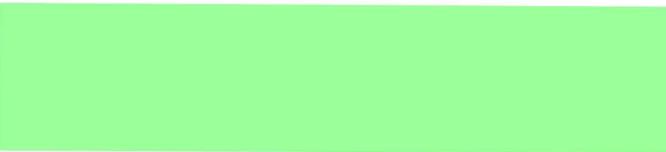


(b)(6)



U.S. Citizenship  
and Immigration  
Services



DATE: **MAR 18 2013**

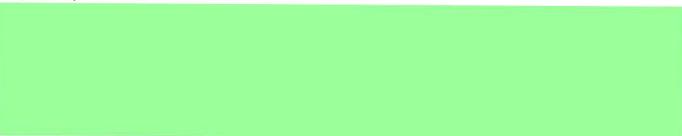
OFFICE: NEBRASKA SERVICE CENTER

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 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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner filed a motion to reopen and reconsider the director's decision. The director granted the motion to reopen and reconsider and affirmed its previous decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty 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 June 17, 2009 denial, an 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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$25,000 per year. The Form ETA 750 states that the position requires two years experience in the proffered position as a specialty chef or two years experience in the related position of cook.

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>

At the outset, the AAO notes that there are inconsistencies in the record with respect to the petitioner's identity. The Form ETA 750 lists the employer's name as [REDACTED] d/b/a [REDACTED]. The Form I-140 lists the name of the petitioner as [REDACTED] with Employer Identification Number (EIN) [REDACTED]. The Form I-290B, Notice of Appeal, was filed by [REDACTED]. The evidence in the record of proceeding includes the federal tax returns of [REDACTED] with EIN [REDACTED] and [REDACTED] d/b/a [REDACTED] with EIN [REDACTED]. Nothing in the record of proceeding explains these discrepancies or which entity will actually employ the beneficiary.

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 of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner does not state when it was established or how many workers it employs. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary claimed to have worked for the petitioner since May 1996.

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

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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).

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 record of proceeding includes Forms W-2 issued to the beneficiary by multiple organizations, including [REDACTED]; [REDACTED]. The record also contains Forms W-2 issued to the beneficiary by other organizations from 2001 to 2008, including [REDACTED], [REDACTED]). As the EIN of these organizations does not match the EIN on the petition, these Forms W-2 will not be considered as evidence of the petitioner's ability to pay the proffered wage.

As noted above, the record does not establish which entity is the beneficiary's actual intended employer. The AAO will consider the Forms W-2 separately. First, the record demonstrates that [REDACTED] paid the beneficiary for 2001 to 2005 as shown in the table below.

- In 2001, the Form W-2 showed wages paid to the beneficiary of \$9,748.63
- In 2002, the Form W-2 showed wages paid to the beneficiary of \$13,252.83
- In 2003, the Form W-2 showed wages paid to the beneficiary of \$9,813.58
- In 2004, the Form W-2 showed wages paid to the beneficiary of \$10,719.60
- In 2005, the Form W-2 showed wages paid to the beneficiary of \$2,692.80

From 2001 to 2005, [REDACTED] paid the beneficiary less than the proffered wage of \$25,000.

From 2006 to 2008, [REDACTED] paid wages as shown in the table below.

- In 2006, the Form W-2 showed wages paid to the beneficiary of \$17,123.75
- In 2007, the Form W-2 showed wages paid to the beneficiary of \$17,174.00
- In 2008, the Form W-2 showed wages paid to the beneficiary of \$721.25

The AAO notes that the social security number (SSN) of the beneficiary listed on Forms W-2 for 2007 and 2008 does not match the SSN listed for the beneficiary on Forms W-2 for 2001 to 2006.

Further, it is noted that on the petition, in part 3, no SSN is listed for the beneficiary.<sup>2</sup> Therefore, the actual recipient of the wages paid is in question, and the AAO cannot consider any of the Forms W-2 as evidence of wages paid to the beneficiary. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* This issue must be addressed in any further filings.

