(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: MAY 2 3 2013 OFFICE: NEBRASKA SERVICE CENTER FILE

IN RE: Petitioner:
Beneficiary:

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

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

The petitioner[1] is a restaurant business. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor 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, and that it had failed to show that the beneficiary had the requisite work experience for the offered job position. 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 July 26, 2012 denial, the issues in this case are: (1) 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; and (2) whether the petitioner has demonstrated that the beneficiary's work experience meets the minimum requirements of the offered position as set forth in the underlying labor certification.

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]

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

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[1] According to tax returns in the record, the petitioner's correct corporate name appears to be The petitioner's name as listed on the Form I-140, Petition for Alien Worker, is "

[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).

> 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 30, 2001. The proffered wage as stated on the Form ETA 750 is $13.80 per hour ($28,704 per year). The Form ETA 750 states that the position requires a minimum of two years experience in the job proffered.

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

On the petition, the petitioner[4] claimed to have been established in 1996. However, the evidence in the record of proceeding, including the petitioner's tax returns, shows that the petitioner is structured

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[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[4] The record reveals that the original labor certification, filed on behalf of the beneficiary on the April 30, 2001 priority date and under DOL case number , was in fact filed by a different entity, , which is no longer in business. It appears that the DOL permitted the current petitioner, , to file an amended labor certification in approximately February 2007 for the identical job offer with the same priority date. The labor certification was subsequently approved under the same case number and priority date. The petitioner does not claim to be a successor-in-interest to . At the time the present Form ETA 750 was filed and accepted by the DOL, the substitution of a new employer was permitted by the DOL before a final determination was made, where the particular job opportunity was preserved in the same area of intended employment consistent with 20 C.F.R. § 656.30(c)(2). *See Horizon Science Academy,* 06-INA-46 (BALCA Mar. 8, 2007) (when the present Form ETA 750 was filed, employers could not be substituted unless the alien was working in the exact same position, performing the same duties, in the same area of intended employment, and for the same wages); *see also American Chick Sexing Assn'n & Accu. Co.*, 89-INA-320 (BALCA Mar. 12, 1991) (substitution made before final rebuttal to CO); *Int'l Contractors, Inc. & Technical Programming Services, Inc.*, 89-INA-278 (BALCA June

as a S corporation and was incorporated on July 22, 2004, after the April 30, 2001 priority date of the underlying approved labor certification in this case.[5] As noted, however, the petitioner must demonstrate its continuing ability to pay the beneficiary the proffered wage from the 2001 priority date onward. *See* 8 C.F.R. § 204.5(d).

As it appears the petitioner was incorporated only in 2004, which is after the priority date, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner for each year from the 2001 priority date through 2003.[6] The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for *each* year from the priority date is sufficient cause to dismiss this appeal. *See* 8 C.F.R. 103.2(b)(1). While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation at 8 C.F.R. § 204.5(g)(2).

The record does contain the tax returns for another business, for the years 2001 through 2003, prior to the petitioner's incorporation. In addition, the petitioner has proffered the tax returns of other businesses, including which counsel asserts are all "owned" by the same proprietor who owns the petitioning business. The AAO notes that the director, in the April 2012 NOID, noted that was located in the same area[7] as the petitioning business and was established on October 4, 1996, around

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13, 1990). DOL would also allow a new employer to substitute where it is the same job opportunity in the same area of intended employment. *See also Law Offices of Jean-Pierre Karnos,* 03-INA- (BALCA May 20, 2004) (where there was a new employer who took over the law practice of Karnos on his death, a new labor certification does not have to be filed for an accountant applicant where it is the same job opportunity in the same area of intended employment including the same job duties and wages). Substitutions or modifications of the labor certification are no longer permitted. 20 C.F.R. § 656.11. Although the regulation addresses changes to the identity of the beneficiary on the application, it also states that requests for modification of the labor certification "will not be accepted." 20 C.F.R. § 656.11(b).

[5] The director issued a Notice of Intent to Deny (NOID) on April 20, 2012, placing the petitioner on notice of this inconsistency in the date the petitioner was established. The petitioner's response to the NOID failed to address the issue that it was incorporated after the priority date at all.

[6] The petitioner has also failed to submit its tax returns for 2008 and 2011.

[7] The 2004 IRS Form 941, Employer's Quarterly Federal Tax Return, that was subsequently submitted identifies as the trade name for located at the petitioner's current address. However, the Federal Employment Identification Number (FEIN) on the return does not match the petitioner's, and the tax returns for in the record bear a different address for the business. The same trade name was also used by during that same time period, according to its 2004 quarterly tax return. A 2005 IRS Form 941 is also in the record for the petitioner's incorporated name, with the petitioner's FEIN and no separate trade name. An "employer" for immigration purposes includes a corporation with a valid FEIN. 20 C.F.R. § 656.3. Thus, these businesses cannot be considered to be the same entity. While these records indicate that there may be a relationship between the various businesses, such as a shared trade name, they do not establish the

the same time the petitioner claims to have been established on the Form I-140. The director observed that this may suggest that the two businesses may be related in some form, and afforded the petitioner an opportunity to establish a nexus and demonstrate the nature of the relationship between the two entities. The petitioner failed to address this issue in its response. Moreover, on appeal, the petitioner does not assert, and the record does not establish, that a *bona fide* successor[8] relationship exists between and the petitioner, such that the tax returns from 2001 through 2003 for could be utilized to establish the petitioner's ability to pay the proffered wage to the beneficiary for that period.

