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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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Date:

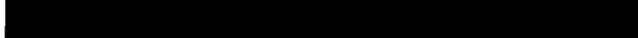
Office: TEXAS SERVICE CENTER

FILE: 

**MAR 29 2012**

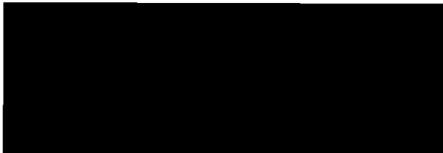
IN RE:

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:

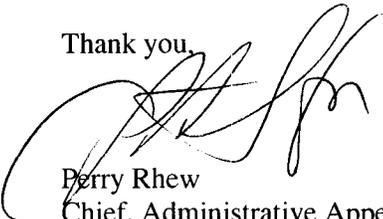


INSTRUCTIONS:

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Mexican restaurant. It seeks to employ the beneficiary permanently in the United States as a cook/Mexican specialty. 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 November 8, 2008 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on August 14, 2002. The proffered wage as stated on the Form ETA 750 is \$14.00 per hour (\$29,120 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000, to have an unstated gross annual income and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on August 12, 2002, the beneficiary claimed to have worked for the petitioner since June 2000.

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 from the priority date, or at any time for that matter.<sup>2</sup> The petitioner did submit, on appeal, a copy of a 2002 W-2 Form which shows

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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).

<sup>2</sup> The beneficiary signed the Form ETA 750 under penalty of perjury on August 12, 2002 stating that he had been employed by the petitioner since June 2000. Although asked by the director in an August 20, 2008 Request For Evidence (RFE) to provide proof of wages paid to the beneficiary from 2002 through 2007, the petitioner failed to do so, except for the year 2002, in its response to the RFE or at any time thereafter. Forms 941 or quarterly state wage reports do not reflect that the petitioner

wages paid by the petitioner to the beneficiary in the amount of \$7,800. As such, the petitioner would be required to pay the difference between the full proffered wage and the wages paid to the beneficiary in that year. That sum is \$21,320.<sup>3,4</sup>

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 (1<sup>st</sup> 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 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

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employed the beneficiary in any year other than 2002.

<sup>3</sup> The petitioner asserts USCIS should prorate the wage in 2002. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

<sup>4</sup> The Form I-140 does not state that the beneficiary has a social security number. The Form W-2 submitted does show a social security number. The petitioner must resolve this inconsistency in any further filings. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 23, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2001<sup>5</sup> through 2007, as shown in the table below.

- In 2001, the Form 1120 stated net income of (\$956).
- In 2002, the Form 1120 stated net income of (\$1,536).
- In 2003, the Form 1120 stated net income of (\$2,171).
- In 2004, the Form 1120 stated net income of (\$1,091).
- In 2005, the Form 1120 stated net income of \$16,367.
- In 2006, the Form 1120 stated net income of \$35,819.
- In 2007, the Form 1120 stated net income of \$39,199.

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<sup>5</sup> The petitioner submitted a copy of its 2001 tax return. Although 2001 predates the August 12, 2002 priority date, the 2001 tax return covers the time frame of October 1, 2001 through September 30, 2002 and the priority date falls within that tax period.

Therefore, for the years 2001 through 2005, the petitioner's tax returns do not state sufficient net income to pay the proffered wage. The petitioner's 2006 and 2007 tax returns do state sufficient net income to pay the proffered wage.

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 corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2001 through 2007 as shown in the table below.

- In 2001, the Form 1120 stated net current assets of (\$14,722).
- In 2002, the Form 1120 stated net current assets of (\$13,591).
- In 2003, the Form 1120 stated net current assets of (\$7,100).
- In 2004, the Form 1120 stated net current assets of (\$5,524).
- In 2005, the Form 1120 stated net current assets of (\$12,780).
- In 2006, the Form 1120 stated net current assets of (\$57,597).
- In 2007, the Form 1120 stated net current assets of (\$7,454).

Therefore, for the years 2001 through 2007, the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage in any year. As previously noted, however, the petitioner's 2006 and 2007 tax returns do state sufficient net income to pay the proffered wage.

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

On appeal, counsel asserts the petitioner has established its ability to pay the proffered wage from the priority date based on a totality of the circumstances. Counsel states that the petitioner's owner is and was willing to forego officer compensation received if necessary to pay the proffered wage. The petitioner submitted copies of its bank statements to assert that it had necessary cash reserves to pay its wages and expenses. Counsel also states that the petitioner had high employee turnover and

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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.

that wages paid to other unnamed employees could have been used to pay the beneficiary had the beneficiary been permitted to work. Finally, the petitioner's owner states that she has an estimated net worth of \$4,585,000<sup>7</sup> and that she is and was willing to use her personal assets, if necessary, to pay the proffered wage.

