



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: SEP 11 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:

SELF REPRESENTED

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and the petitioner subsequently filed a motion to reopen the director's decision. On March 27, 2009, the director reopened the denied petition, considered the evidence presented and reaffirmed his decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Italian restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a pastry chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 27, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R.

¹ The AAO notes that in the filing of both the I-140 petition and the instant appeal, the petitioner was represented by [REDACTED]. However, according to the bar associations of both Florida and New Jersey, Mr. [REDACTED] is now deceased.

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§ 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 October 14, 2002. The proffered wage as stated on the Form ETA 750 is \$15.48 per hour (\$32,198 per year). The Form ETA 750 states that the position requires six years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

On appeal, counsel submits a brief; a letter dated April 30, 2009 from [REDACTED] President and owner of the petitioning business; a letter dated April 30, 2009 from [REDACTED] CPA; an unaudited balance sheet for 2009; and photographs of the petitioner's property.

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 1997 and currently to employ 9 workers.³ 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 June 20, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner's business experienced economic setbacks due to the effects of the terrorist attack on September 11, 2001; that between 2003 and 2005, the petitioner's business "experienced a national economic slowdown which was at no fault due to the Petitioner and

² 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).

³ From 2003 through the present, the petitioner has paid no salaries or wages and has reported no costs for labor on Schedule A of its U.S. Income Tax Return for an S Corporation (Form 1120S). Rather, for Line 19 of Form 1120S, the petitioner attached a separate statement on which it itemizes "other deductions." Among the other deductions, the petitioner includes a line for "Employee leasing."

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).

Based upon the evidence, the petitioner has no employees but, instead, utilizes the services of independent contractors exclusively.

the manner the restaurant was operating;" and that the director should have considered the totality of the petitioner's financial circumstances.

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).

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, USCIS electronic records show that the petitioner filed at least one other I-140 petition which has been pending during the time period relevant to the instant petition.⁴ Where, as here, 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. at 144-145 (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 Form ETA 9089). See also 8 C.F.R. § 204.5(g)(2).

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

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,

_____ was filed on July 7, 2003 and approved on November 17, 2003. The priority date conferred by the approval of the employment-based immigrant visa petition is April 12, 2001. The beneficiary of this immigrant visa petition obtained lawful permanent residence on May 3, 2006.

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 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 March 9, 2009 with the receipt by the director of the petitioner's motion to reopen the director's decision to deny the I-140 petition. In its initial petition submission, the petitioner provided its federal income tax returns for 2002 and 2006 only. On

November 21, 2008, the director issued a request for evidence (RFE), asking the petitioner to supply evidence of its ability to pay for 2003, 2004, 2005 and 2007 in the form of annual reports, federal income tax returns or audited financial statements. The director indicated that in addition to the evidence requested, the petitioner may also supply profit and loss statements and personnel records. The petitioner did not respond to the director's RFE and the director denied the petition on February 13, 2009, finding that the petitioner did not demonstrate the ability to pay the beneficiary the proffered wage from the priority date.

On March 9, 2009, the petitioner filed a motion to reopen the director's decision. In his motion, counsel for the petitioner asserted that both the RFE and denial were issued when the petitioner was out of town. Further, counsel asserts that he was not provided a copy of either the RFE or the denial notice and was, therefore, not able to respond to either. Counsel was correct in that he was not provided a courtesy copy of either the RFE or the denial. The director accepted counsel's argument and reopened the matter. With his motion, counsel provided the petitioner's federal income tax returns for 2003, 2004, 2005 and 2007.

As of the date upon which the petitioner filed its motion, the petitioner's 2008 federal income tax return was not yet available. 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 2002, 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2002, the Form 1120S stated net income⁵ of \$39,047.00.⁶
- In 2003, the Form 1120S stated net income of \$2,697.00.
- In 2004, the Form 1120S stated a net loss of \$13,412.00.
- In 2005, the Form 1120S stated net income of \$888.00.
- In 2006, the Form 1120S stated net income of \$15,038.00.
- In 2007, the Form 1120S stated net income of \$7,345.00.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 8, 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 income, deductions and other adjustments shown on its Schedule K for 2002, 2003, 2005, 2006 and 2007, the petitioner's net income is found on Schedule K of its tax returns for those years.

⁶ In identifying the petitioner's net income for each year, the director did not take Schedule K into account.

USCIS records indicate that the petitioner has filed one other I-140 petition which was pending during the time period relevant to the instant petition. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence.⁷ See 8 C.F.R. § 204.5(g)(2).

Therefore, for the year 2002, the petitioner demonstrates sufficient net income to pay one beneficiary the proffered wage. However, the petitioner has not demonstrated sufficient net income to pay more than one beneficiary the proffered wage. For 2003, 2004, 2005 and 2006, the petitioner has not demonstrated sufficient net income to pay one beneficiary the proffered wage. For 2007, the petitioner has not demonstrated sufficient net income to pay the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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, 2003, 2004, 2005, 2006 and 2007, as shown in the table below.

