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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **APR 07 2010**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

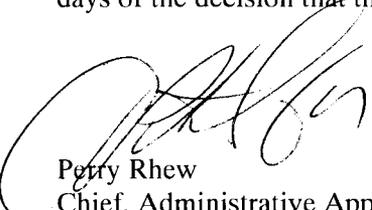
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty foreign food cook (cook). 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. Therefore, the director denied the petition.

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.

According to the director's September 27, 2007 denial, at issue in this case is whether 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 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 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 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 DOL accepted the petitioner's Form ETA 750 on March 26, 2004.¹ The proffered wage as stated on the Form ETA 750 is \$23,795 per year. The Form ETA 750 states that the position requires two years of experience in the job offered.

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 on appeal.²

The evidence in the record shows that the petitioner is structured as an S corporation. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner claimed to have been established in 1995, to currently employ seven workers, and to have a gross annual income of \$1,611,467. According to the tax returns in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on March 22, 2004, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, 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).

¹ U.S. Citizenship and Immigration Services (USCIS) records indicate that the petitioner has filed 21 other Forms I-140 for 21 additional beneficiaries which are pending or were pending during all or part of the relevant period of analysis in this case. Of these additional petitions, USCIS records indicate that 14 are still pending, and 7 have adjusted to LPR status. In the July 2, 2007 request for evidence (RFE), the director requested documentation regarding any additional petitions that the petitioner had pending during the relevant period of analysis. The director also requested documentation of the proffered wages for all the petitioner's sponsored workers. The director pointed out that the petitioner must show the ability to pay the instant wage and the wages of all its sponsored workers. The petitioner did not submit documentation regarding its other sponsored workers and their proffered wages, as requested by the director.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in this 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).

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. Here, the petitioner has not established or even asserted that it employed the beneficiary at any time during the relevant period.

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. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced, contrary to counsel's assertions. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages or had labor costs in excess of the proffered wage is not sufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service (INS), 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 assertion that the INS 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 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). Thus, this office rejects any suggestion made on appeal that the petitioner’s depreciation allocation should be considered funds available to pay the wage.

As a preliminary matter, the AAO would underscore that the petitioner also had pending petitions for over 20 other beneficiaries during the relevant period of analysis. In the RFE dated July 2, 2007, the director requested that the petitioner submit documentation regarding each of its pending petitions, including documentation of the proffered wage in each case. The director specified in the RFE that “the petitioner must establish the ability to pay the total amount of the proffered wage for all of the beneficiaries. Submit documentation of each I-140 petition filed, the proffered wage for each I-140 petition, and evidence to show that the petitioner has the ability to pay the combined wages of all the aliens named in the petitions filed.” The petitioner did not provide this evidence with its reply to the RFE. In the Notice of Decision, the director stated that no documentation had been submitted to substantiate the petitioner’s other filings or the proffered wages of all its other sponsored workers. On appeal, the petitioner also failed to provide documentation of any of its other pending Forms I-140 and the proffered wages in those cases.³

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide documentary evidence of all its pending petitions and the proffered wage associated with each of these petitions. This evidence would have shown how much the petitioner must pay to cover the wages of its other sponsored workers. USCIS must have information regarding the petitioner’s added expense of these additional wages before it may analyze the petitioner’s ability to pay the instant proffered wage. The petitioner’s failure to submit this evidence cannot be excused. 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). The appeal must be dismissed on this basis.

Further, the AAO would underscore that throughout these proceedings the petitioner acknowledged only four additional filings. Yet, USCIS records show that the petitioner had over 20 additional pending petitions in the relevant period. This inconsistency in the record casts doubt on all the evidence in the record.

Doubt cast on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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

³ This office notes that when, as in the present matter, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept such evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

not suffice. *Id.*

The record before the director closed on September 17, 2007 with the receipt of the petitioner's submissions in response to the RFE. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2004 through 2006, as shown in the table below:

- In 2004, the Form 1120S stated net income⁴ of \$122,120.
- In 2005, the Form 1120S stated net income of \$82,683.
- In 2006, the Form 1120S stated net income of \$84,917.

