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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



FILE:



Office: NEBRASKA SERVICE CENTER

Date: FEB 09 2011

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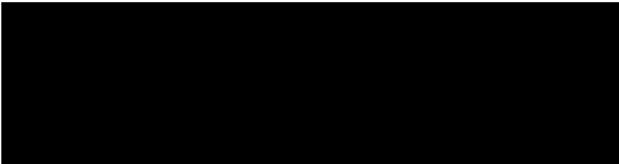
Petitioner:



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 \$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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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. 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, an 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.

Beyond the decision of the director, additional issues are: (1) whether the petitioner is still in business and offering *bona fide* employment to the beneficiary; (2) whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position; and (3) whether the petitioner has sufficient income to pay all the wages for all sponsored beneficiaries on the priority date. The petitioner has filed one other immigrant petitions (Form I-140) according to the electronic records of U.S. Citizenship and Immigration Services (USCIS). 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 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 ETA Form 9089 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 9089 was accepted on April 30, 2007. The proffered wage as stated on the Form ETA 9089 is \$9.75 per hour (\$20,280.00 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.¹

Accompanying the petition and the labor certification, counsel submitted an undated letter from the petitioner; a State of California, Department of Social Services, license issued July 13, 2001, to [REDACTED] a residential-elderly facility located in Novato, California; an illegible City of Novato business license; and the petitioner's federal income tax (Form 1120-A) return for 2005.

On August 26, 2008, the director issued a request for evidence (RFE), and instructed, *inter alia*, that the petitioner submit a copy of the petitioner's federal income tax returns (Forms 1120) including Schedules L for years 2006 and 2007 as well as the petitioner's annual report, or a third party audited financial statement for the same years, if available.

Regarding the beneficiary, the director requested the beneficiary's Wage and Tax Statements (W-2) for years 2006 and 2007, as well as copies of the beneficiary's three most recent pay vouchers.

On October 2, 2008, counsel submitted, *inter alia*, an explanatory letter dated September 24, 2008; the petitioner's federal income tax (Forms 1120) returns for 2006 and 2007; the beneficiary's federal income tax return for 2007 with a 1099-MISC Statement; [REDACTED] bank checking statement for the period July 19, 2008, to August 18, 2008; a copy of [REDACTED] § Grant Deed dated April 15, 2008, for a property bearing the address of [REDACTED] with two pages downloaded from the website <http://www.appraisal.com> as accessed on September 29, 2008; a letter dated September 18, 2008, from [REDACTED] and a copy of the court decision *Matter of Ohsawa America*, 1988-INA-240 (BALCA).

The director denied the petition on October 12, 2008.

On appeal, counsel submitted a legal brief dated December 11, 2008, and no additional evidence.

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). 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 evidence in the record of proceeding shows that the petitioner was structured as a C corporation. On the petition, the petitioner claimed to have been established in 2001, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based upon a calendar year. On the Form ETA 9089, signed by the beneficiary on June 15, 2007, the beneficiary did not claim to have worked for the petitioner even though counsel claims in his appellate brief that the beneficiary began working for the petitioner on May 1, 2007. 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).

As a threshold issue, the petitioner has failed to establish that it is still in business and, thus, that the job offer to the beneficiary is still bona fide. The petitioner has also failed to establish that it has been succeeded by a bona fide successor-in-interest. Accordingly, the petition will be denied for this additional reason.

The labor certification and petition were filed by the petitioner, a corporation, in 2007. On October 27, 2010, the AAO sent a Notice of Derogatory Information to the petitioner noting that the California Department of State's public website was devoid of information about the petitioner. The AAO also noted that the record contained evidence that the licensee of the petitioner's facility had been at one time a corporation called [REDACTED], which has since been suspended by the State of California. Moreover, the AAO noted that the public records of the County of Marin, California, indicate that the [REDACTED] appears to be a fictitious name for two individuals, which further undermines the petitioner's claim to own and operate the business.

In response, the petitioner admits that it no longer operates the facility. The petitioner claims that the assets of the business was purchased by two individuals on December 1, 2009, and that these individuals will offer the same job under the same conditions to the beneficiary. However, the record is entirely devoid of evidence establishing the terms of, and circumstances surrounding, this transfer.

A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 250 (Comm. 1984). A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the corporation that filed the labor certification is a different entity than the individuals who allegedly bought the assets.

