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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 and Immigration Services

B6

[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **AUG 11 2010**

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you
[Redacted Signature]

Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 construction firm. It seeks to employ the beneficiary permanently in the United States as a form builder. As required by statute, a Form ETA 750 Application for Alien Employment Certification¹ approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established it had the continuing financial ability to pay the proffered wage and denied the petition, accordingly.

On appeal, the petitioner, through counsel, merely states that additional evidence is being submitted.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(AAO's *de novo* authority supported by federal courts.)

At the outset and beyond the decision of the director, the AAO finds that the petition is not approvable because unskilled worker visa classification designated by the petitioner on the Immigrant Petition for Alien Worker, (Form I-140) is not supported by the appropriate ETA 750.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of

¹ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the ETA Form 750 was filed prior to the enactment of the PERM regulations.

performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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(l) states in pertinent part:

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on July 20, 2007, indicates that the petitioner was established on March 15, 1999, employs fifteen workers and reports a gross annual income of \$4,452,581 and an annual net income of \$925,610. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. However, the ETA 750 submitted in support of this visa classification required two years of work experience in the job offered as a form builder. The job duties of the certified position described in Item 13 of the ETA 750 additionally require the applicant to construct built-in-place or prefabricated forms, have the ability to read and interpret blueprints, form and finish concrete, perform rough framing, finish carpentry, painting, masonry and basic electrical. Item 15 of the ETA 750 also requires the applicant to have basic reading, writing and writing skills in English.

Citing 8 C.F.R. § 204.5(l)(2), and as mentioned above, the certified position described on the ETA 750 required two years of experience. As the visa classification sought on the I-140 petition designated the unskilled worker category (paragraph g), the I-140 petition is not approvable because it is not supported by the appropriate ETA 750. In order to be classified as an unskilled worker, the ETA 750 must require less than two years of training or experience. The petition is deniable on this basis because the petitioner failed to demonstrate that the position required less than two years of training or experience. As the labor certification required two years of experience, the petition may not be filed as an unskilled worker petition. The proper remedy would be to submit a new petition, supported by the appropriate labor certification, choose the proper category, and submit the required fee and documentation.

Further, it is noted that even if the petitioner had filed an I-140 in the appropriate visa category of a skilled worker, the record does not adequately document that the beneficiary acquired two years of experience in the job offered as of the priority date, or demonstrate that the beneficiary possessed basic reading and writing skills in English as of the priority date. The filing date or

priority date of the ETA 750 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); [REDACTED] 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 750 was accepted for processing on April 27, 2001, which establishes the priority date.² The director's decision included a finding that the petitioner had satisfied the ETA 750's requirements relevant to the beneficiary's education and experience. Although the petitioner's evidence relating to the beneficiary's primary school education was sufficient, the documentation supporting the beneficiary's required experience and special skills noted in Item(s) 14 and 15 have not been satisfied and only in this respect is the director's decision withdrawn.

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

Even if the I-140 were filed with the correct visa classification as a skilled worker, the petitioner's employment verification letter submitted in response to the director's request for evidence (RFE) issued on August 20, 2008, failed to adequately document the beneficiary's previous employment experience. The letter, dated November 9, 2007, was from [REDACTED] Mexico, who identified himself as having employed the [REDACTED] from July 1995 to August 1997. The letter failed to describe any of the beneficiary's duties so that it may be determined that this may be considered qualifying experience in the job offered as required by the ETA 750. Further, this job was not listed on Part

² 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

B of the ETA 750, which identifies those jobs that the beneficiary specifies as qualifying him for the certified position and all jobs held in the previous three years. Part B of the ETA 750 was signed by the beneficiary under penalty of perjury on April 12, 2001. For these reasons, the letter from [REDACTED] will not be considered as probative of the beneficiary's qualifying work experience. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

Additionally, although a note from an unknown writer appended to a copy of the director's RFE indicates that the beneficiary has studied English as a second language at Golden Oak Adult School, dates unspecified, and is English speaking, no first-hand evidence from this school or other authoritative entity has been submitted that confirms that the beneficiary possessed basic English reading and writing skills as of the priority date as set forth in Item 15 of the ETA 750. The petitioner has not satisfied the terms of the ETA 750 in this respect and this must be considered as an additional ground for denial of the petition. 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 director denied the petition because the petitioner had not established its continuing financial ability to pay the proffered wage of [REDACTED] per hour,³ which amounts to [REDACTED] per year.