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

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<sup>2</sup> Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with Social Security number fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at [http://www.ssa.gov/OP\\_Home/ssact/title02/0208.htm](http://www.ssa.gov/OP_Home/ssact/title02/0208.htm) (accessed on April 26, 2011).

- **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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 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 13, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due.

As discussed above, there are multiple inconsistencies in the record with respect to the actual petitioner and EIN. While the labor certification lists the employer as [REDACTED], the petition lists the petitioner as [REDACTED]. The appeal was filed by [REDACTED] and the supporting evidence identifies at least two other entities, [REDACTED]. In the director's Request for Evidence (RFE) dated February 4, 2009, he requested, among other things, proof of the petitioner's ability to pay the proffered wage beginning on the priority date. He further noted that federal tax returns for Persian Foods, Inc. had been submitted for the years 2001 to 2004, and alerted the petitioner that the financial resources of an entity that had no legal obligation to pay the beneficiary's wage would not be considered. The petitioner's response to the RFE did not indicate which entity is the actual employer.

[REDACTED] tax returns demonstrate its net income for 2001 through 2009, as shown in the table below.

- In 2001, the Form 1120S stated net income<sup>3</sup> of \$39,886.00
- In 2002, the Form 1120S stated net income of \$26,115.00
- In 2003, the Form 1120S stated net income of -\$111,306
- In 2004, the Form 1120S stated net income of -\$43,981.00
- In 2005, the Form 1120S stated net income of \$43,863.00
- In 2006, the Form 1120S stated net income of \$129,049.00
- In 2007, the Form 1120S stated net income of -\$16,348.00
- In 2008, the Form 1120S stated net income of \$8,512.00
- In 2009, the Form 1120S stated net income of -\$15,041.00

Therefore, for the years 2003, 2004, 2007, 2008, and 2009, [REDACTED] did not have sufficient net income to pay the proffered wage.

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<sup>3</sup> 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) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 31, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2009, therefore, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

tax returns demonstrate its net income for 2001 through 2007, as shown in the table below. Its tax returns for 2008 and 2009 were not submitted.

- In 2001, the Form 1120S stated net income<sup>4</sup> of \$148,740.00
- In 2002, the Form 1120S stated net income of -\$12,030.00
- In 2003, the Form 1120S stated net income of \$36,930.00
- In 2004, the Form 1120S stated net income of \$69,771.00
- In 2005, the Form 1120S stated net income of \$39,028.00
- In 2006, the Form 1120S stated net income of -\$21,722.00
- In 2007, the Form 1120S stated net income of \$8,951.00

Therefore, for the years 2002, 2006, and 2007, did not have sufficient net income to pay 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.<sup>5</sup> 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.

tax returns demonstrate its end-of-year net current assets for 2003, 2004, 2007, 2008, and 2009, as shown in the table below.

<sup>4</sup> 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) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed January 31, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K for 2001 through 2009, therefore, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

<sup>5</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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

- In 2003, the Form 1120S stated net current assets of -\$17,136.00
- In 2004, the Form 1120S stated net current assets of -\$179,040.00
- In 2007, the Form 1120S stated net current assets of -\$85,228.00
- In 2008, the Form 1120S stated net current assets of -\$223,385.00
- In 2009, the Form 1120S stated net current assets of -\$301,748.00

Therefore, for the years 2003, 2004, 2007, 2008, and 2009, [REDACTED] did not have sufficient net current assets to pay the proffered wage.

[REDACTED] tax returns demonstrate its end-of-year net current assets for 2002, 2006, and 2007, as shown in the table below. As noted above, [REDACTED] did not submit its tax returns for 2008 and 2009.

- In 2002, the Form 1120S stated net current assets of \$11,663.00
- In 2006, the Form 1120S stated net current assets of -\$226,034.00
- In 2007, the Form 1120S stated net current assets of -\$232,138.00

Therefore, for the years 2002, 2006, and 2007, [REDACTED] 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.