First, USCIS records indicate that the petitioner had as many as 16 of its more than 20 additional petitions pending in 2004. The petitioner must demonstrate the ability to pay these 16 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant proffered wage and all its sponsored workers' wages in 2004.

USCIS records indicate that the petitioner had as many as 18 of its more than 20 additional petitions pending in 2005. The petitioner must demonstrate the ability to pay these 18 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant proffered wage and all its sponsored workers' wages in 2005.

USCIS records indicate that the petitioner had as many as 19 of its more than 20 additional petitions pending in 2006. The petitioner must demonstrate the ability to pay these 19 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant proffered wage and all its sponsored workers' wages in 2006.

⁴ 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 17e (in tax years 2004 and 2005), and on line 18 (in tax year 2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 26, 2010) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional deductions and other adjustments shown on its Schedule K for 2004 through 2006, the petitioner's net income is found on page 1, line 21 of its tax returns.

Therefore, for the years 2004 through 2006, the petitioner has not established that it had sufficient net income to pay all of the full proffered wages.

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, USCIS will review the petitioner's assets. However, total assets will not be considered in the determination of the ability to pay the proffered wage, as suggested by counsel. 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 through 2006, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of \$64,990.
- In 2005, the Form 1120S stated net current assets of \$76,351.
- In 2006, the Form 1120S stated net current assets of \$91,279.

Again, USCIS records indicate that the petitioner had as many as 16 additional petitions pending in 2004. The petitioner must demonstrate the ability to pay these 16 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated that it had sufficient net current assets to pay the instant proffered wage and all its sponsored workers' wages in 2004.

USCIS records indicate that the petitioner had as many as 18 additional petitions pending in 2005. The petitioner must demonstrate the ability to pay these 18 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated that it had sufficient net current assets to pay the instant proffered wage and all its sponsored workers' wages in 2005.

⁵According 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.

USCIS records indicate that the petitioner had as many as 19 additional petitions pending in 2006. The petitioner must demonstrate the ability to pay these 19 salaries as well as the instant wage before this office can find that it has shown the ability to pay the wage in that year. The petitioner did not document for the record the proffered wage in each of those cases, as requested by the director. Thus, the petitioner has not demonstrated that it had sufficient net current assets to pay the instant proffered wage and all its sponsored workers' wages in 2006.

Therefore, the petitioner has not established that it had the continuing ability to pay the beneficiary and all its sponsored workers the proffered wages from the respective priority dates forward through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may also 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 Sonogawa*, 12 I&N Dec. 612. 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. As in *Sonogawa*, 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.

Here, the petitioner incorporated in 1995 and has seven employees. It has not established its historical growth since incorporating. Its gross sales or receipts have not steadily increased, but have fluctuated as follows: \$1,487,919 in 2004; \$1,611,467 in 2005; and \$1,605,878 in 2006. Further, the petitioner has not established: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. Most critically, the petitioner has failed to address the issue the added expense of its additional beneficiaries' salaries. Thus, assessing the totality of the circumstances in this individual case, the AAO finds that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. The appeal must be dismissed on this basis.

On appeal, counsel asserted that the director indicated that the petitioner needed only to demonstrate an ability to pay \$111,322 each year from the priority date year onwards. This is not correct. The director stated in the notice of decision and the RFE that the petitioner must demonstrate the ability to pay the wages of all its sponsored workers. The director stated in the notice of decision that the petitioner had failed to submit the requested documentation regarding the additional petitions which it had pending and what the proffered wages were in those cases.⁶

Counsel also suggested that USCIS should view the petitioner's retained earnings and other liabilities from the Schedule L such as additional paid-in capital as funds available to pay the proffered wage. This is not correct. All relevant information presented on the petitioner's tax returns was duly considered when analyzing those tax returns in the previous section of this decision.

The AAO would also note that retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. As such, this year's retained earnings are last year's retained earnings plus this year's net income. Thus, to add retained earnings to net income and/or net current assets would be to count the same funds twice. Instead of doing that, USCIS will look at each particular year's net income, not the cumulative total of the previous years' net incomes represented by the line item: retained earnings.

Further, even if they are considered separately from net income and net current assets, retained earnings do not necessarily represent funds that are available to pay the wage. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition. Thus, appropriated earnings are not available to pay a sponsored worker's wages, to pay shareholder dividends, or for other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated funds and that they are cash or current assets that would be available to pay the proffered wage.

