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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
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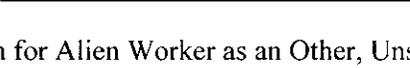
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FILE:  Office: TEXAS SERVICE CENTER

Date: **SEP 07 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, 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, Texas Service Center and after review of the statements and representations made on appeal, the denial remains unchanged, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a silk screen printer business. It seeks to employ the beneficiary permanently in the United States as a hand printer of silk screens. 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 (the 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, and that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. 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 denial, issues in this case are whether petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, as a further reason for ineligibility for the immigration benefit requested, is that the petitioner has filed another immigrant petition (Form I-140) according to the

¹ Although not a basis for this decision, the AAO notes that the beneficiary has the same surname as an owner of the petitioner, [REDACTED]. The petitioner was incorporated as [REDACTED] in 2004. According to the tax returns submitted, the company is owned by two shareholders, [REDACTED]. Under the regulations at 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 Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). According to the Form ETA 750A, Section 21, entitled "Describe Efforts to Recruit U.S. Workers and the Results" the employer specified the sources of recruitment as follows; "Word of Mouth – no qualified applicants." If this matter is pursued, the petitioner must show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers, and whether an employer is related by "blood" or by financial interests, by marriage, or through friendship to the beneficiary.

electronic records of U.S. Citizenship and Immigration Services (USCIS). The petitioner must show that it had sufficient income to pay all the wages for all sponsored beneficiaries on the priority date. 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 was 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 March 25, 2005. The proffered wage as stated on the Form ETA 750 is \$21.92 per hour (\$45,593.60 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.

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

Accompanying the appeal, counsel submitted an undated legal brief; an explanatory letter dated September 2, 2008; a letter from Paulette Fashions Industries, Inc., dated August 28, 2008; the petitioner's federal income tax (Forms 1120) returns for 2005, 2006, and 2007; three Wage and Tax (Forms W-2) Statements for 2005, 2006, and 2007 purportedly issued by the petitioner to the beneficiary; and the beneficiary's personal federal income tax (Forms 1040 and 1040EZ) returns with W-2 statements for the same years. Additionally, 2005 W-2 Statements were submitted from other employers.

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 2004, to have a gross annual

income of \$880,000.00, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year begins on December 1st and ends on November 30th of each year. On the Form ETA 750B, signed by the beneficiary on March 23, 2005, the beneficiary claimed to have worked for the petitioner since March 2005.

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 Sonegawa*, 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 support of the petition, the petitioner submitted, *inter alia*, W-2 statements purportedly representing wages paid to the beneficiary in 2005, 2006, and 2007. The petitioner also submitted alleged copies of the beneficiary's tax returns on which he supposedly claimed these wages as income. However, the record contains inconsistencies pertaining to the identity of the beneficiary. The W-2 statements state that the wages were paid to a person having social security number 145-20-2634. The petitioner did not respond to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, 145-20-2634 is the beneficiary's social security number. Furthermore, the beneficiary's tax returns bear an individual tax identification number (942-73-6366) and do not indicate that he has a social security number. 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). Absent clarification of these inconsistencies in the record, the AAO will not accept the W-2 statements as persuasive evidence of wages paid to the beneficiary in 2005, 2006, or 2007. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8th Cir. 2010).

Regardless, assuming the W-2 statements were persuasive evidence of wages paid to the beneficiary during those years in question, the petitioner's allegedly paid the beneficiary wages as stated below:

Petitioner's Tax Year:	Proffered Wage	Wages Paid	Difference between the Proffered Wage and the Wage Paid in Each Year:
2005	\$45,593.60	\$20,420.00	\$25,173.60
2006	\$45,593.60	\$25,418.77	\$20,174.83
2007	\$45,593.60	\$25,287.50	\$20,306.10

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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).

According to counsel’s brief in the matter, “Once amortization,² depreciation, carry-overs³ and all of the rest of the accounting tricks of the trade have been applied, the amount of taxable income of any

² Intangible assets on a balance sheet are included as “other assets” and they are amortized over a term of years. Amortization is the equivalent of depreciation for those intangibles.

³ It is not clear what counsel is referring to by “carry-overs.” The petitioner’s tax returns were prepared pursuant to cash convention as noted in Form 1120, Schedule K, Line 1, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to the IRS. This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner’s present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner’s tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the petitioner’s adjustments. If the petitioner wished to persuade this office that accrual accounting supports the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, then the petitioner was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

company is reduced to minimize the amount of tax due,” and therefore, for these reasons, the petitioner has the ability to pay the proffered wage. 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.

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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 petitioner’s tax returns demonstrate its net income as shown in the table below.

- In 2005, the Form 1120 stated net income of \$-0.0-.
- In 2006, the Form 1120 stated net income of \$2,444.00.
- In 2007, the Form 1120 stated net income of \$7,844.00.

Therefore, for the years 2005, 2006, and 2007, through of an examination of wages paid and net income, the petitioner did not have the ability to pay the proffered wage on the priority date and thereafter.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the

petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2005, the Form 1120 stated net current assets of \$21,255.00.
- In 2006, the Form 1120 stated net current assets of <\$5,252.00>.
- In 2007, the Form 1120 stated net current assets of <\$361.00>.

For the years 2005, 2006, and 2007, through an examination of wages paid and net current assets, the petitioner did not have the ability to pay the proffered wage on the priority date and thereafter.

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.

