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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**

PUBLIC COPY

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FILE:

Office: NEBRASKA SERVICE CENTER

Date: **NOV 18 2010**

IN RE:

Petitioner:

Beneficiary:

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:

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. The fee for a Form I-290B is currently \$585, but will increase to \$630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the \$630 fee. 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 petitioner¹ is a residential care home. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the Form ETA 750, Application for Alien Employment Certification, approved by DOL, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the director denied the petition 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.

Beyond the decision of the director, issues in this case are whether [REDACTED] qualifies as a successor-in-interest to [REDACTED] and whether

¹ Initially, the petitioner was represented by [REDACTED] [REDACTED] is not a licensed attorney. The regulation governing representation in filing immigration petitions and/or applications with U.S. Citizenship and Immigration Services (USCIS) is found at 8 C.F.R. § 103.2(a)(3), which provides in pertinent part that:

(3) *Representation.* An applicant or petitioner may be represented by an attorney in the United States, as defined in § 1.1(f) of this chapter, by an attorney outside the United States as defined in § 292.1(a)(6) of this chapter, or by an accredited representative as defined in § 292.1(a)(4) of this chapter.

A review of the most recent Roster of Recognized Organizations and Accredited Representatives maintained by the Executive Office for Immigration and Review, available on the Internet at <http://www.usdoj.gov/eoir/statspub/raroster.htm> (accessed September 17, 2010), indicates [REDACTED] is not an accredited representative of an organization recognized by the Board of Immigration Appeals (BIA). Therefore, the AAO may not recognize [REDACTED] in this matter. Further, a California federal grand jury has since indicted [REDACTED], on May 27, 2010, on charges stemming from an investigation by U.S. Immigration and Customs Enforcement (ICE) into allegations she engaged in immigration, mail and tax fraud. According to the indictment as returned, Evelyn Sineneng-Smith counseled foreign nationals, most of whom entered the United States on visitor's visas from the Philippines, to apply for the Department of Labor's (DOL) employment labor certification so they could work in residential health care facilities.

² The AAO accessed the State of California, Secretary of State corporate records at its website at <http://kepler.sos.ca.gov/cbs.aspx> on September 20, 2010. According to information found on that website, [REDACTED] is an active California corporation incorporated on January 9, 2003. The petitioner stated on the petition it is [REDACTED] [REDACTED] which is the same as the EIN found in the petitioner's corporate tax returns.

██████████ qualifies as a successor-in-interest to ██████████ and ██████████ and whether sufficient evidence has been submitted to demonstrate either the petitioner and/or its predecessor-in-interest had 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)(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 qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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 accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$11.18 per hour (\$23,254.40 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).³

The petitioner submitted no documentary evidence with the petition and labor certification.

The director issued a request for evidence (RFE) dated April 28, 2008, to the petitioner and, *inter alia*, requested complete copies of the petitioner's federal income tax returns for years 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as well as the petitioner's latest federal income tax returns, annual report or a third party audited financial statements. Additionally, the director instructed that the petitioner may introduce additional evidence such as profit/loss statements, bank account records, and personnel records.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in 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).

The director also requested copies of W-2 Statements evidencing wages paid by the petitioner to the beneficiary. In response, the petitioner submitted 1099-MISC Statements from the petitioner to the beneficiary for 2006-\$10,000.00, and 2007-\$12,000.00, as well as W-2 Statements issued to the beneficiary by a purported predecessor-in-interest. These show wages paid to the beneficiary by [REDACTED] of \$4,384.25 in 2002; \$9,600.00 in 2003; and \$7,500.00 in 2004..

Further, the director indicated "if the petitioner is a sole proprietor," then in that case, the petitioner was requested to submit copies of the petitioner's federal income tax returns for years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, along with a statement of the petitioner's monthly recurring household expenses. The director instructed that this statement must include, but not be limited to, all of the family's household living expenses, such as rent or mortgage payments, automobile payments, installment loans, credit card payments, and household expenses.

No tax returns were submitted showing the petitioner was a sole proprietor, and no household living expenses statement was submitted.⁴

Additionally, the director requested a copy of the petitioner's checking and savings account statements. The petitioner's checking and savings account statements were not submitted.