With respect to the petitioner's ability to pay the proffered wage, it is noted that 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 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 continuing financial ability to pay the proffered wage as of the priority 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. §

³ The ETA 750 additionally states an overtime rate of [REDACTED] per hour and ten hours of overtime.

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 [REDACTED] although the overall 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).

The director's reasons for denying the petition are explained in his RFE and subsequently in his denial. It is initially noted that both the employer identified on the labor certification and the petitioner named in the I-140 is [REDACTED]. The address on both the labor certification and the I-140 petition is also the same. However, based on the tax returns and W-2s submitted to the record, the petitioner's federal employer's identification number is not 95-[REDACTED] as claimed on Part 1 of the I-140, but 95-xxx6850 as stated on the beneficiary's W-2s for 2001 and 2002. It is unclear why the petitioner listed an IRS tax number assigned to separate entity. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As noted by the director in the RFE, the petitioner had submitted copies of the 2001, 2002, 2003, 2004, and 2005 federal Form 1065, U.S. Return of Partnership Income filed not by the petitioning corporation, Canyon View Sales, Inc., but by "Canyon View Limited, a California Limited Partnership." The director requested clarification of this relationship, as well as evidence, if applicable, that [REDACTED] Limited is the successor-in-interest to Canyon View Sales, Inc.

It is noted that a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only obtained the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent

resident. See *Matter of [REDACTED] Inc.*, 19 I&N Dec. 481 (Comm. 1986).⁴ If a successor-in-interest cannot be established, then the labor certification may not be used by the entity claiming to be the successor.

⁴*Matter of [REDACTED]* involved a petition filed by [REDACTED], Inc. ([REDACTED]) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED], counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the [REDACTED] under 20 C.F.R. § [REDACTED] (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and [REDACTED] has, at times, strictly interpreted *Matter of [REDACTED]* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying labor certification could be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In this case, in response to the director's RFE, the petitioner submitted a letter, dated September 5, 2008, from Chris Seidenglanz of [REDACTED] limited and [REDACTED] Inc. He explains that Canyon View Sales Inc. constructed and sold homes in [REDACTED] Estates in Santa Clarita, California. [REDACTED] is owned by [REDACTED], however, according to [REDACTED] the investors and shareholders of [REDACTED] are the same as Canyon View Sales Inc. As the construction of part of Canyon View Estates was completed, the crews became employed by Canyon View Limited and will return to the employment of Canyon View Sales, Inc. when further homes are to be built.

The director denied the petition on October 6, 2008. He determined that the petitioner and Canyon View Limited are two separate entities. The director noted that although the petitioner had provided two W-2s issued by Canyon View Sales, Inc. to the beneficiary for 2001, indicating wages paid that were [REDACTED] less than the proffered salary, and for 2002, showing wages paid that were [REDACTED] less than the proffered wage,⁵ the petitioner had failed to provide any evidence directly supporting Canyon View Sales, Inc.'s ability to pay the proffered wage.

On appeal, counsel submits copies of documentation already provided to the underlying record and additionally provides copies of checking account statements held by Canyon View Limited.

It must be noted that the pertinent statutory and regulatory provisions relevant to immigrant visas do not provide for multiple or co-employers. Further, the regulation at 20 C.F.R. § 656.3(1) defines an employer as an entity that possesses a valid Federal Employer Identification Number (FEIN). As noted above, [REDACTED] Inc. and [REDACTED] both have different FEIN numbers. Additionally, as shown in the 2001-2005 tax returns filed by [REDACTED] View Limited, it is organized as a limited partnership consisting of "Canyon View Estates, Inc.," the 1% general partner with FEIN 95-xxx9862 and "Canyon View Estates," the 99% limited partner with FEIN 95-xxx5196. [REDACTED] letter does not support the theory that Canyon View Limited is the successor-in-interest to Canyon View Sales, Inc. and or even that Canyon View Sales, Inc. is part of the Canyon View limited partnership.⁶ It is noted that no contemporaneous documentation has provided any corroboration of the nature and location of any assets and liabilities acquired. No copies of any executed agreements of transfer, escrow statements, deed transfers, bill(s) of sale, and executed copies of the pertinent UCC, fictitious trade name and other state or municipal records have been discussed or submitted that clearly establish the history and transfer of ownership of Canyon View Sales, Inc. to Canyon View [REDACTED] Inc. and Canyon View Limited are separate legal

⁵ The 2001 W-2 showed wages paid of [REDACTED] less than the proffered wage of \$45,448 per year. The 2002 W-2 reflected [REDACTED] n wages paid, which was [REDACTED] less than the proffered salary.

