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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

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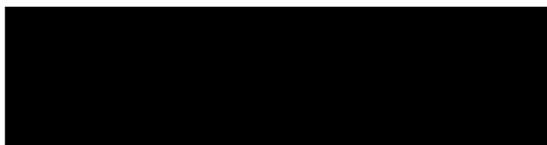
IN RE:

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 \$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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care services. It seeks to employ the beneficiary permanently in the United States as a personal attendant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an other, unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date through the present, and 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.

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

As set forth in the director's February 25, 2009 denial, the primary issue in this case is whether or not the petitioner has established that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the 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 not available in the United States.

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.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation 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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). On the petition, the petitioner claimed that it was established on November 9, 1999,² and has a gross annual income of \$48,250, net annual income of \$48,250³ and 25 employees. On the Form ETA 750B signed by the beneficiary on February 9, 2006, she did not claim to have worked for the petitioner.

It is noted that the instant case arose in the seventh circuit. Therefore, in this case, the AAO is bound by precedent decisions of the circuit court of appeals for the seventh circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit).

The seventh circuit court of appeals recently issued a precedent decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over \$50,000 per year.⁴ The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.⁵ The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.⁶

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some

² The petitioner's tax returns show that it was incorporated on January 6, 1999.

³ The petitioner claimed a gross annual income and net annual income of \$498,250 on all other petitions it filed. The AAO assumes that this is a typographical error here.

⁴ 563 F.3d at 595.

⁵ *Id.*

⁶ *Id.*

reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure.”⁷

The court then turned to an examination of the USCIS method for determining an employer’s ability to pay the proffered wage. The court noted that USCIS “looks at a firm’s income tax returns and balance sheet first.”⁸ The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner’s tax returns do not establish its ability to pay the proffered wage the petitioner “has to prove by other evidence its ability to pay the alien’s salary.”⁹ The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage “plus employment taxes (plus employee benefits, if any).”¹⁰

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer’s ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner’s federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Further, the court in *Construction and Design* noted that the “proffered wage” actually understates the cost to the employer in hiring an employee, as the employer must pay the salary “plus employment taxes (plus employee benefits, if any).” As noted above, because the instant case arose in the seventh circuit, the AAO is bound by the seventh circuit’s decision in *Construction and Design*. Therefore, pursuant to the decision in *Construction and Design*, the petitioner in the instant case must establish that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker’s compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the “fully burdened” wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.¹¹ In this case, as noted above, the proffered wage as stated on the Form ETA 750 is \$20,800 per year. Using the OMB-approved formula, the “fully burdened” wage rate in this case

⁷ Id.

⁸ Id. at 596.

⁹ Id.

¹⁰ Id.

¹¹ The 1.4 multiplier is from the Bureau of Labor Statistics 2009: <http://www.bls.gov/news.release/ecec.t01.htm>

equates to \$29,120 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case must establish its ability to pay \$29,120 per year.

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 AAO notes that the director mistakenly indicated in his decision that the petitioner submitted the beneficiary's Forms W-2 for 2001, 2002, 2004, 2005, 2006 and 2007. In fact, the petitioner submitted the beneficiary's individual income tax returns for 2001 through 2005 and 2007 and the beneficiary's Form 1099-MISC issued by the petitioner for 2001 through 2007 except for 2003 as evidence that the petitioner paid the beneficiary the full or partial proffered wage since the priority date. On appeal, counsel submitted the beneficiary's 1099 form for 2003. However, the record does not contain the beneficiary's 2006 tax return.

The record contains a copy of the beneficiary's 1099 form for 2005 in the amount of \$31,290.56. However, the form indicates that the amount was paid by [REDACTED] instead of the petitioner in this matter. Wages paid by someone other than the petitioning entity cannot be considered to prove the petitioner's ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Therefore, the beneficiary's 1099 form for 2005 from [REDACTED] cannot demonstrate that the petitioner paid a full or partial proffered wage to the instant beneficiary in 2005.

