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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

DATE: **APR 08 2011** Office: TEXAS SERVICE CENTER

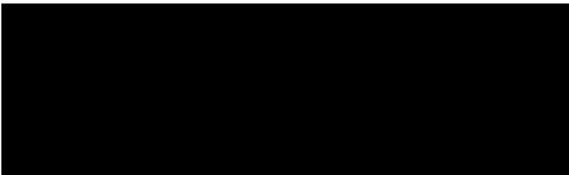
FILE: A75 230 419
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IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 \$630. 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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a ranch. It seeks to employ the beneficiary permanently in the United States as a horse trainer pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(iii). 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 December 23, 2009 denial, the first issue in this case is whether or not 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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).

Here, the Form ETA 750 was accepted on February 9, 2004. The proffered wage as stated on the Form ETA 750 is \$19,198.00 per year. The Form ETA 750 states that the position requires one year of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 on January 1, 1985, and that it currently employs 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 January 27, 2004, the beneficiary claims to have been employed by the petitioner since February 1997.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel asserts that the director failed to consider all of the facts and evidence in the case in order to obtain an accurate account of the petitioner's financial ability to pay the proffered wage.

As a threshold issue, counsel claims that the petitioner and another entity are affiliated, and that the affiliated company, [REDACTED], is responsible for the petitioner's payroll. The record of proceeding contains copies of IRS Forms W-2 issued by [REDACTED], a personnel change notice issued by [REDACTED] and an earnings statement dated June 18, 2004 and issued by [REDACTED]. The petitioner provided a corporate chart that showed [REDACTED] as the 100% shareholder of RMA, Inc. and a 99% limited partner in [REDACTED]. The record also contains a letter signed by [REDACTED] who stated the [REDACTED] affiliated group of companies, including the petitioner, processes their payroll through the Toyota dealerships. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

¹ 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).

Counsel asserts on appeal that USCIS is allowed to accept a statement from a financial officer of an organization that employs 100 or more workers, and therefore, credence should be given to the statement made by the CPA firm. Contrary to counsel's claim, the petitioner stated on the Form I-140 petition that it currently employed three workers, and there is no evidence in the record to establish that the affiliate company or the shareholder is responsible for the petitioner's payroll.

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled.

Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120).

There is no evidence in the record to demonstrate that the Don McGill group filed consolidated tax returns. The petitioner's Employer Identification Number [REDACTED] is different from [REDACTED]. Furthermore, there is nothing in the record to demonstrate that [REDACTED] paid wages to the beneficiary, [REDACTED], and that [REDACTED] is the same person. Although the petitioner has submitted a copy of the beneficiary's claimed Texas driver's license, the W-2 statements indicate that the recipient of the wages has social security number [REDACTED]. However, the Form I-140 query regarding the beneficiary's social security number is blank, and the beneficiary's tax returns list a tax payer identification number [REDACTED]. Therefore, the record is not persuasive in establishing that the beneficiary and [REDACTED] are the same person, even assuming the relevance of W-2 statements issued by [REDACTED] to the petitioner's ability to pay the proffered wage.

Contrary to counsel's assertion, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner or affiliated entities to satisfy the corporation's ability to pay the

² The petition states that the petitioner's [REDACTED] which is different from both the petitioner's tax returns and the [REDACTED] W-2 statements. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In view of the above, 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.

The petitioner initially submitted copies of IRS Forms W-2 for 2004 through 2008. However, as noted by the director in his denial, the employer's name was [REDACTED] not the petitioner's name and the W-2s were printed on 2008 wage and tax statements and were not issued during the appropriate years. In addition, as noted by the director, the employee's name that appeared on the Forms W-2 was [REDACTED] and that in contrast, the beneficiary, [REDACTED] name, not [REDACTED] appears on the Form I-140 and Form ETA 750. On appeal, counsel asserts that the beneficiary's name as evidenced from his Texas driver's license, is [REDACTED] and that two surnames are commonly used by natives in Hispanic cultures and that such practices are followed by aliens in their new country. Contrary to counsel's claim, the name that appears on the Texas driver's license is [REDACTED]. The beneficiary signed his name under penalty of perjury on the Form ETA 750 as [REDACTED]. His name also appears as [REDACTED] on the Form I-140 that was denied on October 18, 2008, on the Form I-140 submitted on June 2, 2009, and on the Form ETA 750. The beneficiary also signed his name [REDACTED] on his declaration of employment dated December 9, 2007. All the letters submitted by the petitioner as evidence of the beneficiary's employment identify the beneficiary as [REDACTED]. On appeal, the petitioner submits a copy of a Form W-2 for 2004 and bearing the petitioner's name as employer and the beneficiary's name [REDACTED] as employee. As noted above, the Forms W-2 pertain to a person having social security number [REDACTED] even though all other evidence in the record tends to establish that the beneficiary does not have a social security number. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence

pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel further asserts that the original employment data pertaining to the beneficiary was transcribed by the human resource department at [REDACTED] onto 2008 Forms W-2 rather than locating the original documents that were archived in storage. Counsel states that copies of the original Forms W-2 have now been made available and submits the documents as evidence on appeal. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a qualified position. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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. 1988).

