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U.S. Department of Homeland Security
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]
SRC 07 156 51485

Office: TEXAS SERVICE CENTER

Date: MAR 09 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)

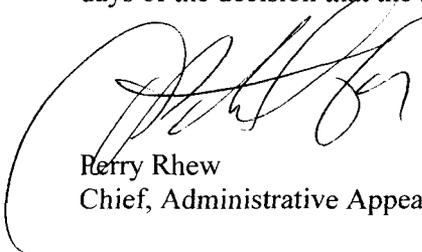
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a first line supervisor/manager of retail sales. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 19, 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 Form ETA 750 was accepted on April 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$19.23 per hour (\$39,998.40 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.²

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 1998 and to currently employ three workers. According to the tax returns in the record, the petitioner’s fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 12, 2007,³ the

¹ United States Citizenship and Immigration Services (USCIS) records indicate that the petitioner petitioned for a second beneficiary whose last name is the same as that of the petitioner’s president. That petition had a priority date of April 26, 2001 and the beneficiary in that matter adjusted to lawful permanent residence, based on that petition, on March 3, 2009. The petitioner also petitioned for a third beneficiary and the priority date on that petition is April 26, 2001. USCIS approved that petition on March 28, 2008. The beneficiary’s request to adjust to lawful permanent residence is still pending.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations 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).

³ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL’s final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing

beneficiary claimed to have worked for the petitioner from January 1999 through the date that he signed that form.

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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.⁴ The petitioner has documented that in 2001 it paid the beneficiary \$6,883.76 or \$33,114.64 less than the proffered wage. In 2002, it paid the beneficiary \$7,800 or \$32,198.40 less than the proffered wage. In 2003, it paid the beneficiary \$10,800 or \$29,198.40 less than the proffered wage. In 2004, it paid the beneficiary \$11,565 or \$28,433.40 less than the proffered wage. In 2005, it paid the beneficiary \$12,225 or \$27,773.40 less than the proffered wage. The petitioner also documented that in 2007 it paid the beneficiary \$6,668 or \$33,330.40 less than the proffered wage.

of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Louis D. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

⁴ In the appeal brief, counsel suggested that because the copies of four paychecks in the record indicate that from September 16, 2007 through November 16, 2007 the petitioner paid the beneficiary an amount that would be equivalent to a wage slightly higher than the proffered wage, if this amount were paid over the course of an entire year, that these four paychecks establish the petitioner's ability to pay the wage in 2007. This is not correct. These four paychecks do not establish nor has the petitioner otherwise shown that it paid this wage throughout the year or that it had the ability to pay the proffered wage throughout 2007. These paychecks show only that the petitioner paid the beneficiary a certain amount during September 2007 through November 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 (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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is not sufficient. Similarly, showing that the petitioner paid wages 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, 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 November 15, 2007 with the receipt of the petitioner's submissions in response to the request for evidence. 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 2001-2006, as shown in the table below.

- In 2001, the Form 1120S stated net income⁵ of \$40,846.
- In 2002, the Form 1120S stated net income of \$28,611.
- In 2003, the Form 1120S stated net income (loss) of -\$12,557.
- In 2004, the Form 1120S stated net income of \$56,105.
- In 2005, the Form 1120S stated net income of \$84,599.
- In 2006, the Form 1120S stated net income of \$87,267.

Thus, in 2001, the petitioner would have had sufficient net income to cover the difference between the actual wages paid the beneficiary and the proffered wage, or \$33,114.64. However, during 2001, the petitioner also had pending petitions for two other full-time employees. One of these employees adjusted to lawful permanent resident status in 2009. The petitioner must demonstrate the ability to pay their salaries as well before this office can find that it has shown the ability to pay the wage in 2001.⁶ The specific proffered wages in those two additional cases are not listed in the record. Nonetheless, the AAO finds that the amount left after deducting \$33,114.64 from the 2001 net income of \$40,846, or \$7,731.36, is not sufficient to possibly cover even one annual wage. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant proffered wage or all its sponsored workers' wages in 2001.

In 2002, the petitioner did not have sufficient net income to cover the difference between the actual wages paid the beneficiary and the proffered wage, or \$32,198.40. The petitioner also had pending in 2002 the petitions of two other full-time employees. It has failed to demonstrate it had sufficient net income to pay the additional expense of their two salaries as well. Thus, the petitioner has not demonstrated it had sufficient net income to pay the instant proffered wage or all its sponsored workers' wages in 2002.

In 2003, the petitioner had a net loss, rather than a net income. Thus, it did not have sufficient net income to cover the difference between the actual wages paid the beneficiary and the proffered

⁵ Where, as in the instant case, 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.

