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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

DATE: JUL 13 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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)

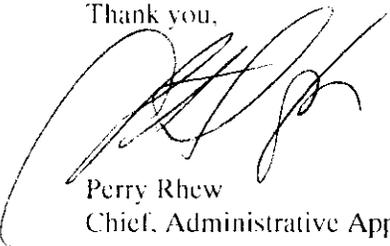
ON BEHALF OF PETITIONER:

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner, The Cottage,¹ is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Cook. 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 May 14, 2009, denial, the 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. The director determined that the petitioner demonstrated the ability to pay the proffered wage for calendar year 2003, but failed to demonstrate the ability to pay the proffered wage for calendar years 2001, 2002, 2004, 2005, 2006, and 2007.

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.

¹ The Cottage is not registered with the California Secretary of State as a corporation or partnership. The petitioner submitted tax returns for [REDACTED] which is registered with the California Secretary of State. Counsel has provided no explanation for this discrepancy. The petitioner must address this issue in any further filings and submit documentation to show that both entities operate under the same federal tax identification number, that one represents a valid assumed name, or that the petitioner "does business as" the stated petitioner to properly determine that the tax returns can be attributed to the petitioner's ability to pay.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$13.87 per hour (\$28,849.60 per year²). The Form ETA 750 states that the position requires two (2) years of experience.

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.³

In this instance, Form ETA 750 was initially submitted by [REDACTED] with an address of [REDACTED]. The name and address of the employer on the Form ETA 750 were crossed out and changed to "The Cottage," showing an address of [REDACTED]. The correction stamp states that DOL approved this change October 2007. The Form I-140 lists the petitioning employer as [REDACTED]" with an Internal Revenue Tax number (EIN) of [REDACTED].

The regulation at 20 C.F.R. § 656.30(c)(2) provides as follows:

656.30 - Validity of and invalidation of labor certifications.

...

(c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

...

² The director stated the proffered wage as \$28,849 in his decision. However, as noted above, the correct proffered wage is \$28,849.60, based on multiplying the hourly wage offered by the equivalent number of hours for full-time employment: $\$13.87 \times 2080 = \$28,849.60$.

³ 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) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

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.

When the present Form ETA 750 was filed and accepted by the U.S. Department of Labor, (DOL), the DOL would permit the substitution of a successor employer⁴ if it occurred before a final determination where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.30(c)(2). *See Horizon Science Academy*, 06-INA-46 (BALCA Mar. 8, 2007) [when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages]; *See also American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991) [substitution made before final rebuttal to CO]; *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June 13, 1990). DOL would also allow a new employer to substitute where it is the same job opportunity in the same area of intended employment. *See also Law Offices of Jean-Pierre Karnos*, 03-INA- (BALCA May 20, 2004) [where there was a new employer who took over the law practice of Karnos on his death, a new labor certification does not have to be filed for an accountant applicant where it is the same job opportunity in the same area of intended employment including the same job duties and wages.]

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), a binding, legacy Immigration and Naturalization Service ("INS") decision that was designated as a precedent by the Commissioner in 1986. The

⁴ Substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although the regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." 20 C.F.R. § 656.11(b).

regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-83 (emphasis added).

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482. Here, similar to a successor, the change in employer was accepted by the Department of Labor in October 2007. The initial entity, [REDACTED], must establish its ability to pay the proffered wage from April 30, 2001, until the date of amendment. [REDACTED] must establish its ability to pay the proffered wage from October 2007 onward. Nothing shows that [REDACTED] and [REDACTED] are the same entity or operate under the same tax identification number, or that [REDACTED] is the successor to [REDACTED]. California state corporation records show that [REDACTED] and [REDACTED] are separately registered corporations. The petitioner has not provided any of the evidence specified in 8 C.F.R. § 204.5(g)(2) to document its

[REDACTED] is not a registered "Doing Business As" fictitious name for any corporation in Los Angeles County, California, according to the online database maintained by that county. See http://rrcc.lacounty.gov/Clerk/FBN_Search.cfm (accessed July 11, 2012)

predecessor's ability to pay the proffered wage. The petitioner must address and resolve this issue in any further filings.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1984 and to currently employ 15 workers. 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 April 9, 2001, the beneficiary did not claim to have worked for the petitioner.

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 has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. The petitioner provided W-2 statements and payroll records⁶ demonstrating that it did pay the beneficiary wages that were less than the proffered wage in the following years and amounts as shown in the table below. No evidence has been submitted to document the wages paid by the initial entity listed on the labor certification, [REDACTED] to the beneficiary.⁷

⁶ The beneficiary's W-2 forms state a social security number, but Form I-140 states "none" for the box to list the beneficiary's social security number. This discrepancy calls into question the validity of the W-2 statements. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Even if the AAO accepted all the Forms W-2 provided as attributable to the petitioner and beneficiary, the petitioner still cannot establish its ability to pay the proffered wage.