As previously referenced, the petitioner is structured as an S corporation, and claimed on the petition to have been established in 1996 and to currently employ 50 workers. However, the petitioner's tax returns indicate it was incorporated on July 22, 2004 and that its fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 21, 2001, the beneficiary did not claim to have worked for the petitioner. However, the petitioner has submitted an Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for the beneficiary for each year from 2005 through 2008.

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

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exact nature of that relationship and do not overcome the evidence in the record that they are separate and distinct entities. In any further filings, the petitioner must provide independent, objective evidence to establish any purported relationship between the separate corporate entities. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[8] Based on the evidence, the petitioner, ' are two separate entities. A labor certification employer must possess a valid FEIN. 8 C.F.R. § 656.3. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If a petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In this case, the record is not clear that the petitioning entity even existed at the time of the 2001 priority date, since it was only incorporated in 2004. Thus, the record does not show that the initial job offer was valid, unless the petitioner demonstrates that it is the *bona fide* successor-in-interest to the original labor certification entity or another qualifying entity. A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. As noted, the evidence in the record does not address this issue at all. In any future filings, the petitioner must address all three conditions to establish successorship.

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 Sonegawa*, 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.

Based on the evidence submitted, the petitioner paid the beneficiary the wages for the years 2005 through 2008, as shown below:

Tax Year	Wages Paid to Beneficiary	Proffered Wage ($28,704) Less the Wages Paid
2005	$ 8,831.22	$19,872.78
2006	$18,011.81	$10,692.19
2007	$18,388.68	$10,315.32
2008	$28,121.60	$ 582.40

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2001 onward. The record does not contain any W-2 forms for the beneficiary for the years 2001 through 2004. Therefore, for the years 2001 through 2004, the petitioner must establish its ability to pay the full proffered wage, and for 2005 through 2008, the petitioner must demonstrate its ability to pay the difference between the wages paid and the proffered wage as indicated above.

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, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 19, 2012 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 should be the most recent return available, but the record does not contain the petitioner's tax returns for the years 2008 and 2011.[9] Additionally, as noted previously, the petitioner has not submitted tax returns for the years 2001 through 2003. The petitioner's tax returns that are in the record

[9] The AAO notes, however, that the April 20, 2012 NOID issued by USCIS did not request the 2011 tax returns.

demonstrate its net income for the relevant years from the 2001 priority date onwards, as shown in the table below.

- In 2001, petitioner's tax return was not submitted.
- In 2002, petitioner's tax return was not submitted.
- In 2003, petitioner's tax return was not submitted.
- In 2004, the Form 1120S stated net income[10] (net loss) of ($41,299).
- In 2005, the Form 1120S stated net income (net loss) of ($30,379).
- In 2006, the Form 1120S stated net income of $13,216.
- In 2007, the Form 1120S stated net income (net loss) of ($86,473).
- In 2008, petitioner's tax return was not submitted.
- In 2009, the Form 1120S stated net income (net loss) of ($118,835).
- In 2010, the Form 1120S stated net income (net loss) of ($105,765).
- In 2011, petitioner's tax return was not submitted.

Therefore, the petitioner has demonstrated that it has the ability to pay the beneficiary the difference between the wages it paid the beneficiary and the proffered wage, using its net income for the year 2006. However, it has not shown an ability to pay the difference between the actual wages it paid the beneficiary and the proffered wage using its net income for the years 2005, 2007, or 2008, or to pay the full proffered wage to the beneficiary from 2001 through 2004 and from 2009 through 2011.

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.[11] 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.

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[10] 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), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed May 2, 2013) (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 the years 2004 through 2007 and 2009 through 2010, the petitioner's net income is found on Schedule K of its tax returns.

[11] 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.

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 the relevant period from the 2001 priority date onwards, as shown in the table below.

- In 2001, petitioner's tax return was not submitted.
- In 2002, petitioner's tax return was not submitted.
- In 2003, petitioner's tax return was not submitted.
- In 2004, the Form 1120S stated net current assets of $52,674.
- In 2005, the Form 1120S stated net current assets (liabilities) of ($15,164).
- In 2006, the Form 1120S stated net current assets (liabilities) of ($114,306).
- In 2007, the Form 1120S stated net current assets (liabilities) of ($172,672).
- In 2008, petitioner's tax return was not submitted.
- In 2009, the Form 1120S stated net current assets (liabilities) of ($45,807).
- In 2010, the Form 1120S stated net current assets (liabilities) of ($36,638).
- In 2011, petitioner's tax return was not submitted.