The petitioner submitted the beneficiary's 1099 forms issued by the petitioner for 2001 through 2007 which show that the petitioner paid the instant beneficiary nonemployee compensation of \$36,500, \$32,850, \$34,800, \$34,770, \$2,900, \$43,940 and \$44,000 respectively. However, we cannot agree with counsel's assertions on appeal that the petitioner established its ability to pay the instant beneficiary the proffered wage from the priority date to the present with these 1099 forms. The AAO cannot consider total amounts reflected on 1099 forms as wages actually paid to the beneficiary by the petitioner in determining the petitioner's ability to pay the proffered wage. The record does not contain any documentary evidence showing that the beneficiary was employed by the petitioner during these years. The beneficiary did not claim to have worked for the petitioner on the Form ETA 750B signed on February 9, 2006.

Further, the beneficiary's tax returns show that the beneficiary ran her own care service business during these years and reported her business income after she deducted her business expenses from the amounts she received from the petitioner. Therefore, the amounts the beneficiary received from the petitioner in the form of nonemployee compensation on the 1099 forms for these years were not only the wage the petitioner paid to the beneficiary for her services provided to the petitioner but also include reimbursements for expenses incurred to her while she was doing business with the petitioner. As the beneficiary's schedule C of the 1040 tax returns reflect, these business expenses included car and truck expenses, legal and professional services, office expenses, vehicles, machinery and equipment rent or lease, repairs and maintenance, supplies, taxes and licenses, travel, meals and entertainment, and other expenses. These

expenses are not part of wages an employer normally pays to its employee. The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage. *See* 20 C.F.R. § 656.20(c)(3). Similarly, amounts paid for reimbursing the beneficiary's business expenses cannot be counted as wages actually paid to the beneficiary in determining the petitioner's ability to pay the proffered wage because the petitioner would not pay its employee these amounts if the beneficiary had been put on payroll as an employee.

However, for the portion the beneficiary reported as her business income on line 29 of the schedule C and line 12 on the Form 1040 after deducting all her business expenses from the amount reflected on the Form 1099, the AAO will consider as wages actually paid to the beneficiary by the petitioner in determining the petitioner's ability to pay.

In this case, the beneficiary's schedule Cs of the tax returns show that the amounts reflected on her 1099 forms for 2001 through 2005 and 2007 were the total gross receipts or sales for the beneficiary's business and after deducting the reimbursements for her business expenses, the beneficiary reported \$17,695, \$23,415, \$10,788, \$11,795, \$1,700 and \$14,070 respectively as her income from services she provided to the petitioner. However, the record does not contain the beneficiary's 2006 tax return. The AAO has calculated \$18,788.74 as the beneficiary's income reported on her schedule C of the 2006 tax return based on the average rate of the business net profits over the gross receipts.¹²

Therefore, the petitioner demonstrated that it paid the instant beneficiary the full proffered wage and thus, established its ability to pay the instant beneficiary the proffered wage for 2002 through examination of wages actually paid to the instant beneficiary. For all other relevant years, the petitioner demonstrated that it paid a partial proffered wage to the instant beneficiary and therefore, the petitioner must demonstrate that it had sufficient net income or net current assets to pay the differences of \$4,347 in 2001, \$14,016.80 in 2003, \$12,607 in 2004, \$26,740 in 2005, \$28,157.64 in 2006 and \$9,422 in 2007¹³ between wages actually paid to the beneficiary and the proffered wage under the seventh's circuit court rule in *Construction and Design*.

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

¹² The percentage of the total reposted net profits (\$79,463) over the gross receipts (\$185,820) for the beneficiary's business for the six years 2001 through 2005 and 2007 is 42.76%.

¹³ The differences between wages actually paid to the instant beneficiary and the proffered wage for 2001 through 2007 except for 2002 are calculated by a formula that the proffered wage of \$20,800 minus wages paid in each year and then multiplied by 1.4.

(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. On appeal, counsel's assertion that the annual gross income for the petitioner is between \$387,500 and \$769,000 for the years 2001 through 2007 and that the petitioner annually pay out a minimum of about \$273,000 in salaries is misplaced. 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 evidence in the record of proceeding shows that the petitioner's structure switches between an S corporation and C corporation. However, the petitioner's fiscal year is always based on a calendar year. The record contains the petitioner's Form 1120S, U.S. Income Tax Return for an

S Corporation for 2001, 2002 and 2007, and Form 1120, U.S. Corporation Income Tax Return for 2003 through 2006. Since the petitioner established its ability to pay the proffered wage for 2002 through an examination of wages actually paid to the beneficiary, the petitioner's tax returns for 2002 are not necessarily dispositive. The petitioner's tax returns demonstrate its net income for 2001 and 2003 through 2007, as shown in the table below.

