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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



FILE: [Redacted]  
LIN 06 105 54262

Office: NEBRASKA SERVICE CENTER

Date:

**AUG 13 2010**

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:**

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 our 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  
  
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 motel. It seeks to employ the beneficiary permanently in the United States as an general maintenance worker.<sup>1</sup> 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. 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.

The single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 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.<sup>2</sup> Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup> The record indicates that the petitioner substituted the instant beneficiary for [REDACTED] the original beneficiary. The record contains an I797 Receipt notice dated October 23, 2002 for the approval of the original beneficiary's I-140 petition (LIN 03 001 51475). United States Citizenship and Immigration Services (USCIS) computer records do not indicate that the original beneficiary ever adjusted his status as a result of the prior approved I-140 petition. The petitioner also indicated on the I-140 petition that the petitioner's owner had filed an I-130 relative petition (LIN 99 146 51984) for the beneficiary as the beneficiary's brother, and that the beneficiary's mother, Laxmiben Patel, had also filed an I-130 petition (WAC 05 156 54339) for the beneficiary.

<sup>2</sup> The AAO notes that the director stated in his decision that the petitioner is required to demonstrate sufficient financial resources to pay the first year of the beneficiary's proffered wage. Pursuant to 8

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 April 30, 2001.<sup>3</sup> The proffered wage as stated on the Form ETA 750 is \$18.02 per hour (\$37,481 per year). The Form ETA 750 states that the position requires two years of prior work experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup>

On appeal, counsel states that the petitioner has the ability to pay the proffered wage as of 2001 and onward. Counsel states that the petitioner provided evidence in its response to the director's RFE of the petitioner's additional assets such as certificate of deposits, bank account and an existing line of credit. Counsel resubmits the petitioner's Forms 1120S for tax years 2001 to 2006, with a list of the petitioner's gross sales and total assets for these years, and submits for the first time, the petitioner's Form 1120S for tax year 2007. Counsel also submits Forms 1040 U.S. individual Income Tax Return for [REDACTED] identified on Motel Assets Purchase Agreement in the record as the petitioner's owners. For tax years 2001 to 2007. Counsel also submits copies of the Forms 1120S for [REDACTED] identified as another of [REDACTED] businesses.

Counsel also submits a letter dated November 4, 2008 from [REDACTED], the petitioner's accountant. [REDACTED] states that [REDACTED] owns both

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C.F.R. § 204.5(g)(2), the petitioner has to establish its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Although the director examined the petitioner's tax returns for tax years 2001 to 2006 in his decision, his focus on the petition's priority year is misplaced. The AAO will withdraw this part of the director's decision.

<sup>3</sup> Counsel in a cover letter with the initial I-140 petition refers to the date of certification for the initial ETA Form-750 as September 4, 2002. The AAO notes that the date of receipt of the ETA Form-750 by DOL determines the priority date. Thus, April 30, 2001 is the priority date for the instant petition.

<sup>4</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).

██████████ have a net worth of \$1,775,000 dollars. Attached to ██████████ letter is a Personal Financial Statement for ██████████, dated October 10, 2008. Among the additional evidence that counsel submits are copies of U.S. Savings Bonds in the name of ██████████, and business checking accounts for ██████████. Further documentation submitted on appeal include a receipt for a key jumbo Certificate of Deposit in the name of the petitioner's owners' child opened on September 12, 2008, and checking accounts for ██████████ with US Bank. The record also contains a statement for the ██████████'s business checking accounts with AMTrust Bank as of September 30, 2008.

Only two documents in the evidence submitted on appeal pertain directly to the petitioner: the August 30, 2008 statements for two of the petitioner's Small Business checking accounts with National City Bank. These two statements indicate ending balances of \$6,260.49 and \$3,794.61, respectively.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in January 2, 1997, to have a gross annual income of \$143,918, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The AAO does not find a Form ETA 750, Part B, filled out and signed by the instant beneficiary. Therefore, the record cannot establish whether the beneficiary worked for the petitioner as of the 2001 priority date.<sup>5</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).

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<sup>5</sup> The AAO further notes that the record does not contain the original ETA Form 750 filed on behalf of the original beneficiary. The petitioner in its response to the director's RFE dated June 8, 2007, stated that it could not submit the original ETA 750 Parts A and B, as it had been submitted to USCIS on or about October 1, 2002 with the prior I-140 petition. The petitioner requested that USCIS obtain a duplicate original ETA 750, Parts A and B from DOL. The record is not clear that such a duplicate document was obtained from DOL. Based on the lack of a Part B for the instant beneficiary, the AAO also cannot determine if the information contained in the letter of work verification submitted to the record from an Indian company corroborates what the beneficiary claims as his prior work experience as a general maintenance worker.