On appeal, counsel submits a supplemental brief in which he asserts that the petitioner operated “at a loss for a period of time in order to improve their business position in the long run,” and therefore, the Service erred in examining the petitioner’s ability to pay based on net income and net current assets for each individual year. To support this assertion, counsel cites a memo, “Memorandum from Michael Aytes, Acting Associate Director, Domestic Operations, *AFM Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD 70/23.12, September 12, 2006,” (Aytes Memo), which counsel claims is a “superseding memo” to another memo regarding the ability to pay the proffered wage. See “Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004) (Yates Memo). Counsel concludes that the director’s denial based on the petitioner’s ability to pay “directly contradicts the guidance of its own controlling memorandum.” Counsel urges that, based on the Aytes’ Memo, the AAO should consider that the petitioner operated at a loss to improve its business position in the long run.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd.*

*Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

The Aytes' Memo relied upon by counsel instructs adjudicators to take into account that companies sometimes operate at a loss to improve their business position in the long run. According to the memo, an example of this would be research and development costs on a product line that is not expected to generate revenue for several years. In these cases, the memo instructs that sufficient documentation should be included in the record of proceeding which fully explains the sources of funding and the expected profit potential. The memo states that adjudicators should examine the specific facts presented. Additionally, the memo instructs that in the case of large, well-known corporations or other entities such as universities that have established records of filing petitions with USCIS, the financial information on the petition is usually sufficient.

In this case, the petitioner has not presented any documentation to show that it is temporarily operating at a loss to increase its profits in the future due to investment in an area such as research and development or another area which will increase profits in the future. Additionally, the petitioner has not shown that it is a well-known corporation or other entity with a history of filing petitions with USCIS. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Aytes Memo as counsel urges, that is, to not determine the petitioner's ability to pay the proffered wage each year, but rather, to "look at the long-term viability of the organization," then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage each year beginning on the priority date, which in this case is April 27, 2001. The circumstances to which counsel cites are not applicable to the current case, as discussed previously. Additionally, policy memoranda are not legally binding on the AAO.

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

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, counsel, in his supplemental brief, argues that the petitioner's historical track record of profitability, cash on hand sufficient to pay the proffered wage, and a reasonable expectation of increasing profits should be considered in evaluating the totality of the circumstances. The petitioner, however, has not demonstrated a historical record of profitability. The record contains tax returns from 2000 to 2009. During the ten-year period from 2000 to 2009, [REDACTED] reported negative net income for five years. Unlike in *Sonegawa* where the petitioning entity consistently earned a gross annual income of around \$100,000 over an eleven-year period, the petitioner in this case has not demonstrated a historical record of profitability.

Counsel argues that the petitioner has sufficient cash on hand to pay the proffered wage. Counsel states that the petitioner has been paying wages to its employees since it opened, and for this reason, the petitioner has sufficient cash on hand to pay the proffered wage. The petitioner's cash is shown on line 1 of Schedule L on the 1120S tax returns and has already been calculated in the petitioner's net current assets which were negative for the relevant years. Thus, there is nothing in the record to demonstrate that the petitioner has sufficient cash on hand to pay the proffered wage.

Counsel further argues that the petitioner has a reasonable expectation of increasing profits in the future because it is an established restaurant with a good reputation. However, the petitioner has not shown an increase in profits over the years such as that in *Sonegawa*, nor has it submitted any evidence to show how its reputation has led to increased profits in the past or would lead to expected profits in the future. The information submitted regarding the restaurant's reputation is from the years 1985, 1992, 1996, 1999, 2001, 2006, and 2009-10. Yet, despite this and despite being in business since 1984, the petitioner still reported negative income for five of the ten years of tax returns submitted. The record of proceeding fails to demonstrate how the petitioner's reputation has increased its profits.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Beyond the decision of the director,<sup>6</sup> the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years experience in the proffered position or in the alternate occupation of cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an assistant chef from April 1998 to the present and as a cook's assistant from May 1996 to March 1998 for the petitioner. No other experience is listed on the labor certification.