- In 2002, the Form 1120S, Schedule L stated net current liabilities of \$82,649.00.
- In 2003, the Form 1120S, Schedule L stated net current liabilities of \$95,638.00.
- In 2004, the Form 1120S, Schedule L stated net current liabilities of \$97,510.00.
- In 2005, the Form 1120S, Schedule L stated net current liabilities of \$97,329.00.
- In 2006, the Form 1120S, Schedule L stated net current liabilities of \$174,069.00.
- In 2007, the Form 1120S, Schedule L stated net current liabilities of \$225,421.00.

Therefore, for the years 2002, 2003, 2004, 2005, 2006 and 2007, the petitioner did not have sufficient net current assets to pay the proffered wage.

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

⁷ The beneficiary of [REDACTED] obtained lawful permanent residence on May 3, 2006. Therefore, the petitioner must demonstrate the ability to pay two beneficiaries in 2002, 2003, 2004, 2005 and 2006.

⁸ 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.

On appeal, counsel asserts that the petitioner experienced financial setbacks due to the terrorist attack on the World Trade Center on September 11, 2001.

However, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001.

On appeal, counsel also asserts: "Between 2003 and 2005 the business experienced a national economic slowdown which was at no fault due to the Petitioner and the manner the restaurant was operating."

Counsel, however, provided no specific explanation for the decline of the petitioner's business during these years and no evidence demonstrating that the petitioner's economic situation was due to factors outside of its control. Again, a mere broad statement by counsel that, for some reason outside of the control of the petitioner, its business was impacted by forces outside of the business, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that USCIS should consider the totality of the facts and factors presented. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support his assertion.

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). However, 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 claims to have been operating for 10 years at the time the instant petition was filed. In support of its petition, the petitioner provided financial evidence for six of those years. Out of the six years, the petitioner demonstrated profitability for five years. However, four of the five years demonstrated only marginal income. The petitioner's gross sales were consistent. However, the petitioner paid no officer compensation or salaries from 2003 to the present. The petitioner has not established the historical growth of its business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

It must also be noted that on appeal, counsel provided a letter dated April 20, 2009 from ██████████ President and owner of 50 percent of the petitioning business. In his letter, Mr. ██████████ states:

At time, when it was needed, the partners have come up with funds from personal accounts to meet all financial responsibilities, which have always been regularly met, and they are all in good standing.

Mr. ██████████ does not offer to forgo any portion his officer compensation for purposes of augmenting the petitioner's net income. Rather, he merely indicates that in the past he and his partner have infused their personal funds into the business for purposes of meeting certain unnamed financial obligations. Further, it must be noted that the petitioner does not pay officer compensation, nor has it done so since 2002.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Therefore, USCIS cannot accept Mr. ██████████'s assurance that the partners have met the petitioner's outstanding financial obligations out of their personal resources for purposes of determining the petitioner's ongoing ability to pay because the partners have no personal obligation to satisfy such financial obligations out of their personal resources.

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. The petitioner filed the labor certification on October 14, 2002. 2002 was the last year in which the petitioner paid any wages to employees. According to the petitioner's federal income tax returns, in 2002, it paid \$11,571 in salaries. During that year, the petitioner reported no cost of labor on Schedule A of its tax return. Rather for line 19 of Form 1120S, the petitioner provided an attached statement in which it itemized "other deductions." In 2002, line 8 of the other deductions represented funds paid for "Employee leasing." In 2003, the petitioner no longer paid any salaries and still reported no funds for cost of labor on Schedule A. In that year, the amount for "Employee Leasing" increased to \$112,013. Since 2003, the petitioner has paid no salaries but has consistently paid more than \$100,000 towards "Employee Leasing." Thus, according to the petitioner's tax returns, it has no actual employees but, instead utilizes independent contractual labor, as indicated on the statement attached to line 19 of Form 1120S.

It should also be noted that, on appeal, the petitioner provided an unaudited profit and loss statement for 2009. Although USCIS would not consider an unaudited financial statement for purposes of determining the petitioner's ability to pay, because it does not comply with the requirements at 8 C.F.R. § 204.5(g)(2), setting forth the forms of evidence which are acceptable for demonstrating the ability to pay, this document is informative for this discussion. Though the figures have not been audited and, therefore, cannot be verified, it is worthy of note that the petitioner did not include a line item on the statement for wages or salaries. However, again the petitioner claims to have paid \$92,473 for "Employee Leasing."

It must also be noted that, on appeal, counsel states that “it has been the policy of the Petitioner to hire only those individuals who are Lawful Permanent Residents.”

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).

This statement does not comport with the fact as they are reflected on the petitioner’s tax returns. According to these documents, the petitioner has not hired anyone.

Further, since the petitioner utilizes contractual labor, it should have a contract with the provider of such labor. The petitioner has not provided this contract and by failing to do so has not clarified the relationship which it has with those workers which it utilizes, specifically with respect to the control which it has over them and their work product.

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).

Given the fact that the petitioner has no actual employees and that its pattern, since 2003, is to utilize contractual labor, the petitioner has not demonstrated that it will actually employ the beneficiary in this instance. The petitioner has provided no documentation describing the contractual relationship which exists between it and the workers which it utilizes and, therefore, has not demonstrated that it controls when, where, and how a worker performs the job; the continuity of the worker’s relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer’s regular business. Therefore, the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

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.