⁶ The record indicates that the petitioner did not make known to the director that it had the added expense of these two salaries throughout the relevant period of analysis. Consequently, the director indicated incorrectly in his decision that the petitioner had demonstrated an ability to pay the wage in 2001, 2004, 2005 and 2006. The AAO withdraws this point from the notice of decision. The AAO also notes that the petitioner's various documents in the record, which list its wage earners, do not indicate that it was paying the other two sponsored beneficiaries during the relevant period of analysis.

wage, or \$29,198.40. In addition, the petitioner failed to demonstrate that it had sufficient net income in 2003 to cover the expense of two additional beneficiaries' salaries. Thus, the petitioner has not shown it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2003.

In 2004, the petitioner had a net income which is sufficient to cover the difference between the actual wages paid the beneficiary and proffered wage, or \$28,433.40. However, after this amount is deducted from net income, only \$27,671.60 remains. The petitioner failed to demonstrate that this amount is sufficient to cover the expense of two additional beneficiaries' salaries. Thus, the petitioner has not shown it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2004.

In 2005, the petitioner had a net income which is sufficient to cover the difference between the actual wages paid the beneficiary and proffered wage, or \$27,773.40. However, after this amount is deducted from net income, only \$56,825.60 remains. The petitioner failed to demonstrate that this amount is sufficient to cover the expense of two additional beneficiaries' salaries. Thus, the petitioner has not shown it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2005.

In 2006, the petitioner had a net income of \$87,267 which is sufficient to cover the full proffered wage.⁷ However, after deducting the proffered wage from net income, only \$47,268.60 remains. The petitioner failed to demonstrate that this amount is sufficient to cover the expense of two additional beneficiaries' salaries. Thus, the petitioner has not shown it had sufficient net income to pay the instant wage or all its sponsored workers' wages in 2006.

The petitioner did not submit its 2007 tax return. Thus, it has not shown that it had sufficient net income to pay the difference between the proffered wage and the amount that it paid the beneficiary in 2007 or \$33,330.40. In addition, the petitioner failed to demonstrate that it had sufficient net income in 2007 to cover the expense of two additional beneficiaries' salaries. Thus, the petitioner has not shown an ability to pay the wage in 2007.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the

⁷ The petitioner did not document for the record that it paid the beneficiary in 2006.

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.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001-2006, as shown in the table below.

- For 2001, the Form 1120S states net current assets (liabilities) of -\$22,625.
- For 2002, the Form 1120S states net current assets (liabilities) of -\$19,472.
- For 2003, the Form 1120S states net current assets of \$9,102.
- For 2004, the Form 1120S states net current assets (liabilities) of -\$4,262.
- For 2005, the Form 1120S states net current assets (liabilities) of -\$30,353.
- For 2006, the Form 1120S states net current assets (liabilities) of -\$37,730.

In 2001, 2002, 2004, 2005 and 2006, the petitioner had negative net current assets. Thus, it has not shown an ability to pay the difference of any wage that it may have paid the beneficiary during those years (if any) and the proffered wage using its net current assets. It also has not shown the ability to pay out of its net current assets the added expense of the two full-time salaries of its two other beneficiaries whose petitions were pending during these years. In 2003, the petitioner did not have sufficient net current assets to pay the difference between the actual wages that it paid the beneficiary and the proffered wage, or \$29,198.40. It also did not have sufficient net current assets to pay the added expense of two additional full-time salaries. The petitioner did not submit its 2007 tax return. Thus, it failed to show that it had sufficient net current assets in 2007 to pay the difference between what it paid the beneficiary in 2007 and the proffered wage, and to pay the added expense of two additional full-time salaries.

Thus, the petitioner has not shown an ability to pay the wage using its net current assets during the years 2001 through 2007.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel suggested that language in the May 4, 2004 USCIS Interoffice Memorandum from William Yates, regarding when a request for evidence is and is not required, supports the finding that the September 16, 2007 through November 16, 2007 paychecks in the record, which show that the petitioner paid the beneficiary slightly more than the proffered wage during those three months, are sufficient to demonstrate that the petitioner had the continuing ability to pay the proffered wage from the priority date onwards. First, as this memorandum itself states it may not be relied upon by any individual or party to create any right or benefit substantive or procedural.⁹ Also, as noted previously, the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner demonstrate the

⁹ USCIS memoranda merely articulate internal guidelines for INS personnel. They do not establish judicially enforceable rights. An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *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)).

ability to pay the proffered wage from the priority date until the beneficiary obtains lawful residence. Counsel may not interpret the May 4, 2004 memorandum as granting the petitioner the right to sidestep this regulatory requirement by showing that its recent paychecks in 2007 to the beneficiary reflect an amount which, if paid over the course of an entire year, would be equal to the proffered wage or that wages paid in 2007 would show an ability to pay the wage from 2001 onwards. The AAO must examine whether the petitioner has shown an ability to pay the proffered wage from the priority date onwards, and dismiss the appeal if it has not.