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 current organizational structure of the successor. The evidence does not establish that the individuals acquired the essential rights and obligations of the petitioner necessary to carry on the business in the same manner as the petitioner. The evidence does not establish that the individuals are continuing to operate the same type of business as the petitioner. The evidence does not establish that the manner in which the business is controlled by the individuals is substantially the same as it was before the purported ownership transfer.

The fact that the petitioner's assets was owned by one or more of the individuals who now allegedly operate the business as sole proprietors or partners, and the fact that the individuals have the same name and address of the petitioner, is not sufficient to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the individuals are successors-in-interest to the corporation that filed the labor certification and petition. It has not been established that the job offer is still *bona fide*.

Regardless, assuming that the job offer is still valid even though the petitioner appears to no longer operate the business, the record fails to establish that the petitioner had the ability to pay the proffered wage beginning on the priority date.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Counsel submitted a 1099-MISC Statement for 2007 stating that the petitioner paid the beneficiary [REDACTED]. 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*, 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 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

In counsel's letter of September 24, 2008, he stated that in 2006 and 2007, the petitioner's "total gross income" is the total of its "total income" and depreciation for those two years. 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). Similarly, counsel contention that the petitioner’s gross income may be supplemented by adding back depreciation is also misplaced.

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 October 2, 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 is the most recent return available.² The petitioner’s tax return demonstrates its net income as shown in the table below.

- In 2007, the Form 1120 stated net income of [REDACTED]

Therefore, for 2007, the petitioner did not have sufficient net income to pay the proffered wage.

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.

Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown on [REDACTED] 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

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. Tax returns submitted for years prior to the priority date (i.e. April 30, 2007) have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner’s 2005 and 2006 federal income tax returns generally. Even if the AAO considered the 2005 and 2006 returns, the petitioner’s net income losses of <[REDACTED]> and <[REDACTED]>, as stated on the tax returns, were insufficient to pay the proffered wage.

³According 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.

to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.⁴ The petitioner's tax return demonstrates its end-of-year net current assets for 2007 as shown in the table below.

- In 2007, the Form 1120 stated net current assets of [REDACTED]

Therefore, for 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

From the date the Form ETA 9089 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 its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's continuing ability to pay the proffered wage from the priority date.

Counsel states as a basis for the appeal filed on November 14, 2008, that the beneficiary paid the beneficiary at a rate equal to or greater than the proffered wage. Counsel submitted a 1099-MISC Statement for 2007 stating that the petitioner paid the beneficiary [REDACTED]. Although, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date, the AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Further, there is no regulation or court decision that provides that the *rate* that a beneficiary is paid is demonstrative of the petitioner's ability to pay. It is further noted that the unresolved inconsistencies in the record pertaining to the beneficiary's start date, as noted above, undermine the credibility of the payroll evidence and have made a proration in this case impossible.

Counsel contends that the "employer's personal assets, and the employer's stated willingness to continue to fund" the petitioner (which is losing money), demonstrates the petitioner's ability to pay the proffered wage. As already stated, counsel submitted [REDACTED] checking statement for the period July 19, 2008, to August 18, 2008; a copy of [REDACTED] Grant Deed dated April 15, 2008, for a property bearing the address of [REDACTED] [REDACTED] with two pages downloaded from the website <http://www.appraisal.com> as accessed on [REDACTED]

⁴ As already stated, tax returns submitted for years prior to the priority date (i.e. April 30, 2007) have little probative value in the determination of the ability to pay from the priority date. However, we will consider the petitioner's 2005 and 2006 federal income tax returns generally. As with the net income figures, even if the AAO considered the 2005 and 2006 returns, the petitioner's net current assets of [REDACTED] and [REDACTED], respectively, were insufficient to pay the proffered wage.

September 29, 2008; and a letter dated September 18, 2008, from Clede M. Odiwe referred to by counsel as the “guarantee letter.” Further, counsel cites the BALCA decision of *Matter of Far East International, Inc.*, 93-INA-22 (BALCA Dec. 21, 1993) for consideration of the owner’s personal assets in the determination of a corporation’s ability to pay the proffered wage; and in furtherance of this argument, in a letter dated September 24, 2008, counsel stated that the “employer” guarantees the payment of [the beneficiary’s] salary from her personal savings ... and [her] equity in real estate property”⁵

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. 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.” Further, the employer’s stated willingness to continue to fund is insufficient evidence to demonstrate the petitioner’s ability to pay the proffered wage. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel states that a BALCA⁶ cases are applicable to the instant petition before the AAO. Citing for example, the decision of *Matter of Ohsawa America*, 1988-INA-240 (BALCA), counsel states that in that case \$4 million personal assets of the corporate owner were sufficient to determine the ability to pay the proffered wage, and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how the DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. See 8 C.F.R. § 103.9(a).