⁷ As noted above, the initial petitioning entity listed on the labor certification must document its ability to pay the proffered wage from the priority date through the substitution date. The only evidence provided is a statement from Eric Jaeger, dated April 15, 2009, stating that the beneficiary

- In 2002, the petitioner paid the beneficiary \$5,622.75, a shortfall of \$23,226.85.
- In 2003, the petitioner paid the beneficiary \$1,417.63, a shortfall of \$27,431.97.
- In 2005, the petitioner paid the beneficiary \$3,131.25, a shortfall of \$25,718.35.
- In 2006, the petitioner paid the beneficiary \$5,200.72, a shortfall of \$23,648.88.⁸
- In 2007, the petitioner paid the beneficiary \$16,342.90, a shortfall of \$12,506.70.
- In 2008, the petitioner paid the beneficiary \$24,669.00, a shortfall of \$4,180.60.

The petitioner did not provide any evidence of wages paid to the beneficiary for calendar years 2001 or 2004. The wages paid during the remaining years are less than the proffered wage of \$28,849.60. Further, the petitioner has not demonstrated the initial entity's ability to pay the proffered wage from the priority date to the substitution date. Therefore, the petitioner failed to demonstrate its ability to pay the proffered wage for calendar years 2001, 2002, 2003, 2004, 2005, 2006, and 2007.

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

was "paid with a personal check" during his employment with [REDACTED] which is insufficient to establish any wages paid. Counsel did not submit evidence documenting the amount of wages paid to the beneficiary.

⁸ The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo. Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). The wages paid prior to 2007 are significantly less than the proffered wage, and are indicative of part-time or intermittent employment.

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 May 4, 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 2008 federal income tax return was due. Based on the date of the petitioner’s response to the director’s Request for Evidence, it is unclear whether the petitioner’s 2008 tax return was available at that time, or at the time of the appeal. Therefore, the petitioner’s income tax return for 2007 likely is the most recent return available. The tax returns submitted for The Cottage demonstrate its net income for calendar years 2001 to 2007, as shown in the table below. However, as noted above, the initial labor certification employer would need to demonstrate its ability to pay the proffered wage from the date of filing until the date of substitution.

- In 2001, the Form 1120S stated net income⁹ of -\$965.

⁹ 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-

- In 2002, the Form 1120S stated net income of -\$5,817.
- In 2003, the Form 1120S stated net income of \$48,065.
- In 2004, the Form 1120S stated net income of -\$13,466.
- In 2005, the Form 1120S stated net income of \$19,793.
- In 2006, the Form 1120S stated net income of -\$30,692.
- In 2007, the Form 1120S stated net income of -\$111,551.

Even if the AAO considered all the returns of the substituted employer, the petitioner did not have sufficient net income to pay the proffered wage for the years 2001 to 2002, and 2004 to 2007. As the record does not contain the initial labor certification employer's 2003 tax return (or other relevant years), the petitioner has not established its ability to pay the proffered wage in 2003 either.

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.¹⁰ 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 2002 to 2007, as shown in the table below.¹¹

- In 2002, the Form 1120S stated net current assets of \$18,428.
- In 2003, the Form 1120S stated net current assets of \$26,835.
- In 2004, the Form 1120S stated net current assets of \$18,711.
- In 2005, the Form 1120S stated net current assets of \$2,847.
- In 2006, the Form 1120S stated net current assets of \$8,561.
- In 2007, the Form 1120S stated net current assets of -\$8,769.

2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 6, 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 additional deductions and/or adjustments shown on its Schedule K for 2002, 2003, 2004, 2005, and 2006, the petitioner's net income is found on Schedule K of its tax returns.

¹⁰According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹¹The petitioner did not provide a complete tax return for calendar year 2001; the return provided included pages 1 and 2 of Form 1120S, however, none of the additional Schedules were attached. The director requested this information in his Request for Evidence, and noted the deficiency in his decision. Without Schedule L for 2001, the AAO cannot calculate the petitioner's net current assets.

Therefore, even if the AAO accepted the substituted employer's tax returns for the years 2001 to 2007, the petitioner did not have sufficient net current assets to pay the proffered wage. As noted above, the record lacks the initial labor certification employer's tax returns covering the period from the priority date until the date of substitution.

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, counsel¹² relies on dicta from *Construction and Design Co v. USCIS.*, 563 F.3d 593 (7th Cir. 2009) and asserts that the petitioner has demonstrated its ability to pay the proffered wage. Counsel's reliance on the dicta from *Construction and Design* is misplaced. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). This matter does not arise within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, therefore it is not binding.