Any suggestion by counsel that the petitioner's total assets balanced against a portion of its total liabilities should be considered funds available to pay the wage is also misplaced. As stated previously, 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. Instead, USCIS will consider net current assets, as discussed above, or the petitioner's current assets

⁶ The director also noted that in the response to the RFE the petitioner asserted, without providing the requested documentation to prove its assertion, that the wages of all its sponsored workers combined is \$111,322. This appears to be based on counsel's claim that the petitioner has only four additional sponsored workers. The director stated that even if the petitioner did document for the record that this is indeed the accurate combined amount it must pay all its sponsored workers, it still would not have shown an ability to pay the wage, as it had not demonstrated an ability to pay \$111,322 from the priority date onwards.

balanced against its current liabilities, as a method of demonstrating the ability to pay the proffered wage.

In addition, counsel indicated on appeal that USCIS should follow the minutes from the November 16, 1994 Eastern Service Center (ESC)/American Immigration Lawyers Association (AILA) Liaison teleconference. Counsel suggested that these minutes support using the “common liquidity ratio” when analyzing a petitioner’s ability to pay the wage. First, such communications, whether oral or written, in which outside parties obtain advice from USCIS are not binding on USCIS adjudicators and do not create any judicially enforceable rights. *See Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). The guidance provided at this teleconference similar to guidance provided by an agency’s internal memoranda “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.” *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989(5th Cir. 2000)(*quoting Fano v. O’Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)). Furthermore, the minutes from this teleconference, as summarized by counsel, indicate that where a petitioner has a favorable enough “ratio of total current assets to total current liabilities”, it will be found that the petitioner has shown the ability to pay. That is, these minutes merely state, as noted previously in this decision, that if the petitioner demonstrates that it has sufficient net current assets to pay the wage (and to pay the wages of all its sponsored workers), it will be found that the petitioner has shown the ability to pay the wage. These minutes, according to counsel’s own summary, do not state that the “common liquidity ratio” should be considered when analyzing a petitioner’s ability to pay the wage, as counsel indicated. Counsel did not provide any alternative rationale for relying upon the “common liquidity ratio” or other financial ratios when analyzing the petitioner’s ability to pay the wage. Finally, documentation of a petitioner’s “common liquidity ratio” and of other financial ratios 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 not applicable or otherwise paints an inaccurate financial picture of the petitioner. Counsel also did not show that the funds analyzed in the “common liquidity ratio” or other financial ratios mentioned in the record somehow reflect additional funds available to pay the wage that were not considered when examining the petitioner’s tax returns.

Counsel indicated on appeal that USCIS had failed to consider that the petitioner’s shareholder loans listed on its Schedule L represent additional funds that are available to pay the wage. This is incorrect. The relevant information on the Schedules L and the rest of the tax returns in the record was already duly considered when analyzing the petitioner’s tax returns in the previous section of this decision. This office would also note that in general USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm’s liabilities and will not improve its overall financial position. Although loans and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage and the wages of all its sponsored workers. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Any suggestion by counsel that this office may consider the officers' compensation listed on the tax returns as funds available to pay the instant wage and the sponsored workers' wages is misplaced. There is no documentation in the record to support the assertion that the sponsored workers could assume some portion or all of the compensation which the petitioner paid its two officers such that those funds may be considered funds available to pay the wage. For example, in the record, there are no notarized, sworn statements from both of the petitioner's owners which attest to the claim that the instant beneficiary and the petitioner's other sponsored workers would assume these two officers' duties and that each of the officers would or could then forego any corresponding compensation such that it might be used to pay the beneficiary's wage and its other sponsored workers' wages.⁷ 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)).