Moreover, counsel also does not state that the BALCA panel in *Ohsawa America* also considered the fact that the petitioning entity showed increased revenue and decreased operating losses in addition to one of its shareholder’s willingness to fund the company. In the instant petition, the petitioner shows continuous and increasing losses. Thus, in addition to not being binding precedent, *Ohsawa America* is distinguishable from the facts of the instant petition.

Counsel is also citing the decision of *Matter of Ranchito Coletero*, 2002-INA-I04 (2004 BALCA for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the DOL’s BALCA precedent is binding on

⁵ Counsel mischaracterizes [REDACTED] as the employer in this case since it is The [REDACTED], which is the petitioner as well as the named employer in the ETA Form 9089. Further the 2005 tax return identifies [REDACTED] as the 100% owner of the petitioner, not [REDACTED] also known as [REDACTED].

⁶ Board of Alien Labor Certification Appeals.

the AAO. Furthermore, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a corporation at least before the reputed sale of its assets.

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 9089 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 \$100,000.00. 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.

According to the petition, the petitioner was established in 2001, and employs four employees. In the instant case, the petitioner submitted two tax returns for 2005 and 2006, and one for 2007, the year of the priority date. In 2005, 2006, and 2007, the petitioner stated gross receipts of [REDACTED], [REDACTED], and [REDACTED] which indicates its business receipts are in decline. For the three years for which tax returns were submitted, the petitioner suffered losses and negative current assets. No evidence of the petitioner's business reputation or sufficient evidence of the petitioner's business prospects for profitable years was introduced into evidence. No evidence of the occurrence of any uncharacteristic business expenditures or losses was submitted to account for the petitioner's poor business prospects. The petitioner has not provided conclusive evidence of its ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director, an additional issue is whether the petitioner has sufficient resources to pay all the wages for all sponsored beneficiaries on the priority date. The petitioner has filed one other immigrant petition (Form I-140) according to the electronic records of USCIS, [REDACTED]. The petitioner would need to demonstrate its ability to pay the proffered wage for the other I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each beneficiary the prevailing wage in accordance with DOL regulations, and the labor certification accompanying each petition. This is an additional reason for ineligibility.

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

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 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 ETA Form 9089 states that the position requires three months experience or three months of experience in the related occupation of nurse aide.

The ETA Form 9089 describes the job duties of caregiver as follows:

Assist residents in performing personal hygiene activities such as bathing, grooming, oral care; assist them in performing basic daily activities such as walking, eating and exercising; perform housekeeping duties such as wash dishes, make beds, change and wash linens, clean rooms and prepare and serve meals; monitor residents' behavior and physical state and report unusual signs; ensure that surrounding areas are free from any hazards.

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

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(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.

The beneficiary under penalty of perjury stated that she was employed fulltime from June 1, 2001, to December 1, 2001, by [REDACTED] the Republic of the Philippines, in a health center as a nurse aide. According to the labor certification, the beneficiary stated she "attended to patients' needs such as giving medication, taking vital signs and assisting patients in eating and bathing and other daily activities." No other prior employment experience was stated in the labor certification.

Counsel submitted a letter from [REDACTED], municipal health adviser, of the [REDACTED] the Republic of the Philippines, and stated that the beneficiary was employed as a nursing aide from April 2, 2001, to December 2, 2001. According to [REDACTED], the beneficiary's duties included attending to patient needs such as giving medication, assisting patient in eating, bathing and other "ADL."

The sole statement submitted in the record concerning the beneficiary's qualifications received from [REDACTED] is insufficient evidence under the regulation at 8 C.F.R. § 204.5(1)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. There is no other evidence submitted concerning the beneficiary's qualifications to meet the requirements of the labor certification which also are to "assist [residents] in performing basic daily activities such as walking, eating and exercising; perform housekeeping duties such as wash dishes, make beds, change and wash linens, clean rooms and prepare and serve meals; monitor residents' behavior and physical state and report unusual signs; ensure that surrounding areas are free from any hazards." The duties of employment in the labor certification also differ substantially from the duties listed in [REDACTED]. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.