Therefore, aside from the year 2004,[12] the petitioner has not shown that it had sufficient net current assets to pay the proffered wage to the beneficiary for the years 2001 through 2011.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets. Moreover, as previously stated, for the years 2001 through 2003, 2008, and 2011, the petitioner failed to establish its ability to pay the beneficiary the proffered wage because it failed to submit its complete annual reports, federal tax returns, or audited financial statements, as required by regulation at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel contends that the net income and net assets of other businesses related to, and preexisting, the petitioner, should be considered in determining the petitioner's ability to pay the proffered wage from 2001 onwards. The petitioner has proffered tax returns and records for these other previously referenced businesses, including for that purpose. The record indicates that was established in 1996; was incorporated in 1999; and was established in 2000. the tax returns in the record show that the remaining businesses continued to exist and operate separately even after the petitioner's 2004 incorporation. Counsel asserts that all of these businesses, including the petitioner, are owned by the same "petitioner proprietor," and thus, the income and assets of the businesses could be utilized to pay the beneficiary the proffered wage during the relevant period from the 2001

[12] As previously noted, the petitioner's net income was sufficient to show its ability to pay the proffered wage in 2006.

priority date onwards. However, contrary to counsel's contention, none of the referenced businesses, including the petitioner, are sole proprietorships. Rather, as indicated on their respective tax returns, like the petitioner, is a corporation, and both are limited liability companies. All four businesses have their own federal employer identification numbers and exist as separate entities.

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." Here, the petitioning business, ' is a S corporation, existing separately and distinctly from its principal shareholder. Thus, unlike a sole proprietorship, the financial resources of the petitioner's shareholder, including his assets and other financial holdings (such as income or assets generated from other businesses), may not be utilized in determining the petitioner's ability to pay.

The AAO further notes that the record does not indicate that the petitioner and these other entities are part of an affiliated group, in which the member corporations are eligible to file a consolidated return. *See* 26 U.S.C. § 1501. Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled.

Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns (Schedule O to IRS Form 1120). As noted, however, in this case, the record of proceeding and the petitioner's tax returns do not indicate that the petitioner is part of such a controlled group.

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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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*, 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 petition indicates that the petitioning business was established in 1996. However, the record contains no evidence of the business' claimed longevity, and to the contrary, it demonstrates that the business was incorporated and came into legal existence only in July 2004. The record also lacks evidence of the petitioner's reputation in the industry or in its service area, and of the number of employees it maintains. Moreover, the tax returns in the record do not reflect the business' growth or increasing gross receipts. In fact, they show a steady decline in the gross receipts of the business between 2005 and 2010, as well as in the wages paid out yearly. The AAO also notes that, except for 2004 and 2006, the record failed to demonstrate that the petitioner had the ability to pay the full proffered wage in any year since 2001. 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.

The director also determined that the petitioner had failed to demonstrate that the beneficiary satisfied the minimum requirements of the offered job as stated on the labor certification. The Form ETA 750 indicates that a minimum of 24 months experience as a cook is required for the offered position. An undated letter in the record from the owner of [redacted] indicates that the beneficiary was employed there as a full time cook and prep cook from April 30, 1998 to April 2001. The AAO notes that the letter is vague and does not set forth in any specificity a description of the training the beneficiary received or his work experience with [redacted], as required under 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter also fails to set forth the length of employment the beneficiary was employed by [redacted] in each capacity, as both a cook and a prep cook. The AAO also observes that the labor certification requires two years of experience in the offered position of cook, and does not indicate that experience in a related occupation, such as a prep cook, would be acceptable. Thus,

the evidence does not show that the beneficiary has the requisite two years of experience in the offered position. Furthermore, as the director pointed out, the dates of employment in this letter conflict and are inconsistent with those provided in other documents in the record. For instance, the amended labor certification (filed in February 2007) states that the beneficiary gained his experience with from 1992 to August 2004 and at from August 2004[13] onward. Yet, the beneficiary indicated in his Form G-325A, Biographic Information, dated August 6, 2007, that he was employed at from July 1992 to March 2005 and at from April 2005 forward.

On appeal, counsel contends that USCIS erred in finding the letter from to be insufficient to establish the beneficiary's work experience, and asserts that as the proprietor of , the owner's attestation of the beneficiary's employment there as a cook and prep cook should be accepted. Counsel's contention, however, disregards the inconsistencies in the record, including in the letter, regarding the beneficiary's experience, as set forth above. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Here, the petitioner has made no attempt, before USCIS or on appeal, to address or provide an explanation for these inconsistencies. Further, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires a description of the duties performed and not just a job title. Accordingly, the petitioner has failed to demonstrate that the beneficiary satisfies the minimum requirements for the offered position as set forth in the labor certification.

In summary, the petitioner has not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; and (2) that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date.

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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[13] The AAO notes that the experience acquired after the priority date cannot be utilized to establish the beneficiary's qualifications, as the beneficiary must meet the terms of the labor certification as of the priority date. *See Matter of Wing's Tea House*, *supra.*