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

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: JAN 3 0 2012

Office: NEBRASKA SERVICE CENTER

FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The AAO issued a request for evidence and notice of derogatory information (RFE/NDI), and afforded the petitioner an opportunity to provide evidence in further support of the petition. The appeal will be dismissed.

The petitioner was a "donut manufacturer and retail sales" business. The petitioner seeks to classify the beneficiary as an "assistant manager yeast donut shop." As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position 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.

As set forth in the director's December 7, 2009 denial, the primary issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The director determined that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position, as the record did not establish that he has two years of work experience qualifying him for the job offered. The director further determined that, based upon an investigation conducted by United States Citizenship and Immigration Services (USCIS) in India, the employment letter from [redacted], which was submitted as evidence of the beneficiary's employment experience, appeared to be fabricated. The director noted that the evidence received from the petitioner in response to his Notice of Intent to Deny (NOID) was in stark contrast to the results of the USCIS investigation of the beneficiary's alleged former employer.

In addition to the beneficiary's qualifications for the job offered, the AAO will also address the bona fides of the job offer and whether the petitioner has established its continuing ability to pay the proffered wage to the beneficiary. 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).

Qualifications for the offered position

The petitioner seeks to classify the beneficiary as a skilled worker. 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The labor certification application in this case was accepted on April 27, 2001.

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

According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered or in the related occupation of yeast donut and pastry baker.

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

> (ii) *Other documentation*—
>
> > (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.

The beneficiary described his experience in the "work experience" section of part B of the Form ETA 750. Both the petitioner and the beneficiary signed the Form ETA 750 under penalty of perjury declaring the contents to be true and correct. The beneficiary claimed to have been employed as a "yeast donut and pastry baker" from December 1995 to November 1997 by

In corroboration of this claimed experience, the petitioner submitted a letter dated April 29, 2003 purportedly from the in Kalol, Mehsana, Gujurat, India. The letter contains an illegible signature attributed to an unidentified "partner" and lists the beneficiary's dates of employment as January 25, 1995 to November 8, 1997.

As noted by the director in his NOID dated August 28, 2009, USCIS conducted an investigation in India where it was determined that the employment letter from dated April 29, 2003 was fraudulent. As explained by the director, the investigators actually visited the bakery in question, interviewed the owner, and confirmed that the beneficiary never worked there. The petitioner claims in response to the NOID that the investigation was "in error" because the bakery in question was demolished after the death of its owner. Counsel suggests that "the investigating officers perhaps interviewed the wrong bakery" and argues that the bakery's name is "a common name in India."

The director denied the petition and indicated that the petitioner's explanation is in "stark contrast" to the investigation. The director noted that the investigation revealed that the owner of the confirmed that it has been under the same ownership for 25 years, that his bakery is the only bakery by that name in the area, that the beneficiary never worked there, and that the letterhead on the April 29, 2003 letter does not belong to the bakery. In fact, the bakery does not have letterhead.

On appeal, the petitioner claimed that the director failed to provide details regarding the investigation that was conducted in India; and thus, the director did not allow it to have an opportunity to adequately respond to the allegations prior to the denial. Although the record of proceeding indicated that the petitioner had sufficient notice of the material aspects of the investigation, the AAO nevertheless provided the petitioner with a copy of the redacted USCIS investigation report.

The petitioner was notified in the RFE/NDI that the above noted investigation makes clear the fraudulent nature of the April 29, 2003 letter. The petitioner was notified in the RFE/NDI that under the circumstances, it appeared to the AAO that the petitioner's claim that the beneficiary worked for a different bakery -- under the same name in the same location which was demolished after the death of its owner -- was not credible.

The petitioner was asked to resolve the inconsistencies and, unless the petitioner could resolve the inconsistencies as noted above, the AAO noted its intention to dismiss the appeal and make a finding of willful misrepresentation against the petitioner and the beneficiary. The beneficiary was notified in a separate notice. The petitioner was informed in the RFE/NDI that the AAO would also invalidate the labor certification based on fraud or willful misrepresentation. *See* 20 C.F.R. § 656.31(d).

