorship and the assets of the petitioner's owner's other businesses cannot be utilized to establish the petitioner's ability to pay the proffered wage. 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 ETA 750 was accepted for processing by the DOL.

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

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<sup>9</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.

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, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record contains no evidence as to the petitioner's business viability and operations, beyond the letters of recommendation for the beneficiary. These letters detail the intricacies of creating Indian clothing for special occasions and comment extensively on the beneficiary's skills in tailoring. However, the petitioner's business operations are not commented on, and the record reflects significant declines in the petitioner's gross income and wages and salaries in tax years 2005 and 2006. The record also reflects that the petitioner has one employee and that in tax year 2006, it paid \$4,000 in wages. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it is a viable business and that it has the continuing ability to pay the proffered wage.

Beyond the decision of the director, the petitioner has not establish that the beneficiary is qualified to perform the duties of the proffered position, in particular with regard to the requisite four years of prior work experience. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on August 2, 2004.<sup>10</sup> The I-140 petition was filed on January 11, 2007.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects that no education is required for the proffered

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<sup>10</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

position, although the applicant is required to have four years of work experience as a custom tailor prior to the August 2, 2004 priority date.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his work experience as follows:

Employer	Dates of Employment:	Kind of Business
The Petitioner, Houston, Texas	November 1999 to undefined date	Custom Tailoring
Uma Ladies Tailor, Raopura, Vadodakai, India	September 1994 to November 1999	Ladies Tailor
Style Tailor & Em[b]roiders Vadodara, India	August 1992 to September 1994	Ladies Custom Tailor

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) Other documentation—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled worker*. If the petitioner is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . . The minimum requirements for this classification are at least the two years of training or experience.

With the initial I-140 petition, the petitioner submitted a cover letter that stated the beneficiary has many years of experience as a custom tailor, but did not describe any specific period of time that the beneficiary had worked for it as a custom tailor, prior to the August 2004 priority date and his specific responsibilities. The petitioner also submitted eight letters of recommendation.

Four letters are from businesses in India and include the following:

A letter dated March 21, 2004, with an illegible signature from Vaishali Ladies Tailors. The letter writer states that they knew the beneficiary for more than seven years while he was working with Uma Ladies Tailor, Vadodara. The letter writer states that the beneficiary left for the United States after his parents died “to manage the business in Houston;”

A letter dated March 28, 2004 signed by an unidentified proprietor, Novelty Ladies Tailor, Raopura, Vadodara, stating that the letter writer has know the beneficiary for more than twelve years while he was working for the Uma Ladies Tailor, Vadodara. This letter writer describes the beneficiary's skills in creating Indian dresses, and states that he left for the United States on the death of his parents to manage the business in Houston;

A letter from [REDACTED], Iskon Ladies Tailor, Baroda, India, dated March 25, 2004. The letter writer states that she knew the beneficiary for more than nine years, and repeats the text of the other letters from Indian tailors; and

A letter written April 2, 2004 from the proprietor, [REDACTED]. In this letter repeats the text of the other letters from Indian tailoring businesses, describing the beneficiary's skills in tailoring and creating Indian dresses.

The record also contains four letters from businesses in Houston, Texas as follows:

A letter signed by [REDACTED], Houston, Texas, dated April 11, 2004. In his letter, [REDACTED] states that he knew the beneficiary through his father, Mr. [REDACTED] another designer, who died in a house fire, and the beneficiary was given all the alteration work done by the father;

A letter from [REDACTED] Houston, Texas, dated April 8, 2004 that states the beneficiary is a master in making Indian dresses and that the letter writer knew him for the last two years;

A letter from [REDACTED] dated April 11, 2004 that describes the beneficiary's expertise in creating and altering Indian dresses; and

A letter from [REDACTED] Houston, Texas, who describes the beneficiary's work.

While the four letters from Houston describe the work done by the beneficiary as a custom tailor in the United States, none are written by the petitioner, identified on the ETA Form 750, Part B, as the beneficiary's employer in Houston. With regard to the letters written by Indian businesses, none is written by the beneficiary's former employers in India, namely, Uma Ladies Tailor, Vadodakai, and Style Tailor Embroiders, Vadodara. Thus, the record contains no letter of verification for work performed prior to the August 2004 priority date from a former employer or from the petitioner. Further, one letter writer indicated that in 2004, they had known the beneficiary for two years which raises questions about how long the beneficiary worked for the petitioner prior to the 2004 priority date. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (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." Without more specific letters of work verification from either

the petitioner or the beneficiary's former employers, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Also beyond the decision of the director, the AAO notes that the record contains some evidence that a familial relationship exists between the beneficiary and the petitioner. All letter writers refer to the death of the beneficiary's father and to a family business in Houston, Texas. Some letter writers refer to the beneficiary's father as a master custom tailor, which suggests the petitioner may have been the business of the beneficiary's father. The record contains Texas Franchise Tax Public Information Reports for tax years 2002, 2003, 2004 and 2005 signed by the beneficiary as the petitioner's registered agent. This fact suggests that the beneficiary fulfilled other job duties beyond those of a custom tailor. Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). If any familial relationship exists between the beneficiary and the petitioner, the AAO would question the petitioner's level of compliance and good faith in the Form ETA 750 certification process with the Department of Labor.

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.