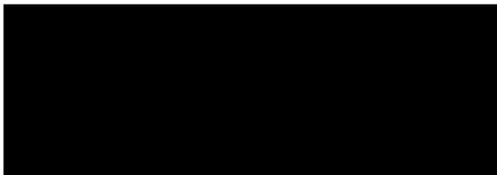


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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090  
**U.S. Citizenship  
and Immigration  
Services**



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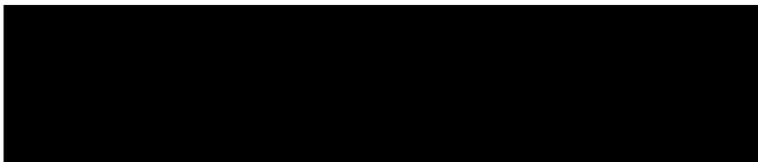
B6

Date: **JAN 17 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 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 preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a rental real estate company. It seeks to employ the beneficiary permanently in the United States as a computer project manager. As required by statute, the petition is accompanied by a labor certification approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish its ability to pay the proffered wage. 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 May 20, 2009 denial, the issue in this case is whether or not the petitioner has established that it has the ability to pay the proffered wage. On appeal, we have identified an additional issue of whether the petitioner demonstrated that the beneficiary had the required experience as of the priority date.

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. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *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.<sup>1</sup>

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

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<sup>1</sup> 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).

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, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on February 16, 2006. The proffered wage as stated on the ETA Form 9089 is \$62,000 per year.

The record indicates the petitioner is structured as a limited liability company (LLC) and files its tax returns on IRS Form 1065.<sup>2</sup> On the Form I-140, the petitioner claimed to have been established in 1960<sup>3</sup> and to currently employ 3 workers. According to the tax returns in the record, the petitioner's fiscal year is the same as the calendar year. On the ETA Form 9089, signed by the beneficiary on April 18, 2006, the beneficiary stated that he began working for the petitioner in August 2000.

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, United

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<sup>2</sup> An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

<sup>3</sup> The petitioner's tax return states the "date business started" as January 1, 1999. Whether a predecessor company existed prior to this date or whether 1960 refers to another company owned by the petitioner's shareholders is unclear from the record. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner submitted the following Forms W-2:

The amount paid in 2008 exceeds the proffered wage, therefore, the petitioner has established its ability to pay the proffered wage in that year alone. In 2006 and 2007, the petitioner must demonstrate its ability to pay the difference between the actual wage paid and the proffered wage, which in 2006 was \$30,057 and in 2007 was \$18,236.

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, 881 (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*, 696 F. Supp. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

<sup>4</sup> On appeal, counsel states that the amount of salary received by the beneficiary in 2006 and 2007 was reduced by a large amount of unpaid personal leave taken during those years. The W-2 forms represent the total wages paid for the year regardless of the amount of leave taken.

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*, 558 F.3d at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

The record before the director closed on April 24, 2009 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 federal income tax return for 2008 is the most recent return available. The petitioner’s tax returns stated its net income as detailed in the table below.



<sup>5</sup> For an LLC, where an LLC’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where an LLC 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K (page 5 for 2008-2009). In this matter, the petitioner filed a blank Schedule K, so the petitioner’s net income can be found on Line 22.

Therefore, for the years 2006 and 2007, the petitioner did not establish that it had sufficient net income to pay the difference between the actual wage paid and the proffered wage. The petitioner can establish its ability to pay in 2008 based on the W-2 wage statement submitted.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>6</sup> A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 for 2006 and 2007 stated its net current assets, as detailed in the table below.

- In 2006, the petitioner's Form 1065 stated net current assets of \$1,000.
- In 2007, the petitioner's Form 1065 stated net current assets of \$1,000.
- In 2008, the petitioner's Form 1065 stated net current assets of \$1,000.

The petitioner's 2006 and 2007 net current assets are insufficient to establish the petitioner's ability to pay the difference between the wages paid and the proffered wage. The petitioner can establish its ability to pay the proffered wage in 2008 based on the W-2 wages paid as noted above. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, and its net income and net current assets.