In response to the RFE/NDI, counsel asserts that the evidence previously submitted is not fraudulent and that in fact the beneficiary had been employed by a bakery in India that no longer exists. The petitioner provides photos of other business establishments in India and indicates

that many Indian bakeries carry the same or similar name as the beneficiary's former employer. However, the declarations, employment letters, death certificates, and photographs are insufficient to substantiate the petitioner's claim. As noted above, USCIS investigators actually visited the bakery identified in the April 29, 2003 letter on Kalol, Mehsana, Gujarat, India and confirmed that the beneficiary never worked there. The investigators further confirmed that the bakery, the address of which appeared on the fraudulent letter submitted by the petitioner, is the only bakery by that name in that neighborhood and that the bakery has been there for 25 years. In view of the investigation conducted by USCIS in India, the petitioner's claim that the bakery visited by USCIS was the wrong bakery, and that the true bakery was demolished after the death of its owner in 2004, is simply not credible. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Although other businesses in India may share the name this does not establish that the April 29, 2003 letter pertains to one of these businesses. Other than unsubstantiated statements, the record is devoid of evidence confirming the existence of, and the beneficiary's employment at, the claimed other at which the beneficiary supposedly worked.

Willful misrepresentation of a material fact in these proceedings may render the beneficiary inadmissible to the United States. An alien is inadmissible to the United States where he or she "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." *See* section 212(a)(6)(c) of the Act, 8 U.S.C. § 1182(a)(6)(c).

The term "willfully" in the statute has been interpreted to mean "knowingly and intentionally," as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. *See Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979) ("knowledge of the falsity of the representation" is sufficient); *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995) (interpreting "willfully" to mean "deliberate and voluntary"). Materiality is determined based on the substantive law under which the purported misrepresentation is made. *See Matter of Belmares-Carrillo*, 13 I&N Dec. 195 (BIA 1969); *see also Matter of Healy and Goodchild*, 17 I&N Dec. 22, 28 (BIA 1979). A material issue in this case is whether the beneficiary has the required experience for the position offered, since the substantive law governing the approval of immigrant visa petitions requires an employer and alien beneficiary to demonstrate that the alien meets the minimum qualifications for the job offered. *See* 8 C.F.R. §§ 204.5(g)(1), 204.5(l)(3)(ii)(B)-(C). Moreover, as a necessary precondition for obtaining a labor certification, employers must document that their job requirements are the actual minimum requirements for the position, *see* 20 C.F.R. § 656.17(i), and that the alien beneficiary meets those actual, minimum requirements at the time of filing the labor certification application, *see Matter of Saritejdiam*, 1989-INA-87 (BALCA Dec. 21, 1989). A misrepresentation is material where the application involving the misrepresentation should be denied on the true facts, or where the misrepresentation tends to shut off a line of inquiry which is relevant to the applicant's eligibility

and which might well have resulted in a proper determination that the application be denied. *See Matter of S-- and B--C--*, 9 I&N Dec. 436, 447 (AG 1961).

Accordingly, as the petitioner and the beneficiary misrepresented facts regarding the beneficiary's work experience in India, which is material to the beneficiary's eligibility for the benefit sought, the AAO enters a finding that the petitioner and the beneficiary sought to procure a visa or other documentation by willful misrepresentation of a material fact.

Furthermore, the AAO will invalidate the labor certification because it involves fraud or misrepresentation. On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089, replaced the Form ETA 750. The new ETA Form 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004, with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The regulation cited at 20 C.F.R. § 656.31(d) is the pre-PERM regulation applicable to the instant case. The regulation stated:

> If a Court, the INS or the Department of State determines that there was fraud or willful misrepresentation involving a labor certification application, the application shall be deemed invalidated, processing shall be terminated, a notice of the termination and the reason therefore shall be sent by the Certifying Officer to the employer, and a copy of the notification shall be sent by the Certifying Officer to the alien, and to the Department of Labor's Office of Inspector General.

Accordingly, as the beneficiary misrepresented his work experience in the Form ETA 750, the labor certification shall be invalidated by USCIS.

Even assuming the validity of the experience letter from the Indian bakery dated April 29, 2003, there is an unresolved inconsistency in the record pertaining to the beneficiary's purported dates of employment abroad which further undermines the credibility of the claims. In the Form ETA 750, the beneficiary claims to have been employed as a "yeast donut and pastry baker" from December 1995 to November 1997 by the [redacted] This represents less than two years of experience, which is what is required by the terms of the labor certification and the skilled worker classification. 8 U.S.C. § 1153(b)(3)(A)(i); 8 C.F.R. § 204.5(l). Accordingly, based on the beneficiary's representation in the Form ETA 750, he is not qualified for the job.