Counsel also suggested that the 2002, 2003 and 2007 Forms 941, Quarterly Federal Tax Report, in the record which list the total wages that the petitioner paid to all its workers during 2002, 2003 and January through March 2007, help support the finding that the petitioner was able to pay the proffered wage during these periods. As noted earlier, it is not sufficient for the petitioner to show that its total wages paid to all workers were more than the proffered wage. Wages paid to others generally cannot be considered funds available to pay the proffered wage.

Counsel indicated too that unusual, unforeseen circumstances which lasted from July 30, 2001 through May 5, 2003 caused the petitioner to lose a significant portion of its business during that period. Specifically, counsel stated that a water pipeline construction project interfered with customers' access to its driveway entries and prompted them to go to other gas station/convenience stores in the area. Counsel failed to provide any convincing documentation that such a project took place at the entryway to the petitioner's business or otherwise interfered with customer access to the petitioner's premises. That is, counsel submitted a print out of information taken from the Houston TranStar¹⁰ website located at: <http://roadworks.houstontranstar.org/> (accessed by counsel on May 23, 2007) which indicates that from July 30, 2001 through May 5, 2003 a water main project took place along [REDACTED] from [REDACTED] going west to [REDACTED].¹¹ Yet, the petitioner is located on [REDACTED] east of [REDACTED] according to the map of the petitioner's location in the record obtained by counsel at www.mapquest.com. Counsel also submitted an aerial photograph of a section of Houston, Texas taken by the U.S. Geological Survey during 2002 which gives no indication of what streets appear in the photograph. The photo displays no evidence of a water main pipeline project that is apparent to this office. The photo also fails to provide any indication of where the petitioner's gas station is located in the photo, if it is in the photo or its location in relation to the effected area. Counsel also submitted two maps of the street on which the petitioner is located and of nearby streets.¹² On these maps, counsel colored in using marker and highlighter, respectively, where he is claiming the stated water main pipeline project was carried out. His colored lines pass by the petitioner's business, but they do not coincide with the information, in the record, taken from the [REDACTED] website which indicates that the petitioner is east of the

¹⁰ This is the abbreviated name of the Greater Houston Transportation and Emergency Management Center.

¹¹ The map in the record which counsel obtained at www.mapquest.com indicates that the correct spelling is [REDACTED] not [REDACTED] as stated in the print out taken from the [REDACTED] website.

¹² The configuration of streets on these maps do not in any respect coincide with the configuration of streets in the U.S. Geological Survey aerial photograph of a segment of Houston, Texas in the record.

water main project. Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported assertions of counsel and the petitioner are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the AAO finds that even if the petitioner could document that a water main pipeline project weakened its financial position from July 30, 2001 to May 5, 2003 that would not be sufficient to show an ability to pay the wage from the priority date onwards. The petitioner has not demonstrated the ability to pay the wage during any year in the relevant period based on multiple filings.

Counsel also indicated that the petitioner had to pay on a high interest loan during 2002 and 2003. Counsel suggested that this was an unusual, detrimental circumstance which was overcome in 2004 when the petitioner refinanced that loan at a lower interest rate. Counsel indicated that the monthly loan payment of over \$15,000 which the petitioner had paid during 2001 through 2003 was reduced after refinancing the loan in 2004, and that this provided the petitioner with additional funds to pay the wage. This assertion is misplaced. First, reduced loan payments 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," the petitioner here has not effectively 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. Second, reduced loan payments show only one reduced expense of the petitioner's many fluctuating expenses and cannot show the continuing ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that any funds saved by the petitioner's lower loan costs somehow denote additional available funds that were not reflected on its tax return, 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. The AAO also notes incidentally that the documents in the record regarding the petitioner's 2004 loans indicate that in 2004 the petitioner took out one loan for equipment and one for real estate and that the combined monthly payment for the two loans was over \$20,000. That is, according to the record, the petitioner did not have loan payments of less than \$15,000 from 2004 forward as suggested by counsel.

In addition, counsel indicated that the petitioner's bank statements from 2002 and 2003 help establish its ability to pay the wage in those years. This is not correct. Bank account statements are also 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. Again, while this regulation allows additional evidentiary material "in appropriate cases," the petitioner here 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 denote additional available funds that were not reflected on its tax return, 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.