- In 2001, the Form 1120S stated net income¹⁴ of (\$2,604).
- In 2003, the Form 1120 stated net income¹⁵ of \$1,650.
- In 2004, the Form 1120 stated net income of \$40,406.
- In 2005, the Form 1120 stated net income of \$27,521.
- In 2006, the Form 1120 stated net income of \$2,688.
- In 2007, the Form 1120S stated net income of \$14,706.

Therefore, for the years 2004, 2005 and 2007, the petitioner had sufficient net income to pay the instant beneficiary the differences of \$12,607 in 2004, \$26,740 in 2005 and \$9,422 in 2007 between wages actually paid to the beneficiary and the proffered wage respectively, and therefore, established its ability to pay the instant beneficiary the proffered wage for these years. However, the petitioner did not have sufficient net income to pay the instant beneficiary the differences of \$4,347 in 2001, \$14,016.80 in 2003, and \$28,157.64 in 2006 between wages actually paid to the instant beneficiary and 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.¹⁶ 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 returns

¹⁴ 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 23 (2001-2003) or line 18 (2006-2008) of Schedule K. See Instructions for Form 1120S, 2007, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed February 10, 2010).

¹⁵ 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.

¹⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

demonstrate its end-of-year net current assets for 2001, 2002 and 2006, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of (\$3,250).
- In 2003, the Form 1120 stated net current assets of (\$5,774).
- In 2006, the Form 1120 contains no data about net current assets.¹⁷

For the years 2001, 2003 and 2006, the petitioner did not have sufficient net current assets to pay the instant beneficiary the difference between wages actually paid to the beneficiary and the proffered wage and therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage for 2001, 2003 and 2006.

Moreover, 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 multiple petitions for multiple beneficiaries which have been pending simultaneously, 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 Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (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 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records show that the petitioner has filed four more Immigrant Petition for Alien Worker (Form I-140), one of which was denied, one was approved and the other two have pending appeals.¹⁸ Therefore, the petitioner must also establish its ability to pay three proffered wages from 2001 to the present in addition to the instant beneficiary. *See* 8 C.F.R. § 204.5(g)(2). The

¹⁷ The petitioner did not complete Schedule L which reflects cash of \$9,952 as its total assets but leaves liabilities and shareholder's equity blank. 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. Without data about the petitioner's liabilities, the petitioner's total assets cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage.

¹⁸ The four additional petitions filed by the petitioner are as follows:

- [REDACTED] was filed for [REDACTED] on May 30, 2007 and denied on February 4, 2009.
- [REDACTED] was filed for [REDACTED] on July 26, 2007 with the priority date of April 30, 2001 and approved on May 12, 2008.
- [REDACTED] was filed for [REDACTED] on July 26, 2007 with the priority date of April 30, 2001 and denied on November 24, 2008. A subsequent appeal is pending with the AAO as of this date.
- [REDACTED] was filed for [REDACTED] on November 8, 2007 with the priority date of April 30, 2001 and denied on February 9, 2000. A subsequent appeal is pending with the AAO as of this date.

records show that the petitioner paid [REDACTED] the full proffered wage for 2003 but still needs \$29,120 per year for 2001 and 2002, and \$23,338 for 2004, \$10,474.80 for 2005, \$8,680 for 2006, and \$10,708.60 for 2007 establish its ability to pay [REDACTED] his proffered wage. The petitioner paid [REDACTED] the full proffered wage in 2002 and 2004 but still needs \$29,120 per year for 2003, 2005 and 2007, and \$6,664 for 2001 and \$15,554 for 2006 to establish its ability to pay [REDACTED] her proffered wage. The record of proceeding contains documentary evidence showing that the petitioner paid [REDACTED] the full proffered wage in 2005 and 2007, but needs \$29,120 per year for 2001 through 2004, and \$22,120 for 2006 to establish its ability to pay [REDACTED] her proffered wage.

