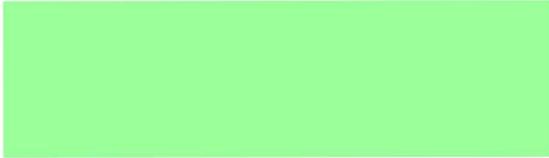
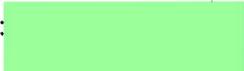


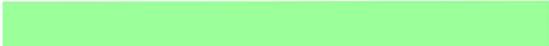


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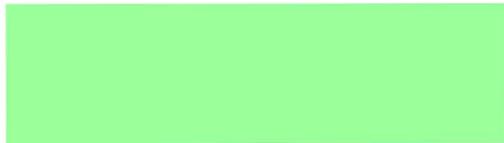


DATE: **AUG 06 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction company. It seeks to employ the beneficiary permanently in the United States as an electrician. 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 March 20, 2009 denial, the single 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary 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, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on January 26, 2004. The proffered wage as stated on the Form ETA 750 is \$19.76 per hour (\$41,100.80 per year). The Form ETA 750 states that the position requires three years 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

On appeal, counsel submits a brief; a letter dated April 9, 2009 from [REDACTED] President of the petitioning entity; copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2004 and 2007; a copy of the U.S. Income Tax Return for an S Corporation (Form 1120S) for [REDACTED] for 2007; copies of checks which were written by the petitioner during 2004; Form I-864, Affidavit of Support Under Section 213A of the Act, which was completed by Rustam Roohani for the beneficiary; a copy of the biographical page of [REDACTED]'s passport; documents dated April 1, 2009 itemizing the personal assets of [REDACTED] and [REDACTED]; and the U.S. Individual Income Tax Returns (Form 1040) for [REDACTED] and [REDACTED] for 2005, 2006 and 2007.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner left blank those sections in which it would identify the date on which its business was established, its current number of employees, its gross annual income, its net annual income and the North American Industry Classification System NAICS Code.² 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 5, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director determined that the petitioner failed to demonstrate the ability to pay for only two years: 2004 and 2007. Counsel asserts that in 2004, the petitioner paid \$54,832 to independent contractors which could have been available to pay the beneficiary. Counsel

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).

² The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system. It was developed jointly by the U.S. Economic Classification Policy Committee (ECPC), Statistics Canada, and Mexico's *Instituto Nacional de Estadística y Geografía*, to allow for a high level of comparability in business statistics among the North American countries. <http://www.census.gov/eos/www/naics/> (accessed June 18, 2012).

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asserts that in 2007, the petitioner had sufficient net current assets to pay the full proffered wage as indicated on its federal income tax returns. Further, counsel asserts that the petitioner's main shareholder, [REDACTED] has sufficient personal assets to pay the proffered wage if the petitioning entity is unable to do so.

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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner neither claimed to have employed the beneficiary nor provided evidence of having paid the beneficiary at any time.

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

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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 22, 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 would have been the most recent return available.

With the petitioner’s initial petition submission, as evidence of its ability to pay, the petitioner submitted copies of its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2005 and 2006 only and none of the other types of regulatory prescribed evidence for any of the years under consideration. On November 20, 2008, the director issued a request for evidence, specifically asking the petitioner to submit its annual reports, federal income tax returns or audited financial statements for 2004 and 2007. The director also requested that the petitioner submit evidence of any wages paid to the beneficiary in 2004, 2007 and 2008, to include copies of IRS Form W-2 and pay vouchers.

In its response, dated December 22, 2008, the petitioner submitted copies of the U.S. Corporation Income Tax Return (Form 1120) for [REDACTED] for 2004, 2005, 2006 and 2007 as well as copies of pay statements issued to the beneficiary by [REDACTED] in October and November 2008. The petitioner also submitted a letter dated December 12, 2008 from Rustam

[REDACTED], president of the petitioning entity. In his letter, Mr. [REDACTED] states that he is the president and chief executive officer of both [REDACTED] and [REDACTED]. He goes on to state:

These businesses are required to operate separately since each has a separate business license (referenced above). Therefore they are required to file separate federal income tax returns. However, for all other purposes, the companies are the same. Since before 2004, [REDACTED] FEIN [REDACTED] assumes all the rights and duties, assets and liabilities of Seven Valleys Construction, Inc. FEIN [REDACTED] and [REDACTED] FEIN [REDACTED] assume all the rights and duties, assets and liabilities of Seven Valleys Realty, Inc. FEIN [REDACTED]