Counsel also suggested that the AAO should consider the petitioner's 2007 bank statements submitted into the record as evidence of its ability to pay the wage, as its 2007 tax return was not yet available at the time the appeal was filed. This assertion is misplaced. Again, bank statements show only the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. This office notes as well that the 2007 bank statements reflect that during each month from, for example, January through June 2007, the petitioner's bank account dropped to a negative amount at some point. Thus, these statements tend to support the finding that the petitioner did not have surplus funds throughout this period in its bank account that could have been used to pay the proffered wage. Rather it needed all these funds in the operation of its business.

Counsel also indicated that the increasing net income in 2004, 2005 and 2006 shows potential for future growth and overcomes the petitioner's failure to show the ability to pay the wage during certain years in the relevant period. As noted earlier, the record indicates that the petitioner did not establish its ability to pay the wage in any year in the relevant period as it sponsored multiple beneficiaries. Thus, the AAO does not view any increase in its net income as sufficient to demonstrate an ability to pay the wage from the priority date onwards.

Finally, counsel requested that USCIS 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 number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record indicates that the petitioner was incorporated in 1998 and that it currently has three employees. The petitioner did not establish its historical growth since incorporating. Its gross profits have not significantly increased, but have remained somewhat close to the same amount with a noticeable drop in gross profits during the final year of analysis. Further, the petitioner has not definitively established through evidence: 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. The petitioner failed to provide proper evidence of the alleged water main project and its effect on its operations to establish an uncharacteristic loss to its business during a portion of the relevant period of analysis. Also the petitioner had the added expense of the salary of two other sponsored workers for which it did not show an ability to pay. Counsel suggested that a bank's decision to refinance a loan of the petitioner at a lower interest rate in 2004 indicates that the bank believes the petitioner is a viable business whose profits are likely to increase. He indicated that under *Sonegawa* the AAO should view such evidence of the strength of the petitioner as evidence of the ability to pay the wage. Counsel did not document whether the bank refinanced a loan because the petitioner had demonstrated that its profits were likely to increase, because interest rates generally had declined, or for some other reason. Going on record without supporting documentary evidence is not sufficient to meet 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)). Unsupported assertions of counsel and the petitioner are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. The appeal will be dismissed on this basis.

Beyond the decision of the director, the record indicates that the petitioner's owner and the substituted beneficiary in this matter may be related by marriage.¹³ Pursuant to 20 C.F.R. § 656.20(c)(8)(2004)¹⁴ the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (October 15, 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or the relationship may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (May 15, 2000).

¹³ 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 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

¹⁴ 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. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The DOL refers to the current regulations using the acronym PERM for Program Electronic Review Management. *See 69 Fed. Reg. 77325, 77326* (Dec. 27, 2004). The PERM regulation applies to labor certification applications for the permanent employment of aliens filed on or after March 28, 2005. The instant labor certification application was filed prior to that date and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations in effect prior to the PERM amendments.

In this case, the petitioner's president and the beneficiary's wife have the same last name. Thus, the beneficiary and the petitioner's president appear to be related by marriage.¹⁵ USCIS must scrutinize whether this apparent familial relationship had an impact on the petitioner's recruitment efforts before the petition may be approved.

Also, the experience letter that the petitioner submitted contains inconsistencies which must be resolved. That is, the petitioner required two years of experience in the proffered position on the Form ETA 750. In the record is an experience letter signed by an individual who has the same last name as the beneficiary which indicates that the beneficiary acquired just over two years of experience in the proffered position at [REDACTED]. However, the AAO conducted an Internet search using the search engine Google which led to the finding that the correct address for this food mart is [REDACTED], not [REDACTED] as indicated in the letterhead stationery of the experience letter submitted by the petitioner. Also, information available at www.mapquest.com (accessed February 9, 2010) indicates that there is no [REDACTED] in Navasota, TX. It is unclear why this business letterhead would contain a significant misspelling.

Doubt cast on any aspect of the proof submitted by an applicant or petitioner may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 (BIA 1988).

As the petitioner's president and the beneficiary appear to be related by marriage and as the petitioner submitted evidence from a party who also appears to be related to the beneficiary there is an indication in the record that the job offer in this matter may not be *bona fide*.

The AAO does not make a final finding on this issue, but in any further filings the petitioner must address the points set forth here.¹⁶

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.

¹⁵ The petitioner also filed for a beneficiary who has the same last name as the petitioner's president who would also appear to be related. This individual had an April 26, 2001 priority date and adjusted to lawful permanent resident status on March 3, 2009.

¹⁶ In any further filings, the petitioner would need to submit independent evidence to corroborate this prior employment of the beneficiary.