As previously discussed, the petitioner did not have sufficient net income or net current assets to establish its ability to pay the instant beneficiary a single proffered wage for 2001, 2003 and 2006, and therefore, it failed to establish its ability to pay all proffered wages for these three years. While the petitioner had sufficient net income to establish its ability to pay the instant beneficiary the proffered wage in 2004, 2005 and 2007, its net income or net current assets for 2004 were not sufficient to pay \$23,338 to [REDACTED] and \$29,120 to [REDACTED]; its net income or net current assets for 2005 were not sufficient to pay \$10,474.80 to [REDACTED] and \$29,120 to [REDACTED] and its net income or net current assets for 2007 were not sufficient to pay \$10,708.60 to [REDACTED] and \$29,120 to [REDACTED].

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL in 2001, the petitioner had not established that it had the continuing ability to pay all beneficiaries their proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel submitted the petitioner's financial statements for all relevant years. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The financial statements clearly indicate that they were not audited. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel requests consideration of the beneficiary's ability to produce income. The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered

wage.¹⁹ Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a personal attendant will significantly increase profits for the company while he is currently working for the company. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel also refers to decisions issued by the AAO concerning the ability to pay the proffered wage, but does not provide its published citation. 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, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

As counsel asserts on appeal, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as

¹⁹ Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

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

In the instant case, counsel asserts that the petitioner has been in business since 1999, and the annual gross income of the petitioner is between \$387,500 and \$769,000 for the years 2001 through 2007 and the petitioner annually pays out a minimum of about \$273,000 in salaries. While counsel claims that the petitioner had significant gross income, this office notes that the petitioner's gross receipts have decreased fifty percent (50%) from \$769,373 in 2001 to \$387,510 in 2007. During the seven years the petitioner submitted its tax returns in the record, the petitioner did not have sufficient profits to hire and pay a new employee for five out of seven years. The petitioner claimed to have 25 employees, however, its tax returns do not reflect that the petitioner paid any salaries and wages to its employees in all these relevant years except that it paid \$19,200 in 2006. The record contains two different versions of the beneficiary's 1099 form for 2007. This raises doubts about the authenticity and reliability of 1099 forms and other financial documents provided by the petitioner. No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that all these five years were uncharacteristically unprofitable years for the petitioner. In addition, given the record as a whole, the petitioner's history of filing immigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. 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.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's November 24, 2008 decision. The petitioner failed to establish that it had the continuing ability to pay all proffered wages beginning on the priority date and continues to the present. Therefore, the petition cannot be approved. Accordingly, the director's decision is affirmed.

Beyond the director's decision, the AAO has identified an additional ground of ineligibility. 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).

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2).

It is noted that the underlying labor certification was filed by and certified to [REDACTED] on behalf of the instant beneficiary for a permanent full-time position of personal attendant at [REDACTED]. On July 26, 2007, the instant petition was filed by [REDACTED] with its address of [REDACTED] in Part 1 of the Form I-140. However, the petitioner left the Part 6 Box 4. "Address where the person will work if different from address in **Part 1**" (emphasis in original) blank. In connection with another appeal from the petitioner, on November 29, 2010, this office served the petitioner a notice of derogatory information (NDI) and informed of this inconsistency. In response to our NDI, counsel did not provide any explanation and evidence to resolve this inconsistency, but just stated "[t]he address mentioned in the Notice also refers to an address on [REDACTED] which counsel assumes is a typographical error on the part of the USCIS as the actual location for the business office in Illinois was [REDACTED] Chicago, Illinois where placement of the health care worker would occur to assigned clients and customers of [REDACTED] for custodial care in Illinois." 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). It seems that the petitioner intended to employ the beneficiary at location of [REDACTED] outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment). The petitioner is not in compliance with the terms of the labor certification and has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966). Therefore, the petition cannot be approved.

In addition, the director also pointed out in his decision that the petitioner's representative, [REDACTED] and the beneficiary, [REDACTED] have a common surname. However, counsel did not submit evidence clarifying the relationship between the petitioner's owner and the beneficiary despite the director's clearly request for evidence (RFE). On appeal, counsel submitted copies of recruitment efforts for this position as evidence that a bona job opportunity exists.