On appeal, counsel asserts that the AAO should pierce the corporate veil and consider the assets of the petitioner's owners as well as other corporations owned by the petitioner's owners as evidence of the petitioner's ability to pay the proffered wage. However, because a corporation is a separate and distinct legal entity from its shareholders, the assets of its owners cannot be considered in determining the petitioning entity's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." On appeal, counsel argues that our reliance on *Matter of Aphrodite* is misplaced because the petitioner is an LLC instead of a corporation. A LLC, like a corporation, is a legal entity separate and distinct from its owners. *Matter of Aphrodite Investments*

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<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

cites to *Matter of M* for the proposition that, “the sole *stockholder* of a corporation [in the non-immigrant context<sup>7</sup>] was able to be employed by that corporation as the corporation has a *separate legal entity from its owners or even its sole owner*.” The petitioner here is an incorporated entity, a LLC, and, as such, 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.

Counsel also argues that as the subject of *Matter of Aphrodite* is a non-immigrant L visa petition, it is inapplicable to the instant immigrant visa petition. Although in *Matter of Aphrodite*, the type of petition referenced may be different, the principle regarding legal entities that corporations and LLCs are separate legal entities from their owners is the same. Assets of other entities, separately structured with different tax identification numbers, cannot be used to establish the petitioner’s ability to pay the proffered wage.

The petitioner submitted a letter dated April 20, 2009 from Stacey Stonebraker, who identifies herself as a financial advisor and tax preparer, stating that the petitioner does not show a net income because any revenue earned by the petitioner is transferred to one of five S-corporations owned by the petitioner’s owners. The petitioner also submitted the tax returns for [REDACTED]

[REDACTED] and [REDACTED]. Nothing in the record demonstrates that any of these corporations operate under the same tax identification number as the petitioner to show that they are the same corporation and that their assets could be properly used to show the petitioner’s ability to pay the proffered wage.<sup>8</sup> Going on record without supporting documentary evidence is not sufficient for

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<sup>7</sup> Ownership of the petitioning entity is treated differently in the immigrant context. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

Where the beneficiary named in an alien labor certification application has an ownership interest in the petitioning entity, the petitioner must establish that the job is *bona fide*, or clearly open to U.S. workers. See *Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (*en banc*). A relationship invalidating a *bona fide* job offer may also 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*, 2000-INA-93 (BALCA May 15, 2000).

<sup>8</sup> The Form 1040 for the petitioner’s owners (husband and wife), Statement 3, Schedule E, Part II, titled “Income or Loss from Partnerships and S Corporations, states that the two individuals are involved in all six of the entities. (For the petitioner and the five S corporations named above, the Statement does not indicate that what percentage of ownership the individuals hold for all six entities.) The Form 1040 sets forth each company and its tax identification number, which makes clear that each entity is separately structured and thus individual companies with no obligation to pay the proffered wage. ETA Form 9089 and Form I-140 state that the petitioning entity has a tax identification number of 48-1207274. 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.”

purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel on appeal asserts that:

The petitioner pays the common expenses for the five Subchapter S corporations, including payroll for all employees, including the beneficiary . . . All of the petitioner's employees perform services for all of the Subchapter S corporations.<sup>9</sup>

<sup>9</sup> It is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary. If "all of the petitioner's employees perform services for all of the Subchapter S corporations," then the petitioner alone would not be the beneficiary's employer.

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

*Darden*, 503 U.S. at 323-324; see also Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the

common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an “employee,” USCIS must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in medical practice as shareholders, could be considered employees to determine whether the petitioner to qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer have fifteen employees. The court cites to *Darden* that “We have often been asked to construe the meaning of ‘employee’ where the statute containing the term does not helpfully define it.” *Clackamas*, 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an “employee” as “individual employed by the employer.” *Id.* (*citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden*, where the court considered whether an insurance salesman was an independent contractor or an “employee” covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an “employee under ERISA. *Id.* (*citing Darden*, 503 U.S. at 323). In looking to *Darden*, the court stated, “as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law.” *Id.* at 447 (*citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship,

... The expenses [for salaries or wages] are deducted on the petitioner's tax form and the remaining revenues are then redistributed back to the Subchapter S corporations, in proportion to each corporation's part of the gross receipts. This distribution is shown on the petitioner's tax form as a deduction for Rent.

Counsel concludes that the combination of tax returns should be considered in an analysis of the petitioner's ability to pay the proffered wage. Only one of these other entities report net current assets. The entities instead report rental real estate income on Form 8825, the gross rents of which are reduced by real estate expenses resulting in rental net income (or loss). Counsel asserts that the rental revenues are passed on to the petitioner, who then "pays salaries and common expenses before redistributing rents to the corporations." Counsel is essentially claiming that the petitioner and the other corporations should be treated as one and the same, which is not correct since, as noted above, the entities all have separate tax identification numbers and are separately structured.