Further, in response, the petitioner submitted two bank letters/statements both dated June 3, 2008, for [REDACTED] "accounts;" an account summary dated June 4, 2008, from Home Depot for the petitioner and [REDACTED]; a water utility bill for [REDACTED] for June 4, 2008; two accounts statements for [REDACTED] one dated April 29, 2008, and one dated May 1, 2008, to reflect balances on apparent charged purchases; an account payment letter dated April 15, 2008, for [REDACTED] and a realty finance statement in the name of [REDACTED] dated December 18, 2007, stating a current principal balance of \$701,107.51.

Additionally, the petitioner submitted its federal income tax returns (Forms 1120) for 2003, 2004, 2005, 2006, and 2007, as well as personal tax returns and W-2 Statement for other individuals.⁵

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2003 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. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary did not claim to have worked for the petitioner. Accordingly, it appears the business in question may have been operated first as a corporation from the priority date then transitioned to a sole proprietor, and

⁴ Although the petitioner submitted some utility and store purchase statements for [REDACTED] this evidence in total was not responsive to the director's RFE.

⁵ The petitioner submitted Forms 1040 and W-2 statements for [REDACTED] or 2001, 2002, and 2003.

then acquired by the petitioner after its organization in 2003. A corporation, [REDACTED] appears to have been the original filer of the Form ETA 750.

The instant petitioning corporation, [REDACTED] was formed on January 9, 2003. In 2004, the Form ETA 750 was amended to change the employer to [REDACTED]. However, on May 10, 2007, [REDACTED] filed the instant petition. It is unclear whether [REDACTED] ever operated the business.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As a threshold issue, the petitioner has also failed to establish that it, as a corporation, is a successor-in-interest to the sole proprietor that is now the employer listed in the labor certification. In 2003, the petitioner, a C corporation, was formed in the State of California. 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." Therefore, the sole proprietor now listed as the employer in the labor certification is a different entity than the petitioner.

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 purchased 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.

The record contains no evidence to establish a valid successor relationship. There is no evidence of the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

The fact that the petitioner is owned by one or more of the sole proprietors, or that the petitioner has the same name and address of the predecessor business organization, is not sufficient to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the petitioner is a successor-in-interest to the sole proprietor that filed the labor certification. The petition is not accompanied by a proper labor certification. 8 C.F.R. § 204.5(l)(3)(i).

The petition will be denied for this reason as well. 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 Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Assuming for sake of argument that the petitioner is a successor-in-interest to the employer identified in the labor certification, or to the original filer of the labor certification, the record does not establish that the business had the ability to pay the proffered wage in 2001, 2002, 2003, and 2004, as is set forth below.

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, as already stated, there are two 1099-MISC Statements stating compensation paid to the beneficiary in 2006-\$10,000.00; and 2007-\$12,000.00 in the record.⁶ A purported predecessor-in-interest paid wages to the beneficiary in 2002-\$4,384.25; 2003-\$9,600.00; and in 2004-\$7,500.00. Therefore, assuming a *bona fide* successorship has occurred, the beneficiary has not been paid the proffered wage from 2001 through 2007.

According to the letter dated May 31, 2008, the petitioner contends that the beneficiary has been a fulltime employee since September 24, 2002, at the yearly salary of \$19,500.00. Clearly, the petitioner has made an inconsistent statement that has not been explained by evidence in the record. Going on record without supporting documentary evidence is not sufficient for purposes of meeting

⁶ These two compensation payments do not appear on the petitioner's 1120 tax returns for 2006, and 2007.

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)).

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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). 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. See *Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on July 18, 2008, 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 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available. The petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2001, [REDACTED] Form 1120 stated net income of \$1,560.00.
- In 2002, [REDACTED] Form 1120 stated net income of \$2,055.00.
- In 2003, [REDACTED] Form 1120 stated net income of \$2,825.00.⁷
- In 2003, the Form 1120 stated net income of <\$38,533.00>.⁸
- In 2004, the Form 1120 stated net income of <\$11,833.00>.
- In 2005, the Form 1120 stated net income of \$21,818.00.
- In 2006, the Form 1120 stated net income of <\$3,577.00>.
- In 2007, the Form 1120 stated net income of <\$46,636.00>.