In comparing the Forms W-2 submitted on appeal with the Forms W-2 contained in the record, the initial Form W-2 for 2004 showed a deduction at part 14 for health insurance; however, the copy of the W-2 submitted on appeal does not. In addition, neither Form W-2 for 2004 has any amount deducted as federal income tax withheld. Counsel submits a copy of an amended IRS Form 1040 and a copy of a Form W-2 for 2004 bearing the petitioner's name as employer and "Daniel Millan" as employee. The initial Forms W-2 for 2005, 2006 and 2007 showed a deduction at part 14 for health insurance; however, the copies of the Forms W-2 submitted on appeal do not. It is also noted that the copy of the initially submitted Forms W-2 detailed the employee department number, division, and employee number; however, the Forms W-2 submitted on appeal, which are said to be the original archived Forms 1040 do not contain such information. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The record of proceeding contains a copy of a personnel change notice from [REDACTED] effective June 2, 2004, where it is indicated that [REDACTED] is characterized as a "new hire" and he is further described as "ranch hand." The petitioner has failed to demonstrate whether or not the beneficiary was hired by the car dealership as of that date. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record contains a copy of Reconciliation Detail purportedly prepared by Bank One for West Eagle Ranch dated June 14, 2004. The statement indicates that paychecks were issued to [REDACTED] by West Eagle Ranch in the amount of \$532.78 per pay period, on April 20, 2004, April 28, 2004, May 4, 2004, May 11, 2004, May 18, 2004, May 25, 2004, and June 1, 2004. The petitioner submitted a copy of the Form W-2 it allegedly issued to the beneficiary for wages he earned in 2004. Counsel infers that as of June 2, 2004, the [REDACTED] Company paid the beneficiary's wages. The evidence shows that averaging the beneficiary's wages from January 2004 through the first pay period in June 2004, he was paid \$11,721.38;

however, the Form W-2 issued to the beneficiary by the petitioner indicates \$9,692.00 in wages paid to the beneficiary in 2004. Regardless, the amount recorded is \$9,506.00 less than the proffered wage.

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise serious concerns about the veracity of the petitioner's assertions. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho* at 591. In this case, the discrepancies and errors noted above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible.

Therefore, for the years 2004, 2005, 2006, 2007, and 2008, the petitioner has not established that it paid the beneficiary the full proffered wage, and as explained above, even if the evidence pertaining to [REDACTED] purported payment of wages were credible, it would be generally irrelevant to whether an affiliated corporation had the ability to pay the proffered wage.

If, as in this case, 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*, 696 F. Supp. 2d 873 (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*, 696 F. Supp. 2d at 881 (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).

The record before the director closed on December 8, 2009, with the petitioner’s response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return is the most recent return available before the director. The proffered wage is \$19,198.00.

The petitioner’s 1120S³ tax returns demonstrate its net income as shown in the table below:

- In 2004, the Form 1120S stated net income of (\$44,139.00).
- In 2005, the Form 1120S stated net income of (\$162,348.00).
- In 2006, the Form 1120S stated net income of (\$277,497.00).
- In 2007, the Form 1120S stated net income of (\$260,780.00).

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) or line 18 (2006-2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.).

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not have sufficient net income to 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.⁴ 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 proffered wage using those net current assets. The petitioner's tax return demonstrates its net current assets as shown in the table below:

- In 2004, the Form 1120S stated net current assets of (\$2,187,824.00).
- In 2005, the Form 1120S stated net current assets of (\$2,160,127.00).
- In 2006, the Form 1120S stated net current assets of (\$2,457,417.00).
- In 2007, the Form 1120S stated net current assets of \$418,363.00.⁵

Therefore, the record does not demonstrate that the petitioner had sufficient net current assets to pay the proffered wage since the priority date.

Therefore, from the date the labor certification 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.

The evidence presented on appeal cannot be concluded to outweigh the evidence of record 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

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.

⁵ Although the petitioner's 2007 tax return shows net current assets (assets minus liabilities) in the amount of \$418,363.00; the other current liabilities figure (Schedule L, item 18) from the 2006 tax return in the amount of \$2,837,533.00 was not carried over to 2007. Instead, in 2007, \$4,989.00 is listed as other current liabilities from 2006. This inconsistency brings into question the authenticity of the petitioner's tax records. *Matter of Ho, supra*.