Counsel cites to *Matter of ---*, EAC-01-018-50413 (AAO Jan. 31, 2003), in support and asserts that the petitioner's regular accounting practices should be considered in evaluating the petitioner's ability to pay. First, we note that 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). Further, the decision that counsel cites in support relates to a personal services corporation, which is different than the structure of the petitioner's business as a limited liability corporation. The decision considered both the unique aspects of a personal service medical corporation as well as the substantial officer compensation paid based on the corporate form. The facts of that non-precedential case are distinguishable from the instant matter.<sup>10</sup>

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which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."<sup>9</sup> *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id.* (citing § 220(2)(a)). The court also looked to the EEOC's focus on control<sup>9</sup> in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how the business' profits and losses are distributed. *Id.* at 449-450.

The petitioner would need to resolve this issue in any further filings. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

<sup>10</sup> The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S.

Counsel also cites *Matter of ----*, SRC 05 264 50562 (AAO Mar. 15, 2007), for the proposition that a “sister corporation’s” assets may be considered in determining the petitioner’s ability to pay the proffered wage. Again, 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 noted above, the companies referenced and tax returns submitted are for separately structured entities, which have no legal obligation to pay the proffered wage.

Counsel also cites *Construction & Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009), and cites a portion of the case that states, “tax considerations drive a wedge between accounting income and economic income . . . The Department of Homeland Security realizes this, and while to save time it looks at a firm’s income tax returns and balance sheet first, it doesn’t stop there unless those documents make clear that the salary of the alien whom the firm proposes to hire would not imperil the company’s solvency.” Counsel asserts that the petitioner’s net income on its tax return is “not indicative of its ability to pay,” and cites to the increase in the beneficiary’s salary as evidence of its ability to pay. A petitioner is required under 8 C.F.R. § 204.5(g)(2) to demonstrate its continued ability to pay from the priority date onward. The AAO will consider the petitioner’s totality of the circumstances.

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 (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 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

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Corporation Income Tax Return. For this reason, a petitioner’s figures for compensation of officers may be considered in some cases, and for some corporate structures as additional financial resources of the petitioner, in addition to its figures for ordinary income. In the case at hand, however, unlike Form 1120, the petitioner files its tax returns on Form 1065 which does not state or have a line item for officer compensation to consider in the instant matter.

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 submitted no evidence to liken its situation to *Sonegawa* including evidence of reputation or that it had one off year. Instead, the petitioner's tax returns reflect net income for every year as \$0, and the tax returns reflect minimal net current assets. In addition, the total salaries and wage amounts paid by the petitioner was only minimally more than the proffered wage in every year. As discussed above, counsel states that the net income and net current assets of the other five S corporations should be considered in determining the petitioner's ability to pay the proffered wage as the companies have shareholders in common with the petitioner and are "sister corporations." As noted above, the companies are separately structured entities. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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.

Additionally, the petitioner failed to establish that the beneficiary met the requirements of the labor certification by 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 (9<sup>th</sup> 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

- (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.
- (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401,

406 (Comm. 1986). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The ETA Form 9089 requires two years of experience before the February 16, 2006 priority date as a computer project manager. The beneficiary listed his experience on ETA Form 9089 as a computer project manager with the petitioner from August 1, 2000 to the date of signing (April 18, 2006) and as a programmer with [REDACTED] from March 1, 1990 to May 1, 1994. The petitioner submitted a letter with its original submission from its President stating that the beneficiary worked with the petitioner from August 2000 to the present as a computer project manager. 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation.

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a Computer Project Manager, and the job duties are the same duties as the position offered. Therefore, it appears that the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. Accordingly, it would not appear that the petitioner can rely on this experience to show that the beneficiary meets the requirements of the certified labor certification.<sup>11</sup> Additionally, the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation. The petitioner did not submit any other evidence of the beneficiary's prior experience to establish that he had the required two years of prior experience in the position offered by the time of the priority date. As a result, we are unable to ascertain that the beneficiary had the required experience as of the priority date. The petitioner must address and resolve this deficiency in any further filings.

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.

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<sup>11</sup> The petitioner checked "no" on ETA Form 9089 to the question, "did the alien gain any of the qualifying experience with the petitioner in a position substantially comparable to the job opportunity requested?" As the petitioner checked "no," it is unclear that DOL audited the labor certification and had a chance to assess the issue of substantial comparability.