Counsel asserts that the petitioner's ability to pay the proffered wage is demonstrated because it has "gross receipts in the amount in excess of [\$]500,000" as well as "assets in excess of [\$]29,967," and has paid for "improvements in excess of \$48,000. [sic] for each of the subject years." These stated figures are not borne out in review of the tax returns provided, as discussed above. As noted, the AAO will review net current assets as reported on the petitioner's tax returns, and will not simply accept a statement of assets without consideration of the petitioner's liabilities.

Counsel also asserts that the petitioner's ability to pay the proffered wage is demonstrated because it "has equipment and fixtures in excess of \$400,000." A petitioner's chattel fails to demonstrate its ability to pay the proffered wage, as it would require the petitioner to liquidate its physical assets in order to do so, negatively impacting its ability to carry on its business. Therefore, "equipment and fixtures" do not generally represent current assets that can be liquidated during the course of normal business and counted towards a petitioner's ability to pay.

Counsel asserts that the petitioner's shareholder's real property be included in the analysis of the petitioner's ability to pay the proffered wage, stating that the "Petitioner pledges these properties and would have utilized them to gain funds..." 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

¹² State bar online records show that counsel is now inactive. See the State Bar of California at <http://members.calbar.ca.gov/fal/Member/Detail/134793>.

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." Therefore, the shareholder's personally held real property fails to evidence the petitioner's ability to pay the proffered wage.

Finally, counsel asserts that the petitioner has demonstrated its ability to pay the proffered wage because the "Petitioner paid the beneficiary's salary each and every year leading up to 2007." That assertion is contradicted by the evidence, including the W-2 income statements and payroll reports provided by the petitioner and discussed above. Additionally, as noted above, the initial labor certification employer would need to establish its ability to pay the proffered wage from the priority date until the date of approved substitution.

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 petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 1984¹³ and its gross receipts appear to have remained relatively stable during the years reported. However, the petitioner has claimed a loss

¹³ Form I-140 indicates the petitioner was established in 1984, however, the corporate records for the state of California indicate that [REDACTED], the entity for which financial information

in five (5) of the seven (7) years reported based on fixed costs including rents, utilities, etc. Further, the petitioner has paid minimal labor costs for the 15 employees claimed in each relevant year.¹⁴ Further, the petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. The record contains no evidence of the initial labor certification employer's ability to pay the proffered wage from the priority date to the date of substitution.¹⁵ Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director, the petitioner has not established that the beneficiary qualifies for the job as offered.¹⁶ 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. *See, Wing's Tea House*, 16 I&N Dec. 158.

The requirements of the job offered as set forth on the ETA 750 Part A, at Item 14, state that the position requires two (2) years of experience in the job offered. In support thereof, counsel has provided a letter dated May 4, 2006, from [REDACTED] states that the beneficiary was in his employ as a cook from October 5, 1999, to April 12, 2002. As noted in the director's Request for Evidence on March 27, 2009, the labor certification, signed by the beneficiary on April 9, 2001, attested that the beneficiary had no work

including tax returns have been submitted, was established May 4, 1994. *See* <http://kepler.ss.ca.gov/cbs.aspx> (accessed July 11, 2012). The petitioner must address in any further filings whether the petitioner listed on Form I-140 and Pancake Cottage, Inc. are the same companies.

¹⁴ The petitioner states on Form I-140, signed October 24, 2007, that it employs 15 employees. The petitioner reported \$170,567 in labor costs for that year, the most of all the reported years. As recently as 2005 it paid significantly less in labor costs, just \$99,492. These total labor costs are not significant as they account for the wages of 15 employees.

¹⁵ State of California corporate records for [REDACTED] show that this legal entity was incorporated June 10, 2002, and suspended on April 21, 2004. Based on the current website for [REDACTED], ownership changed in 2003 and the restaurant was completely shut down for five months. [REDACTED]

From the record, it is not clear that the position remained a continuing *bona fide* job offer from the priority date onward.

¹⁶ 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).

experience in the preceding three (3) years, and no relevant work experience to list. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes 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. The director requested additional evidence to confirm the beneficiary's employment and to clarify the inconsistency. In response, prior counsel provided another letter from [REDACTED], sworn before a notary public, stating that the beneficiary was paid by "personal check." The letter does not indicate that the beneficiary was paid by [REDACTED] nor were copies of deposited checks provided with the response. While the credibility of this evidence has not been established, the point is moot. Based on the sworn statement of [REDACTED] the beneficiary lacked the required two (2) years of work experience as of the priority date, April 30, 2001, as the experience attested to, even if accepted, would only amount to one (1) year, six (6) months, and 25 days by the time of the priority date. Pursuant to the holding in *Wing's Tea House*, the beneficiary is not qualified for the position offered.

In any further filings, the petitioner must establish that the beneficiary has acquired the required two years of experience before the priority date to resolve this conflict, and submit documentation in support of the claimed experience, before the AAO can conclude that the beneficiary has the requisite training and experience to meet the terms of the certified labor certification.

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.