The petitioner's 2007 tax return shows that [REDACTED] owns one hundred percent (100%) of shares of the petitioning corporation in 2007. The record also shows that [REDACTED]

██████████ is the brother of the beneficiary and the petitioner's legal representative in this matter, ██████████ is the spouse of ██████████ and the sister-in-law of the beneficiary. The record contains a copy of Form I-130 immigrant petition for alien relative filed by ██████████ on behalf of the beneficiary as a U.S. citizen's sister.

Under 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 Summart 374*, 00-INA-93 (BALCA May 15, 2000). The submitted recruitment materials do not establish that the petitioner informed DOL about her family relationship with the beneficiary in accordance with 20 C.F.R. § 656.17.

The petitioner should have disclosed the relationship between the beneficiary and the petitioner to the DOL when submitting the beneficiary's Form ETA 750. See *Matter of Silver Dragon Chinese Restaurant*, 19 &N Dec. at 406.²⁰ The petitioner failed to make these disclosures. Further, it appears that the petitioner attempted to continue to hide the familial relationship from DOL and USCIS. The labor certification application and the petition was signed and filed by ██████████ instead of the beneficiary's brother and the petitioner's 100% owner. The beneficiary used her husband's last name on the petition and labor certification application while she uses the name of ██████████ in almost all other documents in the United States.²¹ The petitioner did not make the disclosure until the director issued the RFE specifically requesting the verification. The situation in the instant petition is analogous to the beneficiary in *Matter of Silver Dragon Chinese Restaurant* based on the family relationship between the petitioner's owner and the beneficiary, and the lack of clarity as to the actual relationship of the beneficiary to the petitioner. The familial relationship would have caused the DOL to examine more carefully whether the job opportunity is clearly open to qualified U.S. workers, and whether U.S. workers applying for the job, if any, were rejected solely for lawful job-related reasons. See *id.* at 402. The fact that the beneficiary was employed by the petitioner does not establish that a *bona fide* job opportunity is available to U.S. workers. The petitioner has not established that it has made a *bona fide* job offer to the beneficiary.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner failed to establish that its job offer to the

²⁰ The burden rests on the employer to provide clear evidence that a *bona fide* job opportunity is available, and that the employer has, in good faith, sought to fill the position with a US worker. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

²¹ The beneficiary used the name of ██████████ on her social security documents, 1099 forms, and tax returns in the United States.

beneficiary was realistic on the priority date and has been realistic till the present. Therefore, the petition cannot be approved.

Further, the failure to disclose the beneficiary's family relationship to any owner would constitute willful misrepresentation. Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. See Section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182, regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

With regard to materiality, the court in *Matter of S- & B-C-*, 9 I&N Dec. 436, 447 (A.G. 1961) considered whether the alien's misrepresentation shut off a line of inquiry relevant to the alien's eligibility which would have likely resulted in a proper determination that his admission be denied. In the instant case, the petitioning entity and the beneficiary willfully concealed the family relationship between the petitioning entity and the beneficiary. The omission of the beneficiary's status as a relative in such a small business entity would adversely impact DOL's adjudication of the Form ETA 750. Concealing the close family relationship between the petitioning entity and the beneficiary resulted in DOL's improper approval of the Form ETA 750 and further shut off a line inquiry relevant to the beneficiary's eligibility. Failure to notify DOL amounts to a willful effort to procure a benefit ultimately leading to permanent residence under the Act. See *Kungys v. U.S.*, 485 U.S. 759 (1988), ("materiality is a legal question of whether "misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect the official decision.") Therefore, the petitioner's and the beneficiary's concealing their family relationship consists of a willful misrepresentation to a material fact.

A finding of misrepresentation may lead to invalidation of the Form ETA 750. See 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

By concealing the relationship between the petitioner and the beneficiary on the labor certification application, the petitioner and the beneficiary have sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. We therefore make a finding of fraud. This finding of fraud shall be considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

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. The director's decision is affirmed and the petition remains denied.

FURTHER ORDER: The AAO finds that the petitioner fraudulently and willfully misrepresented elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.