According to the evidence in the record, however, the two companies identified, [REDACTED] and [REDACTED] were established as separate and distinct legal entities and have always functioned as such. For example, according to the U.S. Corporation Income Tax Return (Form 1120) for [REDACTED] this entity was established as a Subchapter C Corporation in 1990, using the FEIN [REDACTED]. The business address is [REDACTED].³ In 2004, 2005 and 2006, [REDACTED] had one shareholder: [REDACTED].⁴ According to the U.S. Income Tax Return for an S Corporation (Form 1120S) for [REDACTED] this entity was established as a Subchapter S Corporation in 1988, using the FEIN [REDACTED]. The business address is [REDACTED]. Unlike, [REDACTED], however, [REDACTED] did not relocate in 2007. Further [REDACTED] has three shareholders, each of which holds 33 percent of the shares. [REDACTED] is one of the three equal shareholders.

The petitioner provided no documentary evidence demonstrating that these two corporations ever operated as the same entity; that one of the individual corporations ever owned or controlled the other or that a merger or acquisition has ever taken place.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, as is clear from the evidence in the record, the two corporations identified are separate and distinct legal entities, even though one shareholder has an ownership interest in each of the two corporations.

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

³ The business address changed in 2007 to [REDACTED]

⁴ The Schedule E for 2007 does not identify the shareholder(s).

the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 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."

The petitioner submitted none of the forms of evidence specifically requested by the director for the petitioning entity and no explanation for the omission. Further, on appeal, the petitioner provided no explanation for failing to submit the requested tax and payroll information which was requested by the director. In his denial, the director explained that the petitioner, [REDACTED] and [REDACTED] are two separate companies, operating in two separate locations, with two different Federal Employer Identification Numbers, and with different ownership. The director, therefore, explained that evidence from one corporation could not be used to demonstrate the ability to pay for another corporation. On appeal, the petitioner provided, for the first time, its U.S. Income Tax Return for an S Corporation (Form 1120S) for 2004 and 2007.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

Therefore, the petitioner's tax returns for 2004 and 2007 will not be considered. The petitioner's tax returns for 2005 and 2006 demonstrate its net income, as shown in the table below.

- In 2004, the petitioner did not properly submit any regulatory-prescribed evidence.
- In 2005, the Form 1120S stated net income⁵ of \$179,849.00.

⁵ 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) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 7, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions or other adjustments shown on its

- In 2006, the Form 1120S stated net income of \$1,062,948.00.
- In 2007, the petitioner did not properly submit any regulatory-prescribed evidence.

Therefore, for the years 2004 and 2007, the petitioner did not demonstrate sufficient net income to pay the proffered wage. However, for 2005 and 2006, the petitioner demonstrated sufficient net income to pay the full 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.⁶ 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 demonstrate its end-of-year net current assets for 2004 and 2007, as shown in the table below.

- In 2004, the petitioner did not properly submit any regulatory-prescribed evidence.
- In 2007, the petitioner did not properly submit any regulatory-prescribed evidence.

Therefore, for the years 2004 and 2007, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage.

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

On appeal, counsel asserts that the director determined that the petitioner failed to demonstrate the ability to pay for only two years: 2004 and 2007. Counsel asserts that in 2004, the petitioner paid \$54,832 to independent contractors which could have been available to pay the beneficiary.

First, as has been discussed above, the petitioner failed to submit properly any regulatory prescribed evidence of the ability to pay (e.g. annual reports, federal income tax returns or audited financial reports) for 2004. Therefore, the petitioner has not objectively demonstrated that it bore any liabilities

Schedule K for either 2005 or 2006, the petitioner's net income is found on line 21 of the first page of its tax returns.

⁶According 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.

for contractual labor for 2004. Second, on appeal, counsel states that he is providing invoices for contractual labor for 2004. However, this evidence is not in the record.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Third, the only evidence supplied to support counsel's assertions regarding contractual labor is checks which the petitioner drafted in 2004. The checks are written to [REDACTED] and [REDACTED]. However, there is no evidence that any of the checks were cashed or deposited (e.g. the checks are not cancelled). There are no invoices, contracts or any other forms of documentary evidence, accompanying the checks to explain the nature of the services which were provided.

Further, if the claimed compensation was meant to pay for the services of specific individual workers, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position or positions involve the same duties as those set forth in the ETA 750. The petitioner has not documented the position, duty, and termination of any workers who performed the duties of the proffered position. If that employee or those employees performed other kinds of work, then the beneficiary could not have replaced him, her or them.