On appeal, counsel cites *South Valley Drywall, Inc.*, 07-INA-272 (BALCA)<sup>6</sup> January 16, 2008) for the premise that the proffered position must be considered a bona fide job offer as the petitioner produced documentation such as tax returns and other financial statements demonstrating its financial ability to pay. Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), and appears to refer to the petitioner as a sole proprietorship. Counsel does not state how the Department of Labor's (DOL) BALCA precedents are binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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). Further *South Valley Drywall* involves a petitioner that did not submit any documentation beyond a statement from an officer as to the petitioner's number of employees to establish its ability to pay the proffered wage. The director in his decision in the instant matter did not refer to any lack of documentary evidence, but rather that the documentation submitted did not establish the petitioner's ability to pay the proffered wage. Further, *Ranchito Coletero* deals with a petitioner that is a sole proprietorship. It is not applicable to the instant petition, which deals with an S corporation.

Contrary to counsel's assertions on appeal, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). 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.

Because 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 a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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." Thus neither the personal financial assets of Mr. and Mrs. Patel, nor the financial assets of the Kanehya Corporation as identified on its federal tax returns, can be utilized to establish the petitioner's ability to pay the proffered wage as of the April 30, 2001 priority date.

The AAO also notes that the petitioner may not establish its ability to pay the proffered wage based on a line of credit. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

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<sup>6</sup> Board of Alien Labor Certification Appeals.

Since the line of credit is a “commitment to loan” and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, 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 lines of credit 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. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Further, the petitioner submitted its unaudited balance sheets for tax years 2001 to 2006 to record. Counsel’s reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant’s report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel’s reliance on the balances of the petitioner’s two bank accounts with National City Bank is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner’s bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner’s net current assets.

In determining the petitioner’s ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the instant case, the petitioner has not established

that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. Thus, the petitioner has to establish its ability to pay the entire proffered wage as of the April 30, 2001 priority date through tax year 2007.

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 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 August 22, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return would have been available. The petitioner submits its 2007 return on appeal. The petitioner’s tax returns demonstrate its net income for the years 2001 to 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>7</sup> of \$35,691.
- In 2002, the Form 1120S stated net income of \$33,159.
- In 2003, the Form 1120S stated net income of \$33,725.
- In 2004, the Form 1120S stated net income of \$43,144.
- In 2005, the Form 1120S stated net income of \$28,663.
- In 2006, the Form 1120S stated net income of \$6,792.
- In 2007, the Form 1120S stated net income of \$8,002.

Therefore, for the years 2001, 2002, 2003, 2005, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage. In tax year 2004, the petitioner established that it had sufficient to pay the proffered wage of \$37,481.

Although counsel identifies the petitioner’s total assets for the relevant period of time in question on appeal, as an alternate means of determining the petitioner’s ability to pay the proffered wage, the AAO examines the petitioner’s net current assets, the difference between the petitioner’s current assets and current liabilities.<sup>8</sup> A corporation’s year-end current assets are shown on Schedule L,

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<sup>7</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) line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf>. (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for tax years 2001, 2002, 2006, and 2007, the petitioner’s net income is found on Schedule K of its tax returns.

<sup>8</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

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 2001 to 2003 and 2005 to 2007, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$2,831.
- In 2002, the Form 1120S stated net current assets of \$3,395.
- In 2003, the Form 1120S stated net current assets of \$2,881.
- In 2005, the Form 1120S stated net current assets of \$7,804.
- In 2006, the Form 1120S stated net current assets of \$1,126.
- In 2007, the Form 1120S stated net current assets of \$3,223.

Therefore, for the years 2001 through 2003, and 2005 through 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by 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'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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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

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salaries). *Id.* at 118.

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 petitioner's gross receipts decreased each year from tax year 2001 to 2007. The petitioner's tax returns do not indicate that the petitioner paid any wages or salaries paid to employees or that any officer compensation, a discretionary expense, were paid. The record contains no evidence with regard to the petitioner's profile within the motel business community. Thus, assessing the totality of the circumstances in this individual case, it is concluded 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 beginning on the priority date.

Beyond the decision of the director, the AAO would question the bona fide nature of the proffered position based on the familial relationship between the petitioner's owner and the beneficiary. 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).

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). As previously stated and as indicated by the petitioner on the I-140 petition, the petitioner's owner has filed an I-130 petition for the beneficiary, as his brother.

Further the AAO would question whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. As previously stated, the record does not contain a regulatorily required new Part B of the ETA Form 750 that reflects the beneficiary's prior work experience. While the record contains a letter of work verification from an Indian company with regard to the beneficiary's prior work experience as a general maintenance worker, without the new Part B, there is no way to corroborate the contents of the work experience correspondence. Thus the petitioner cannot establish that the beneficiary is qualified to perform the duties of the proffered position.

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.

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.