(b)(6)

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

DATE: AUG 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Acting 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 is a construction firm. It seeks to employ the beneficiary permanently in the United States as a carpenter. 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.

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 April 27, 2001, which establishes the priority date. United States Citizenship and Immigration Services (USCIS) show that the petitioner filed a previous Form I-140, Immigrant Petition for Alien Worker. It was denied on January 30, 2007. No appeal was taken. The proffered wage as stated on the Form ETA 750 is $28.90 per hour, which

amounts to $60,112 per year. The Form ETA 750 states that the position requires three years of experience in the job offered. There are no other requirements set forth on the ETA 750.

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.[1]

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 on November 21, 1989 and to currently employ three 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, originally signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner. Subsequently submitted documentation suggests that he has worked for the petitioner since 2002.

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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

At the outset, it is noted that the petitioner has submitted the financial information of the individual shareholder consisting of individual federal income tax returns, Wage and Tax Statements (W-2s) and statement of household expenses.[2] In this case, the petitioner is a corporation. 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

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[1] 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] Even if this information were considered in this case, it is noted that the statements contained no expenses for food, clothing, gasoline, utilities, transportation, medical insurance, or child care and no explanation for such omissions. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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."

The petitioner has also submitted copies of its bank statements from for December 2001 and January 2002, as well as copies of bank statements from for December 2002, December 2003, December 2004, December 2005, December 2006 and December 2007, copies of bank statements from for December 2005 and December 2006. It is noted that 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. Bank statements do not generally reflect all of the encumbrances and liabilities that may affect a petitioner's financial profile. Additionally there is 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 corporate tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

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. If the documentation establishes that the petitioner can cover any difference between actual wages paid and the proffered wage in a given period, the petitioner will be deemed to have shown its ability to pay the full proffered wage for that period. In this case, the record indicates that the petitioner has paid the following wages:

Year	Wages Paid	Difference from Proffered Wage of $60,113 per year
2001	none	$60,112 Less
2002	$6,600	$53,512 Less
2003	$26,000	$34,112 Less
2004	$26,500	$33,612 Less
2005	$26,000	$34,112 Less
2006	$26,000	$34,112 Less
2007	$26,000	$34,112 Less

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 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.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's[3] tax returns demonstrate its net income for 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2001, the Form 1120S stated net income[4] of $31,281.
- In 2002, the Form 1120S stated net income of $20,357.
- In 2003, the Form 1120S did not show stated net income as part of Schedule K was omitted.
- In 2004, the Form 1120S stated net income of $17,801.
- In 2005, the Form 1120S did not show stated net income as part of Schedule K was omitted.
- In 2006, the Form 1120S stated net income of $6,596.
- In 2007, the Form 1120S stated net income of -$18,975.

Therefore, in none of the years of 2001, 2002, 2003, 2003, 2004, 2005, 2006, and 2007, did the petitioner have sufficient net income to cover the difference between the actual wages paid to the beneficiary and the proffered wage of $60,112.

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.[5] 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-

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[3]The record also contains the tax returns of a company containing a different federal identification number (FEIN) from the Form I-140 petitioner. A FEIN is assigned by the Internal Revenue Service (IRS) and is unique to the tax filer. As the employer sponsoring the beneficiary is identified by its FEIN on the Form I-140, the AAO will not consider the tax returns of another corporation. *See* 20 C.F.R. § 656.3. *See also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

[4] 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 (2001-2003) line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (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, credits, deductions, or other adjustments shown on its Schedule K for 2001, 2002, 2004, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax returns.

[5]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.

year net current assets for 2001, 2002, 2003, 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2001, the Form 1120S stated net current assets of $13,841.
- In 2002, the Form 1120S stated net current assets of $6,452.
- In 2003, the Form 1120S stated net current assets of $3,008.
- In 2004, the Form 1120S stated net current assets of -$20,015.
- In 2005, the Form 1120S stated net current assets of $6,790.
- In 2006, the Form 1120S was not submitted with Schedule L, so net current assets cannot be calculated.[6]
- In 2007, the Form 1120S stated net current assets of -$5,977.

Therefore, in none of the years 2001, 2002, 2003, 2004, 2005, 2006, and 2007, did the petitioner have sufficient net current assets to cover the difference between actual wages paid and 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 submits the information relevant to the individual shareholder as discussed above and cites *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967) in asserting that the petition may be approved despite the corporate petitioner's lack of ability to pay the proffered wage shown in its documentation.