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.

In this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage since the priority date. There are no facts paralleling those in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. Although the petitioner submitted evidence pertaining to the size and financial capabilities of affiliated entities and the petitioner's stockholders, this evidence is not relevant to the petitioner's ability to pay the proffered wage, considering the totality of the circumstances. As noted above, assets of entities and individuals who are not petitioners, and thus have no obligation to pay the wage, may not be considered. Furthermore, the record is rife with inconsistencies pertaining to the identity of the beneficiary and the accuracy of the tax returns submitted. Finally, counsel's claim that the accountant's opinion letter establishes the petitioner's ability to pay is not persuasive. The accountant's opinion pertains to affiliated companies and the petitioner's shareholder, not to the petitioner itself, which is the entity which must be proven to be able to pay the wage. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

A second issue in this case is whether the petitioner has submitted sufficient evidence to demonstrate that the beneficiary had one year experience as a horse trainer. In determining whether the beneficiary is qualified to perform the duties of the proffered position, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); and *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's one year experience as a horse trainer, he represented that he was employed by Radulfo in Taxco, Guerrero, Mexico from December 1989 to June 1990 as a cowboy; employed by [REDACTED] as a horse trainer from February 1995 to August 1996; and that he was employed by the petitioner as a horse trainer since February 1997. The petitioner submitted a letter signed by the beneficiary and dated December 7, 2009 in which he stated that he was employed by Pinebrook Farms from October 1993 to January 1995 and was employed by [REDACTED] from June 1992 to September 1993. It is noted that the beneficiary did not indicate on the Form ETA 750 that he was employed by either [REDACTED]. See *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. This statement made by the beneficiary is self-serving. Although counsel asserts that the beneficiary's statement is a sworn affidavit, it has not been notarized and therefore, is insufficient to be characterized as such. The beneficiary further stated that he arrived in the United States in 1991, left the country for a short time in 1994, and returned to the United States in March 1994.

The petitioner submitted an employment letter dated October 7, 2007 from the director of [REDACTED] who stated that the company employed the beneficiary from October 1993 to January 1995 in the capacity of stable and facility maintenance. On appeal, the petitioner submitted a letter dated April 2, 2010 from the director of [REDACTED] who, in addition to her statements made in the October 7, 2007 letter, stated that in addition to the beneficiary's duties as stable and facility maintenance, the beneficiary's duties consisted of "fed, exercised, groomed and talked to the horses at our farm to accustom them to human voice and contact." As noted above, 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* at 176.

Here, the employment letter does not establish that beneficiary has the experience necessary to perform the job duties as described by the petitioner at section 13 of the Form ETA 750. The petitioner described the job duties as:

Trains horses: feeds, exercises, grooms, and talks to horses to accustom them to human voice and contact. Talks to horses to calm and encourage them to follow lead, or standstill when hitched or groomed. Places tack or harness on horse to accustom horse to feel of equipment. Mounts and rides saddle horse to condition horse to respond to oral, spur, or rein command, according to knowledge of horse's temperament and riding technique. Retrains horses to break habits, such as kicking, bolting, and resisting bridling and grooming.

The representative from [REDACTED] fails to specify when the beneficiary began his additional duties or the number of hours he spent performing them. In addition, the representative's statement does not indicate that the beneficiary primarily performed the duties added to the statement on appeal, or that the beneficiary was primarily a horse trainer. The representative stated in the letter that the beneficiary served in the capacity of "stable and facility maintenance." Therefore, the letter is insufficient to demonstrate that the beneficiary has the experience necessary to perform the job duties as described in the Form ETA 750.

The petitioner submitted a letter from [REDACTED] who stated that the beneficiary was in his employ from June 1992 to September 1993, and that the beneficiary was employed on a full-time basis. Contrary to counsel's claim, there is no evidence to demonstrate that the statement is notarized and therefore, it will not be treated as an affidavit. The declarant fails to provide his title or the name of the business entity by which the beneficiary was employed. The declarant also fails to provide a specific description of the beneficiary's duties or title. The vague employment statement casts doubt on the petitioner's proof. Regardless, even if the AAO were to consider the employment letter, it does not demonstrate one year of experience in the job offered as stated in the Form ETA 750. Accordingly, it has not been established that the beneficiary has the requisite one year of experience and is thus qualified to perform the duties of the proffered position. 8 C.F.R § 204.5(g)(1) and (1)(3)(ii)(A). For this additional reason, the petition will be denied.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an alternative grounds for denial. 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.