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

The petitioner's tax returns state that officer compensation was paid to corporate officer[s] as follows:

- 2001 - \$0
- 2002 - \$0
- 2003 - \$26,000
- 2004 - \$61,000
- 2005 - \$78,000
- 2006 - \$58,480
- 2007 - \$52,546

The petitioner's owner states in an affidavit that she was willing to forego officer compensation to the extent necessary to pay the proffered wage if necessary. 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 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may, in certain circumstances, be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. The officer compensation in this instance, however, even if it were used to pay the proffered wage, is insufficient to establish the petitioner's ability to pay the proffered wage from the priority date onward. The petitioner had negative net income and net current assets in its 2001 (the priority date is included in the petitioner's 2001 tax year) and 2002 tax year. The petitioner paid no officer compensation in either of those years. Thus, the ability to pay could not be established based upon officer compensation in those years. Further, the officer compensation paid in 2003 is insufficient to pay the proffered wage. The petitioner also had negative net income and negative net current assets in 2003. It should further be noted that the petitioner's officer claims to have sufficient income from other sources to sustain her family had she not taken officer compensation from the petitioner. The petitioner did not, however, provide the normal living expenses of her family so that a determination could be made as to whether she could have realistically afforded to forego the referenced officer compensation.<sup>8</sup> Going on record without supporting documentary

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<sup>7</sup> Most of this value is estimated based on investments and ownership of other companies.

<sup>8</sup> The net worth based on investments and company ownership estimated above would not appear to represent immediate income. Income from these organizations would be reflected on the petitioner's

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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Under these circumstances, the petitioner has not established its ability to pay the proffered wage from the priority date onward based upon officer compensation paid.

The petitioner submitted copies of bank statements from August 22, 2002 to October 31, 2008 to establish its ability to pay the proffered wage. Reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets. Additionally, there are large discrepancies between the statements submitted and the petitioner's year-end reported cash on its tax returns. For example, the petitioner reported the following account cash balances:

- The 9/23/03 – 10/22/03 statement reported an ending balance for the petitioner's account of \$311,331.52. The petitioner's 2002 tax return reported a year ending (September 30, 2003) cash balance of \$6,456.
- The 9/23/04 – 10/22/04 statement reported an ending balance for the petitioner's account of \$353,055.81. The petitioner's 2003 tax return reported a year ending (September 30, 2004) cash balance of \$5,123.
- The 9/01/06 – 9/29/06 statement reported an ending balance of \$33,262.96. The petitioner's 2005 tax return reported a year ending (September 30, 2006) cash balance of \$9,563.

These significant discrepancies must be resolved. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any

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owner's tax returns. The tax returns do not reflect substantial adjusted gross income for residing in New York City. The petitioner's owner's self-estimate also lists a mortgage. Without an estimate of personal expenses, whether the claim to pay from officer compensation is realistic cannot be determined for 2004 through 2007. However, as noted since no officer compensation was paid in 2001, and 2002, and in 2003, available sums would be deficient to pay the proffered wage even if all the officer compensation was used. Therefore, the claim to use officer compensation is insufficient and unrealistic and will not establish the petitioner's ability to pay.

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).

The petitioner also submitted an estimation of the petitioner's owner's net worth<sup>9</sup> in attempt to establish the petitioner's ability to pay the proffered wage. The personal bank records, tax returns and personal assets of the petitioner's president are also not relevant to the petitioner's ability to pay the prevailing 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. 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." While officer compensation would be considered, as set forth above, it would be insufficient with this matter and would not establish the petitioner's ability to pay the proffered wage.

The petitioner states that it would have used wages paid to unnamed employees who had left its organization to pay the present beneficiary, or would have transferred present, but unnamed, employees to pay the beneficiary's wage if necessary. As noted, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the positions of these unnamed employees involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker[s] who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not have replaced him or her.<sup>10</sup> Additionally, as noted above, the beneficiary claimed on Form ETA 750B

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<sup>9</sup> A CPA compiled financial statement, not an audited statement, does not verify liabilities or personal tax returns and does not, on its surface, corroborate the petitioner's net worth assertions. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business (here, the person) are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management (or, the individual) compiled into standard form. The unsupported representations of management or the individual are not reliable evidence.

<sup>10</sup> The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa

that he was employed with the petitioner already, and, thus, would not replace another worker. 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 had negative net income and net current assets from 2001 through 2006. The petitioner submitted foreign language press documents about its business as well as some articles from New York press. The New York Post rated the petitioner as having the "best quacamole." However, that alone is insufficient to overcome the information presented in the tax returns above. The foreign documents were not translated into English and are of little evidentiary value in these proceedings. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that it has maintained the continuing ability to pay the proffered wage from the priority date onward. As noted above, neither evidence of the bank records of the petitioner (which contain substantial discrepancies as set forth above), the earnings and assets

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category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

of the petitioner's owner (which cannot be accepted as the petitioner is a corporation), employee substitution theories presented by the petitioner nor officer compensation paid to the petitioner's owner (lacking in two years, and insufficient in a third year) will establish the petitioner's ability to pay the proffered wage. 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.

It should further be noted that the labor certification requires two years of experience in the proffered position. To establish that experience the petitioner submitted an affidavit from a chef at El Zocalo Restaurant who stated that the beneficiary was employed as a Mexican specialty cook at that restaurant from December 1995 to December 1998. The experience letter was not on the letterhead of the employer, however, and it is not apparent that the witness had authority to attest to beneficiary's employment on behalf of the employer. Experience letters should be from trainers or employers and include the name, address, and title of the writer, the specific dates of employment and a specific description of the duties performed by the beneficiary pursuant to 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). The letter does not state whether the experience was full-time or part-time to determine the beneficiary's total length of experience. As such, it is not clear that the affidavit is sufficient alone to establish the qualifying experience as a Mexican specialty cook without additional independent objective evidence.<sup>11</sup> The petitioner should remedy this deficiency by independent objective evidence in any future filings.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner must also resolve the issue set forth above related to the beneficiary's previous experience to definitively establish that he meets the two year prior experience requirement.

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.

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<sup>11</sup> 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).