During this proceeding, counsel has also referred to the consultation report regarding the going concern value of the petitioner's two restaurants in the record⁸ which lists the annual cash benefits and depreciated assets of those restaurants, and counsel indicated that the reports help support the finding that the petitioner has funds available to pay the proffered wage. This is not correct. First, reports on the petitioner's value as an going concern are not among the three types of evidence, enumerated at 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 evidentiary material "in appropriate cases," here counsel has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is not applicable or otherwise paints an inaccurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the values reported on these consultation reports somehow denote additional funds that are available to pay the wage which were not reflected on the petitioner's tax returns, such as the petitioner's net income or the cash specified on Schedule L which was duly considered when reviewing the petitioner's net current assets. Also, this valuation report is not an audited financial statement. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not evidence and are not sufficient to demonstrate the ability to pay the proffered wage. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁷ The AAO also notes the following. The record indicates that the petitioner paid as compensation to its officers: \$94,000 in 2004, \$94,600 in 2005, and \$95,000 in 2006. Even if the petitioner were able to document that these amounts were available for the instant beneficiary's wage and for its other sponsored workers' wages, it still would have failed to show an ability to pay the proffered wage for all its sponsored workers from the priority date onwards, as it has not documented for the record what wages it offered in the many additional petitions it has pending.

⁸ Included in the consultation report is the statement: "The authors [of the consultation report] do not represent themselves as experts in the field of restaurant valuation. Experts were identified who could assist in the assignment but they were unable to do so within financial constraints. It was too late to decline the assignment by the time the authors discussed the case."

In addition, counsel has referred to evidence in the record such as the petitioner's owners' individual tax returns, the tax returns of other enterprises apparently within the petitioner's owners' control, and documentation related to other business ventures in which the petitioner's owners are involved and counsel indicated that these help demonstrate the petitioner's ability to pay the instant wage and the wages of its other sponsored workers. This is not correct. USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owners to establish 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.

Beyond the decision of the director, the petitioner has failed to demonstrate that as of the priority date the beneficiary was qualified to perform the duties of the proffered position.⁹ The Application for Alien Employment Certification, Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School --
 - High School --
 - College --
 - College Degree Required --
 - Major Field of Study --

The applicant must have two years of experience in the job offered. The duties of the proffered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, the duties will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth her credentials on Form ETA 750B. At Part 15, eliciting information of the beneficiary's work experience, she represented that she worked for [REDACTED] Seoul, Korea as a cook preparing Japanese style cuisine from January 1998 through January 2001. She did not provide any additional information concerning her employment background on that form.

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

(ii) *Other documentation*—

⁹ 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*, 229 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

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

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

The petitioner submitted into the record a copy of a certificate of experience on [REDACTED] letterhead stationery dated February 16, 2004 and signed by [REDACTED]. In this document, [REDACTED] certified initially that the beneficiary worked at this restaurant as a cook from January 1998 through January 2001. Later in the document, he certified that the beneficiary worked as a cook at this restaurant from January 1998 through January 2000. Thus, the document is not consistent regarding the time period during which the beneficiary worked at the restaurant.

Also, the beneficiary stated on the Form I-485, Application to Register Permanent Residence or Adjust Status, that she entered the United States on January 26, 2000 and that she has not left the country since that date. Further, on the Form G-325A, Biographic Information, which the beneficiary submitted with the Form I-485 and signed on June 7, 2007 the beneficiary stated that she worked at [REDACTED] from January 1998 through January 2000 and that she lived in Seoul, Korea through January 2001. Elsewhere on the Form G-325A, she stated that she lived in Chamblee, Georgia from April 2000 through March 2003. Moreover, as noted previously, on the ETA Form 750, the beneficiary stated that she worked as a cook at [REDACTED] from January 1998 through January 2001.

These inconsistencies, related to the beneficiary's stated qualifying experience, cast doubt on the petitioner's claim that the beneficiary had the required two years of experience in the proffered job as of the priority date, and they cast doubt on all the evidence of record.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. *Id.*

Also the beneficiary's certificate of experience does not indicate whether the beneficiary worked full-time or part-time at [REDACTED]. Therefore, the AAO cannot assess based on this certificate whether the beneficiary had the required two years of full-time experience in the proffered position as of the priority date.

The regulations require that the petitioner provide the letter of a current or former employer which describes the beneficiary's employment experience at that place of employment as proof that the beneficiary has the qualifying experience as described on the Form ETA 750. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The petitioner has failed to provide credible, detailed documentation sufficient to establish that as of the priority date the beneficiary had the required two years of experience in the proffered position and that she was qualified to perform the duties of the position on that date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.