On appeal, counsel asserts that in 2007, the petitioner had sufficient net current assets to pay the full proffered wage and refers to the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) which was submitted for the first time on appeal. As articulated above, the petitioner was afforded the opportunity, via a request for evidence, to provide its tax returns for both 2004 and 2007 but failed to do so. Rather, the petitioner chose to submit those documents for the first time on appeal. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

On appeal, counsel also asserts that the petitioner's main shareholder, [REDACTED]⁷ has sufficient personal assets to pay the proffered wage if the petitioning entity is unable to do so.⁸ In support of his assertion, counsel supplies Form I-864, Affidavit of Support Under Section 213A of the Act, which was

⁷ [REDACTED] also uses the name [REDACTED] or [REDACTED]. Reference to social security records, federal income tax returns and public records shows that these are one and the same individual.

⁸ According to the Schedule K-1 which was submitted with the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for both 2005 and 2006, [REDACTED] owns 33% of the petitioner's shares. Equal portions are also held by [REDACTED] and [REDACTED].

completed by [REDACTED] statements in which the personal assets of [REDACTED] and [REDACTED] are itemized; and the U.S. Individual Income Tax Returns (Form 1040) for [REDACTED] and [REDACTED] for 2005, 2006 and 2007.

Counsel misconstrues the use of the Form I-864, Affidavit of Support Under Section 213A of the Act (Affidavit of Support). The Affidavit of Support is utilized at the time a beneficiary adjusts status to permanent residence in the United States, or obtains an immigrant visa overseas, to provide evidence to USCIS that the applying immigrant has enough financial support to live without concern of becoming reliant on U.S. government welfare. The beneficiary in this matter has not advanced to the consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing stage of proceeding, evidence is required of a sponsoring employer's ability to pay a proffered wage as of the priority date, not its guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guaranty or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

In the instant circumstance, the petitioning corporation must demonstrate the ability to pay and must do so by submitting one of the three forms of evidence prescribed in the regulations at 8 C.F.R. § 204.5(g)(2). Those forms of evidence have been analyzed above.

On appeal, counsel asserts that [REDACTED] has sufficient personal assets to pay the beneficiary the proffered wage in the event that the petitioning corporation is unable to do so. However, 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'r 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."

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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

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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 the instant case, the petitioner made no claims regarding the duration of time for which its business has been operating. Neither has the petitioner indicated its current number of employees. The petitioner properly submitted federal tax returns for only two years. The gross sales between the two years were divergent. However, officer compensation remained similar. The petitioner paid no wages but claims to have compensated independent contractors. These claims were not adequately substantiated with documentary evidence, however. Further, the petitioner has not established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry. Moreover, as explained above, the petitioner has not demonstrated that the beneficiary is replacing a former employee or an outsourced service. 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.

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).

Beyond the decision of the director, it is also concluded that the petition is not supported by a *bona fide* job offer. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record that the beneficiary is the cousin of the owner and president of the petitioning entity. Specifically, on Form I-864, Affidavit of Support Under Section 213A of the Act, [REDACTED] 33% shareholder and president of the petitioning entity, states that he is the cousin of the beneficiary. This assertion is corroborated by other facts contained in the record of proceeding and by public records. For example, [REDACTED] wife of [REDACTED] served as a witness to the beneficiary's wedding in Las Vegas on December 2, 2002 as indicated on the beneficiary's wedding certificate. The [REDACTED] and the beneficiary shared an

(b)(6)

address at [REDACTED] Further, the beneficiary purchased his current residence, [REDACTED] Nevada, from [REDACTED] and [REDACTED] on June 7, 1999. All of these events occurred prior to the filing of Form ETA 750.

Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* 20 C.F.R. § 656.17(l); *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.” *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

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(a)(6)(C), 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.”

A material issue in this case is whether the petitioning entity disclosed any family relationship or close or financial relationship between the petitioning entity and the beneficiary. 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.”) Here, the omission of the beneficiary’s status as a relative in a small corporation, if any, is a willful misrepresentation that would have adversely impacted DOL’s adjudication of the ETA Form 750.

Furthermore, 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 failing to identify any potential familial relationship, the beneficiary would seek to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. Any

finding of fraud as a result shall be considered in any future proceeding where admissibility is an issue.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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).

Should the petitioner decide to pursue this matter further, it must provide documentary evidence overcoming this basis of ineligibility and demonstrating that the relationship between the owner of the petitioner and the beneficiary was disclosed to the DOL during the labor certification process.

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.