Although the April 29, 2003 experience letter indicated that the beneficiary was employed from January 25, 1995 to November 8, 1997, which exceeds a two-year period, the record is devoid of independent, objective evidence reconciling this inconsistency with the Form ETA 750B. 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). Furthermore, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board of Immigration Appeals noted in dicta that the beneficiary's experience, without such fact

certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

In response to the RFE/NDI, counsel asserts that the inconsistencies in the record pertaining to the beneficiary's years of employment experience were due to attorney error, in that the attorney put the wrong dates of employment on the Form ETA 750B and that the attorney is not willing to make this admission.[1] A failure to apprise oneself of the contents of a document before signing them is generally not recognized as a defense to misrepresentation. *See, e.g., Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (citing *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005) and *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993)). Furthermore, counsel makes no attempt to resolve this inconsistency with independent, objective evidence. He simply claims that the only evidence available to prove the beneficiary's work experience is the April 29, 2003 letter (and some self-serving, unsubstantiated affidavits) because of the death of the bakery owner and the alleged destruction of the bakery. This evidence is insufficient to demonstrate that the beneficiary is qualified for the job with two years of experience in the job offered or two years of related experience, yeast donut and pastry baker. 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)).

In the RFE/NDI the petitioner was asked to identify the "partner" who signed the April 29, 2003 letter because his/her identity was not ascertainable from the handwriting. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires a letter from an employer addressing the qualifications of the beneficiary to list the name and title of the employer. Although counsel indicates in response to

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[1] Although the petitioner claims that its former counsel was incompetent, the petitioner did not properly articulate a claim for ineffective assistance of counsel. A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. Any appeal or motion based upon a claim of ineffective assistance of counsel requires:

(1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,

(2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

(3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

the RFE/NDI that the above noted letter is from the deceased owner of the bakery in India, this explanation fails to demonstrate why the owner of the bakery would identify himself as a "partner" when he is claimed to be a sole proprietor. Furthermore, if the owner did have a partner, it has not been explained why he or she is unavailable to address the beneficiary's claimed employment in India. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The letter is not in compliance with 8 C.F.R. § 204.5(l)(3)(ii)(A), and the petition must be denied for this additional reason.

Accordingly, the petitioner has failed to establish that the beneficiary is qualified for the offered job with two years of work experience. The April 29, 2003 letter submitted to establish that the beneficiary worked for over two years at [redacted] is fraudulent. USCIS has confirmed that the beneficiary never worked at that bakery. Furthermore, the letter is inconsistent with the dates of employment listed by the beneficiary in the Form ETA 750 and puzzlingly refers to the signer of the document as a "partner." Finally, the letter is defective under the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because it does not clearly establish the name of the signer.

The petitioner and the beneficiary have misrepresented a material fact by submitting the fraudulent letter and, as this misrepresentation involves representations made on the labor certification, the AAO will both enter a finding of misrepresentation and invalidate the certified Form ETA 750.

Bona fides of the job offer

A second issue in this matter is whether the job offer to the beneficiary is still bona fide. Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3) of the Act. 8 C.F.R. § 204.5(c). Furthermore, where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if an appeal could be otherwise sustained, a petition's approval for an out-of-business petitioner would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

According to 20 C.F.R. § 656.30(c)(2), a labor certification for a specific job offer is valid only for the particular job opportunity and the area of intended employment stated on the Form ETA 750. In this matter, as noted in the RFE/NDI, the AAO uncovered evidence outside of the record which indicated that the job offer for an assistant manager at a [redacted] located at [redacted] is no longer available and, thus, the petitioner no longer desires or intends to employ the beneficiary in compliance with the terms of the approved labor certification.

According to the website of restaurant is not located at *See* www.dunkindonuts.com (accessed December 12, 2011). Furthermore, the AAO noted that, in reviewing the location of the job opportunity on Google Maps, i.e. the entry for this location stated "This place is permanently closed." *See* http://maps.google.com (last accessed May 18, 2011). A copy of the Google Maps print-out was provided with the RFE/NDI.

Although specifically addressed by the AAO in the RFE/NDI, the petitioner failed to respond to this issue. Additionally, based on the petitioner's 2008 tax return – the latest tax return for the petitioner in the record – it appears that the petitioner had no receipts, no profit, and no income in that calendar year and, consequently, did not pay any wages in that year. Therefore, it is more likely than not that the petitioner is out-of-business and that the job offer no longer exists. There is no intention or desire by the petitioner to employ the beneficiary in the certified job. The petition must be denied for this additional reason.