In some cases, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* at 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*,

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[6] The director noted the petitioner's failure to submit this Schedule in his decision, however, the petitioner failed to submit the missing Schedule on appeal.

USCIS may, at its discretion, consider overall factors relevant to the petitioner's situation. 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, or the petitioner's reputation within its industry,

In the instant case, as noted above, the petitioner is a close corporation, employing three workers. None of the corporate petitioner's tax return reflects the continuing ability to pay the proffered wage or the difference between the actual wages paid and the proffered wage in any relevant year. Further, it is noted that the proffered wage of $60,112 is substantially more than the total salaries and wages (line 8) paid to the petitioner's workers in any of the years shown on the tax returns. Additionally, the petitioner's gross receipts have declined by approximately 77% from 2001 to 2007. Thus, assessing the overall 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 director's decision, the current record does not establish that the beneficiary possessed the required three years of employment experience as set forth in the Form ETA 750. In a Notice of Intent to Dismiss (NOID), issued by the AAO on June 19, 2013, the AAO discussed the documentation submitted by the petitioner in support of the beneficiary's claimed experience as set forth below:

> In this matter, the Form ETA 750 reflects that counsel's office prepared it. On Part B of the Form ETA 750, signed by the beneficiary on April 23, 2001, it originally listed two jobs held by the beneficiary: (1) Employed as a carpenter full-time from January 1993 to October 1995 for [redacted] in Cuenca, Ecuador with no address given; (2) Employed in "Various Jobs" with no start date and an end date as "Present." Another position was added to Part B of the Form ETA 750 with a DOL stamp indicating a correction dated June 2, 2006. It is labeled as an "Addendum" and states that the beneficiary was employed as a carpenter at the [redacted] at [redacted] Cuenca, Ecuador from June 10, 1991 to October 25, 1995. No job duties are listed. Accompanying the Form ETA 750 is a letter with a signature indicating that [redacted] is the author. It is not dated but a notarization in Spanish indicates that the date of the signature may have been May 9, 2006, however it is unclear to what document the notarization refers. The translation is dated June 1, 2006. The Spanish version of the letter contains the word "Addendum" in English but the rest of the letter is in Spanish. The letter states that on April 17, 2001, the author indicated that the beneficiary had worked from January 1993 until October 1995 but the author now states that the beneficiary worked from June 10, 1991 until October 25, 1995. The original letter from this individual was dated April 17, 2001 and had verified the beneficiary's employment as a carpenter from January 1993 to October 1995 at a salary of $610 sucres per month.

The employment experience initially appearing on the Form ETA 750 was insufficient to establish 3 years of required employment as a carpenter and but was then amended to reflect different dates of employment for the beneficiary's employment in Ecuador.[7] It is unclear whether the first position listed as [redacted] is the same as his claimed employment at the '[redacted]' or whether these are two separate positions. Given the above changes to the beneficiary's prior work experience, the AAO finds that the evidence offered in insufficient to establish the beneficiary's required three years of employment experience in the job offered. 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 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

If the petitioner elects to respond to this notice, any evidence submitted in support of claims related to the beneficiary's qualifying employment must be corroborated by relevant, independent government records and evidence of wages paid and job duties performed. Any evidence and/or statements submitted by any individual must include five exemplars of his/her signature, must be notarized, and must be accompanied by photo identification. All foreign documents must be accompanied by complete English translations and must comply with 8 C.F.R. § 103.2(b)(3).

Counsel submitted a response to the NOID and explained that the addendum had been provided to the DOL in response to their observation that the beneficiary had not acquired three years of experience in the job offered as originally presented on Part B of the ETA 750. The beneficiary remembered that he had worked for a longer time for the [redacted] and procured another employment verification letter. While counsel's explanation may explain some of the procedural events that occurred prior to the filing of the Form I-140 with USCIS, given these changes which have occurred, the AAO still finds that based on the discrepancy, the beneficiary's qualifying employment must be supported by the first-hand evidence requested in the NOID, such as independent government records and actual evidence of wages paid by the Ecuadoran employer. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As the record currently stands, the petitioner has not established that the beneficiary acquired the requisite three years of experience in the job offered.

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[7] *See also Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

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*, 299 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 reviews appeals on a *de novo* basis).

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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.