Therefore, for the years 2001 through 2007, for which tax returns were submitted, the petitioner, or its purported predecessor, through an examination of its net income or wages paid to the beneficiary could not pay the proffered wage.

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.⁹ 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 [REDACTED] 2003 net income is being considered because the record is unclear as to when, or if, the petitioner began operating the business. It appears that [REDACTED] an individual, acquired the business in 2004 even though the petitioning corporation was operating in 2003.

⁸ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

⁹ 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 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 as shown in the table below.

- In 2001, [REDACTED] Form 1120 stated net current assets of <\$342.00>.
- In 2002, [REDACTED] Form 1120 stated net current assets of \$5,288.00.
- In 2003, [REDACTED] Form 1120 stated net current assets of \$12,319.00.
- In 2003, the Form 1120S stated net current assets of <\$5,663.00>.
- In 2004, the Form 1120S stated net current assets of \$1,248.00.
- In 2005, the Form 1120S stated net current assets of \$160,798.00.
- In 2006, the Form 1120S stated net current assets of \$129,482.00.
- In 2007, the Form 1120S stated net current assets of \$34,204.00.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner, or its purported predecessor, 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 in 2001, 2002, 2003, and 2004. In 2005, 2006, and 2007, through an examination of wages paid to the beneficiary, or net current assets, the petitioner could pay the proffered wage.

On appeal, the petitioner asserts:

Case was denied because tax returns were incomplete. However please note that the company had changed its name, and DOL accepted the change (see attachments please). However, tax returns of old and new Company are attached, showing that that the proffered annual wage could have been paid at all times.

Please note that W2 forms were less than the proffered annual wage because Beneficiary did not work in full-time status for all 3 months.

Accompanying the appeal, the petitioner submitted two identical letters, the first dated June 2004, and signed July 14, 2004, and the second letter dated November 2004, and signed November 16, 2004, by [REDACTED] reputedly sent to the DOL Certifying Officer, San Francisco, California that stated in pertinent part that [REDACTED] transferred the "ownership" of a residential care home called '[REDACTED]' and the facility was renamed [REDACTED]' and three "Memos" signed by [REDACTED] between July 2, 2004, and November 16, 2004, as employer, to the "Assessment Manager, Alien Labor Certification Office" (no address stated), and "Alien Labor Certification Office, U.S. Department of Labor," (no address stated). In these memos [REDACTED] requests that the Form ETA 750, Application for Alien Employment Certification be amended to change the name of the employer to [REDACTED]' and the third memo is a five point statement concerned the transition of ownership between [REDACTED]

However, as stated above, the record is nevertheless devoid of evidence establishing that the petitioning corporation is a successor-in-interest to [REDACTED]. Regardless, as none of the entities has established to have been able to pay the proffered wage from the priority date, the petition must be denied.

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. 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 petitioner was organized as a C corporation in 2003. The petitioner alleges that the residential care facility was owned by other individual(s) sometime before or during 2004. According to the petitioner [REDACTED] reputedly operating as [REDACTED] operated a residential care facility at [REDACTED] until sometime in 2004.

Specific information concerning the transition of the residential care facility from the [REDACTED] to [REDACTED] was not provided.¹⁰ Since the petitioner has submitted a labor certification as [REDACTED] for the same facility location, that was accepted by the DOL in 2001, there exists an inconsistency in the petitioner's allegation that the [REDACTED] operated [REDACTED] at [REDACTED] in 2001 through 2003 or 2004. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

¹⁰ *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

According to the petition, the petitioner [REDACTED] identified in the record as the St. [REDACTED] was established in 2003, and employs two workers. The petitioner submitted Forms 1120 for 2003 through 2007, for the corporation. As already stated, 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 in 2001, 2002, 2003, and 2004.

The petitioner stated gross receipts of \$44,863.00 and \$112,432.00 for 2003, and 2004 respectively. Overall, for 2003 through 2007, its gross receipts were steady, but it could not pay the proffered wage from net income or net current assets in 2003 and 2004, despite declaring no officers' compensation. Otherwise, there is a paucity of information in the record concerning the petitioner's business organization and finances. There is no information in the record concerning the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. 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 in 2001, 2002, 2003, and 2004.

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.