Ability to pay the proffered wage

A third issue in the present matter is whether the petitioner has established its continuing ability to pay the proffered wage to the beneficiary beginning on the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $18.00 per hour ($37,440.00 per year).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm.

1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 Sonegawa*, 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. In the instant case, the petitioner submitted evidence that it has paid the beneficiary $38,016.00 in 2006 and $26,784.00 in 2007.

It is noted that the petitioner has established its ability to pay the proffered wage in 2006 through wages paid to the beneficiary. However, the petitioner paid partial wages in 2007 and did not submit a wage statement for the beneficiary for 2001. Also, the wage statements for 2002, 2003, 2004, 2005, and 2009 were not issued by the petitioner; and therefore, cannot be considered in determining its ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). 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."

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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 petitioner's tax returns demonstrate its net income as shown in the table below.

- In 2001, the Form 1120S stated net income[2] of $165,540.00.
- In 2002, the Form 1120S stated net income of $144,439.00.
- In 2003, the Form 1120S stated net income of $60,167.00.
- In 2004, the Form 1120S stated net income of -$2,243.00.

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[2] 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 (1997-2003), line 17e (2004-2005), or line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

- In 2005, the Form 1120S stated net income of -$10,212.00.
- In 2007, the Form 1120S stated net income of -$29,164.00.
- In 2008, the Form 1120S stated net income of -$40,275.00.[3]

The petitioner did not have sufficient net income in 2004, 2005, 2007, and 2008 to pay the proffered wage. Although the petitioner's net income for 2001, 2002, and 2003 exceeded the beneficiary's proffered wage amount ($37,400.00), the record shows that the petitioner had petitioned for two additional beneficiaries having 2003 priority dates. The proffered wages for these two additional beneficiaries were $37,440 each. Therefore, the petitioner has failed to establish that its net income in 2003 ($60,167) was in excess of the combined proffered wage amounts ($112,320, which includes the beneficiary's proffered wage amount). Consequently, for 2003, the petitioner also has not established that it had the ability to pay the proffered wage through net income or through wages paid to the beneficiary. 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 Matter 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).

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets as shown in the table below.

- In 2003, the Form 1120S stated net current assets of $4,648.00.
- In 2004, the Form 1120S stated net current assets of $13,185.00.
- In 2005, the Form 1120S stated net current assets of -$10,322.00.
- In 2007, the Form 1120S stated net current assets of -$87,246.00.
- In 2008, the Form 1120S stated net current assets of $6,497.00.

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[3] As noted *supra*, the petitioner did not have any receipts in 2008.

[4] 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.

Therefore, for the years 2003, 2004, 2005, 2007, and 2008, the petitioner did not have sufficient net current assets to pay the proffered wage without even considering the other two simultaneously pending Forms I-140.

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

It is noted that, in response to the AAO's RFE/NDI, the petitioner did not submit its tax returns or audited financial statements for 2009 and 2010. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Instead, the petitioner submitted copies of 2008 and 2009 tax returns for (Federal Employer Identification Number . However, there is no evidence that is a successor-in-interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Once again, it is an elementary rule that a corporation is a separate and distinct legal entity from its owners, shareholders, and other corporations. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, the tax returns of this separate corporation are not relevant to whether the petitioner has the continuing ability to pay the proffered wage. As noted *supra*, it appears that the petitioner is out-of-business.

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee

or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence establishing its business reputation. Nor has the petitioner demonstrated the occurrence of any uncharacteristic business expenditures or losses during the relevant years. Counsel infers that the petitioner has been in business since 1992, and that it anticipates a steady increase in its income and that it has always paid its debt and has met its payroll. Reliance on the petitioner's future receipts and wage expense is misplaced. Furthermore, the petitioner has not shown through objective financial documents that the anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Finally, as noted *supra*, the petitioner appears to have gone out of business in 2008. The petitioner had zero receipts in 2008 and has not submitted any documentation showing business activity in 2009 or 2010. The petitioner has also filed multiple immigrant petitions which have been pending simultaneously. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date based on the totality of circumstances.

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 at 1043, *aff'd*, 345 F.3d 683; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis). The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

FURTHER ORDER: The AAO finds that the petitioner and the beneficiary willfully misled the DOL and USCIS on 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. § 656.30(d) based on the petitioner's and the beneficiary's willful misrepresentation.