The record also includes an undated letter from [REDACTED] on [REDACTED] letterhead. The letter asserts that the beneficiary worked for Mr. [REDACTED] for five years, with three years as an assistant chef from March 1998 to April 2001.

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Board of Alien Labor Certification Appeals (BALCA). *See Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment

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<sup>6</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).

practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.<sup>7</sup>

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)<sup>8</sup> in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,<sup>9</sup> the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish “the ‘dissimilarity’ of the position offered for certification from the position in which the alien gained the required experience.” *Delitizer Corp. of Newton*, at 4. In its decision, BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are two years of experience in the job offered or two years of experience in the alternate position of cook. As the actual minimum requirements are two years of experience, the petitioner could not hire workers with less than two years of experience for the same position. See 20 C.F.R. § 656.21(b)(5) [2004].<sup>10</sup> On February 4, 2009, the director issued an RFE requesting proof of the beneficiary’s experience prior to the priority date. In response, the petitioner submitted an undated letter stating that the beneficiary had worked for him for five years, three of which were as an assistant chef from March 1998 to April 2001. The petitioner states that it employed the services of the beneficiary as an assistant chef for the following duties:

[L]earning the art of preparing and seasoning food to prescribed Persian and Near Eastern recipes. He was taught exactly how to prepare, cook, and serve all types of

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<sup>7</sup> In a subsequent decision, the BALCA determined that the list of factors for determining whether jobs are sufficiently dissimilar as stated in *Delitizer* is not an exhaustive list. See *E & C Precision Fabricating, Inc.*, 1989-INA-249 (Feb. 15, 1991) (en banc).

<sup>8</sup> 20 C.F.R. § 656.21(b)(5) [2004].

<sup>9</sup> See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

<sup>10</sup> In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the beneficiary was hired in the offered position with less than two years of experience, it is evident that the job duties of the offered position can be performed with less than the two years of experience listed on Form ETA 750. Therefore, two years of experience as a carpenter cannot be the actual minimum requirement for the offered position of carpenter.

Persian meals, including meat, fish and poultry dishes; appetizers, soups, and more. He was trained extensively in kitchen protocol, safety and sanitation standards, and shown how to make sure the food was handled well and cooked properly. He became well acquainted with maintenance and operation of important kitchen equipment. He also gained experience making sure the right portions were served in every meal and learned the delicate process of arranging food on a plate to make it appear appetizing.

These duties closely match the duties of the offered position of specialty chef, as stated by the petitioner in Item 13 of Form ETA 750:

Supervision of two kitchen helpers in menu planning, preparation of food prior to cooking, seasoning and cooking of food according to prescribed Persian ethnic/cultural traditions and recipes, including meat, poultry, seafood, and vegetarian dinners, appetizers, and soups, Persian and Near Eastern foodstuffs, apportioning and garnishing of food.

In order to utilize the experience gained with the employer, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA). The petitioner failed to establish the dissimilarity between the position the beneficiary previously held with the employer and the permanent position offered. Therefore, the AAO cannot consider the beneficiary's experience gained with the petitioner as qualifying experience to meet the requirements of the labor certification by the priority date.

In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, as the beneficiary's experience gained with the petitioner was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Also, beyond the decision of the director, the petitioner has 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 record of proceeding does not clarify which entity has control over the beneficiary and which entity is submitting the petition on behalf of the beneficiary. The ETA 750 lists the employer as "[REDACTED]" and the petitioner, as listed on the petition, is "[REDACTED]" with EIN [REDACTED].<sup>11</sup> On the Forms W-2 for 2001 to 2008, the beneficiary was paid by a combination of three different entities: [REDACTED], [REDACTED], and [REDACTED]. Based on the foregoing, the petitioner has not established the indicia of control as set forth in *Clackamus*. 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.

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<sup>11</sup> The AAO notes that this EIN contains only eight numbers when it should contain nine. See <http://www.irs.gov/pub/irs-pdf/p1635.pdf> (accessed February 12, 2013).