⁶ A limited partnership is formed under a state limited partnership law and composed of at least one general partner and one or more limited partners. A general partner is a partner who is personally liable for partnership debts. See Instructions for Form 1065 (2007).

[REDACTED]

entities filed with the California Secretary of State and are both in active status.⁷

The AAO concurs with the director's determination that the petitioner, Canyon View Sales, Inc. and Canyon View Limited are two separate entities. A successor-in-interest relationship is not indicated. As noted by the director, a corporation is a separate and distinct legal entity from its owners and shareholders. The 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Moreover, it is well settled that a corporation is a distinct legal entity from its owners or individual shareholders:

The corporate personality is a fiction but it is intended to be acted upon as though it were a fact. A corporation is a separate legal entity, distinct from its individual members or stockholders.

The basic purpose of incorporation is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, own it, or whom it employs.

A corporate owner/employee, who is a natural person, is distinct, therefore, from the corporation itself. An employee and the corporation for which the employee works are different persons, even where the employee is the corporation's sole owner. Likewise, a corporation and its stockholders are not one and the same, even though the number of stockholders is one person or even though a stockholder may own the majority of the stock. The corporation also remains unchanged and unaffected in its identity by changes in its individual membership.

In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985).

Therefore, the tax returns and other financial information relating to Canyon View Limited may not be attributed to the Canyon View Sales, Inc. and may not be considered in determining Canyon View Sales, Inc.'s continuing ability to pay the proffered wage.

It is noted that in determining a petitioner's ability to pay a certified wage, U.S. Citizenship and Immigration Services (USCIS) will examine a petitioner's net income as shown on its respective federal tax return or audited financial statement, and as an alternative, will also review a

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(Accessed August 8, 2010).

petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax returns. [REDACTED] are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁹

It is noted that if a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the [REDACTED], the evidence will be considered [REDACTED] proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this matter, as the record indicates that the petitioner has employed the beneficiary in 2001 and 2002, but has never paid him the full proffered salary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses. *See River Street [REDACTED]* 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 [REDACTED] 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.

⁸ 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.

⁹ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

In *K.C.P. Food Co., Inc. v. [REDACTED]* 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 as claimed by counsel, 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).

As indicated above, the tax returns filed by a separate entity will not be considered as establishing the petitioner's ability to pay the proffered wage. The petitioner has not submitted any of its own financial information except copies of W-2s issued to the beneficiary. As shown in the record, in 2001, the petitioner paid the beneficiary [REDACTED] less than the proffered wage of \$45,448. It paid the beneficiary [REDACTED] less than the proffered wage in 2002. As no tax returns or audited financial statements have been submitted by the petitioner indicative of its own financial status as to net income or net current assets for any of the relevant years, the petitioner has not established that either its net income or net current assets was sufficient to cover the difference(s) between the wages paid and the proffered [REDACTED] and it also failed to demonstrate the ability to pay the proffered wage in the remaining five years.

12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and The petitioner had 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 was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere.

In this case, it is noted that none of the factors outlined in have been asserted and because no tax returns or audited financial statements have been submitted that relate directly to the petitioning corporation, it is impossible to assess the petitioner's overall financial profile. The AAO cannot conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

For the reasons explained above, the petition may not be approved. The petitioner failed to demonstrate that the I-140 visa designation was consistent with the ETA 750. The petitioner also failed to establish that the beneficiary possessed basic reading and writing skills in English, as well as failing to submit sufficient evidence of experience in the job offered even if the correct visa classification had been designated. Finally, the petitioner failed to demonstrate that it has had a *continuing* financial ability to pay the proffered wage beginning at the priority date as required by 8 C.F.R. 204.5(g)(2). (Emphasis added.)

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.