On appeal, counsel asserts that the 2005 tax return shows current assets that exceed current liabilities. In 2005, the Form 1120 stated net current assets of \$21,255.00. Further, counsel then states that "this amount" (i.e. \$21,255.00) plus wages actually paid to the beneficiary (i.e. \$20,420.00) and plus the compensation of officers (i.e. Form 1120, Line 12, \$9,896.00) is in excess of the proffered wage. Finally, counsel argues that officer compensation is not a "fixed amount," and is available to pay the proffered wage. Counsel's assertions are not persuasive. First, the record does not contain any statements from the officers indicating that either officer was willing to forego his compensation in order to pay the proffered wage to the beneficiary. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, given the modest amount of compensation paid to the officers, e.g. \$28,600.00 each in 2007, it is unlikely that either officer would or could have foregone a significant amount of compensation in order to pay the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting

⁴According 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.

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)).

Counsel contends that the actual wages of the beneficiary plus the compensation of the officers exceeded the proffered wage in 2006 and 2007. Counsel's contention must be qualified. In 2006 and 2007, the petitioner paid the beneficiary \$25,418.77, and \$25,287.50. In 2006 and 2007, the petitioner stated officers' compensation of \$49,860.00, and \$57,000.00 respectively which counsel asserts is available to pay the proffered wage. However, since it has been paid, officer's compensation is an expense in those years. Compensation already paid to others is not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The suggestion that expenses should be treated as assets available to pay the proffered wage is not persuasive. Further, once again, neither counsel nor the petitioner's shareholders owners have stated positively that the shareholders have agreed to decrease officers' compensation to pay the proffered wage in any year.

According to counsel, the compensation of the corporate officers is not a fixed amount, but varied according to the financial condition of the business, and "could always be available to pay the [proffered] wage in question." Although counsel has contended that the income of the petitioner's two shareholders received as officers' compensation is discretionary, once received, officers' compensation is a business expense, which by its nature is not discretionary. Since there is no evidence of wage payments to the shareholder/owners in the record, it is clear officers' compensation is their sole return on investment which would have been approximately halved to pay the proffered wage in years 2005 through 2007. Since the officers have made no commitment or offer to reduce their compensation by anything in evidence, counsel is merely speculating upon what could have happened in the past (but did not) and what may or may not happen in the future. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Counsel contention that officers' compensation is evidence of the petitioner's ability to pay the proffered wage is misplaced.

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. 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

The petitioner was established in 2004 and, it has stated gross receipts of \$696,195.00, \$880,029.00, and \$896,541.00 in 2005, 2006, and 2007 respectively. Based upon the tax returns submitted, the petitioner has been a viable and financially stable business with the exception it has stated either no or nominal net income in relation to its gross receipts for the three years for which tax returns were submitted. Since its net current assets have been negative for the same years, the petitioner did not have the ability to pay the proffered wage from either of those two sources.

Further, counsel has not contended or provided evidence of the occurrence of any uncharacteristic business expenditures, losses, or event relevant to the petitioner's ability to pay the proffered wage during the period for which evidence was provided. Finally, as noted above, the record contains unresolved inconsistencies pertaining to the identity of the beneficiary and the petitioner's claim to have paid wages to him. 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.

USCIS electronic records indicate that the petitioner has filed one other I-140 petition.⁵ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed one other petition, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750, now Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

⁵ USCIS identification number [REDACTED]

The record in the instant case contains no information about the proffered wage for the other beneficiary of the other I-140 petition filed by the petitioner, nor about the current immigration status of the beneficiary for which a petition is pending. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other petition filed by the petitioner.

An additional issue is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Counsel states on appeal that the petitioner has submitted proof of his prior employment experience. The Form ETA 750 states that the position requires three months experience in an un-named related occupation.

The petitioner must 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).

The Form ETA 750, Part A, Line 13, describes the job duties as follows:

Make sample screens, mix paint, plastic sol & water base; produce Silk Screens on machines or by hand.

The beneficiary, on the Form ETA 750B, Section 15, under "Work Experience" stated that since March 2005, until "present" (i.e. March 23, 2005), he was employed fulltime as a "hand printer silk screen" for the petitioner. The petitioner submitted a letter from [REDACTED] president, dated August 28, 2008, that stated the beneficiary worked since March 21, 2005, as a Machine Operator for [REDACTED] working in the areas of hand printing, color mixing and screen engraving. The beneficiary had only four days of experience in the offered job before the priority date with the petitioner.

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

(ii) Other documentation—

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

From January 2005, to March 2005, the beneficiary stated he was employed by [REDACTED], from January 2005, to March 2005, as a hand printer. From September 2001, to January 2005, the beneficiary stated that he was employed by [REDACTED], of [REDACTED], as a hand printer. All the job descriptions given by the beneficiary for his three employment experiences are exactly as stated in the labor certification.

Although not stated on the labor certification, according to a W-2 Statement submitted in the record, the beneficiary was also employed by [REDACTED], in 2005.

The petitioner submitted only one letter statement from [REDACTED] president of [REDACTED] dated August 28, 2008, that stated “[The beneficiary] had been employed with [REDACTED] as a Machine Operator for [REDACTED]; from October 2001 to December 2004.” The letter contains no further information concerning the beneficiary’s education, training or experience to perform the offered position.

There is insufficient evidence in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above. Therefore, the statements submitted in the record concerning the beneficiary’s prior employment qualifications are insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position with three months experience.

Other than the beneficiary’s repetitive statements in the Form ETA 750, Part B, of his work experiences at the petitioner, [REDACTED], and [REDACTED], there is no other description of the beneficiary’s job experience. It is not reasonable that the beneficiary’s employment experience would be exactly the same with three employers. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated 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.

ORDER: The appeal is dismissed.