U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2009
WAC 05 062 51732

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center (director) denied the employment-based preference visa petition based on the petitioner's failure to establish that the beneficiary met the experience requirements of the labor certification as of the priority date of the visa petition, April 11, 2002. The petitioner appealed to the Administrative Appeals Office ("AAO"), and overcame the above grounds for denial. However, the AAO found that the petitioner had not established its continuing ability to pay the proffered wage from the priority date of the labor certification, April 11, 2002. The AAO remanded the petition to the director to issue a request for evidence (RFE) related to the new basis for denial, and then for the director to render a determination on the merits of the petition. The director issued a Request for Evidence (RFE). The petitioner provided a response and new evidence. The director stated that the petitioner had not overcome the ground for denial on the issue of ability to pay the proffered wage and certified his decision to the AAO for review. The director's decision on remand will be upheld; the appeal will be dismissed. The director's decision is therefore affirmed, and the petition will remain denied.

The petitioner is a health care services business. It seeks to employ the beneficiary permanently in the United States as a medical and health services manager ("Clinical Staffing Supervisor"). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director, on remand, determined that the petitioner had not established that it had the continuing ability to pay the proffered wage from the priority date and denied the petition accordingly.

Counsel for the petitioner has not submitted a brief or additional evidence on certification.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;

> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On August 17, 2007, after the visa petition was remanded to the director for further consideration and entry of a new decision, the director issued a RFE and requested additional evidence of the petitioner's continuing ability to pay the proffered wage from the priority date of the visa petition. The director specifically requested:

> It does not appear that the petitioner has sufficient income to pay the beneficiary's wage as well as the other aliens they have petitioned. Provide evidence of the petitioner's ability to pay the beneficiary's 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 (with appropriate signature(s)), or audited financial statements. If the petitioner's company has one hundred (100) or more workers, the petitioner may instead provide a statement from a financial officer of the organization that establishes the prospective employer's ability to pay the proffered wage.
>
> The petitioner is requested to provide this evidence from April 11, 2002 to the present.
>
> Submit copies of the U.S. Company's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last 8 quarters that were accepted by the State of California. The forms should include the names, social security numbers, and number of weeks worked for all employees.

The petitioner was given until November 9, 2007 to submit the requested evidence. In response, counsel submitted a brief, copies of the petitioner's 2002 through 2006 Forms 1120S, U.S. Income Tax Returns for an S Corporation, copies of the 2002 through 2005 Forms W-2, Wage and Tax Statements, issued by the petitioner on behalf of the beneficiary, copies of the 2003 and 2004 Forms 1099-MISC, Miscellaneous Income, issued by the petitioner on behalf of the beneficiary, and copies of the petitioner's 2005 through September 2007 Forms DE-6. The director determined that the petitioner had not established its continuing ability to pay the proffered wage to the beneficiary and the additional sponsored beneficiaries from their respective priority dates, and on December 11, 2007, the director denied the visa petition and certified her decision to the AAO.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [U.S. Citizenship and Immigration Services (USCIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 11, 2002. The proffered wage as stated on the Form ETA 750 is $39.40 per hour or $81,952 annually.

The petitioner's 2002 through 2006 Forms 1120S reflect ordinary incomes or net incomes of $3,122, $22,254, $26,298, $23,217, and $33,903, respectively. The petitioner's 2002 through 2006 Forms 1120S also reflect net current assets of $0, $60,574, $61,453, $63,543, and $98,415, respectively.

The 2002 and 2005 Forms W-2, issued by the petitioner on behalf of the beneficiary, reflect wages paid to the beneficiary of $35,150, $29,183.36, $28,376.71, and $12,541.69, respectively.

The 2003 and 2004 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, reflect additional nonemployee compensation paid to the beneficiary of $30,500 and $32,000, respectively.

The petitioner's 2005 through September 2007 Forms DE-6 show that the petitioner employed the beneficiary in the first two quarters of 2005, but not subsequent.

In response to the RFE, counsel states:

> As you will note, that the petitioner had sufficient funds to pay the difference between the proffered wage of $81,952 and the actual wages paid to [the] beneficiary may be gleaned from petitioner's net income figures, and net current asset figures, as reflected on his federal income tax returns. 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).
>
> From an examination of the chart provided, the year 2002 poses a problem for petitioner to demonstrate financial resources sufficient to pay the proffered wage. In this regard, the totality of the circumstances affecting the petitioning business should be considered, as the evidence warrants such consideration (*See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). The conclusion should be that petitioner has sufficient income to pay the beneficiary's wage.

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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 22, 2002, the beneficiary does not claim the petitioner as a past or present employer. However, counsel has submitted the 2002 through 2005 Forms W-2, issued by the petitioner on behalf of the beneficiary, and the 2003 and 2004 Forms 1099-MISC, issued by the petitioner on behalf of the beneficiary, as evidence that the petitioner employed the beneficiary in 2002 through 2005 (The Forms DE-6 show that the beneficiary was employed in the first two quarters of 2005). In addition, USCIS records indicate that the petitioner filed additional immigrant and nonimmigrant petitions (approximately 19) for other beneficiaries with the same priority date year of 2002 and subsequent years. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of $81,952 and the actual wages earned by the beneficiary

in the pertinent years (2002 through 2006) and all of the wages of the additional sponsored beneficiaries from their respective priority dates. The following chart shows the difference between the proffered wage and the actual wages paid to the beneficiary in 2002 through 2006.

YEAR	PROFFERED WAGE	WAGES EARNED	DIFFERENCE
2002	$81,952	$35,150	$46,802
2003	$81,952	$29,183.36 (W-2) $30,500 (1099-MISC)	$22,268.64
2004	$81,952	$28,376.71 (W-2) $32,000 (1099-MISC)	$21,575.29
2005	$81,952	$12,541.69	$69,410.31
2006	$81,952	$0	$81,952

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). 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.

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 116. "[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 November 8, 2007 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 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2002 through 2006, as shown in the table below.

- In 2002, the Form 1120S stated net income[1] of $3,122.
- In 2003, the Form 1120S stated net income of $22,254.
  In 2004, the Form 1120S stated net income of $26,298.
- In 2005, the Form 1120S stated net income of $23,217.
- In 2006, the Form 1120S stated net income of $33,903.

Therefore, for the years 2002 through 2005, the petitioner did not have sufficient net income to pay the difference between the proffered wage of $81,952 and the wages earned by the beneficiary in

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[1] 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) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed November 21, 2008) (indicating that Schedule K is a summary schedule of all shareholder's 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 2002 and 2004 through 2006, the petitioner's net income is found on Schedule K of its tax return in 2002 and 2004 through 2006. In 2003, the petitioner did not have additional income, credits, deductions, or other adjustments shown on its Schedule K; therefore, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S.

2002 through 2005 along with the additional wages of the other sponsored beneficiaries with the same priority date year and subsequent. In addition, the petitioner did not have sufficient net income to pay the entire proffered wage of $81,952 and the additional wages of the other sponsored beneficiaries with the same priority date year and subsequent in 2006.

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.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002 through 2006, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of $0.
- In 2003, the Form 1120S stated net current assets of $60,574.
- In 2004, the Form 1120S stated net current assets of $61,453.
- In 2005, the Form 1120S stated net current assets of $63,543.
- In 2006, the Form 1120S stated net current assets of $98,415.

While the petitioner's 2003 through 2005 Forms 1120S appear to be sufficient to pay the difference between the proffered wage of $81,952 and the actual wages paid to the beneficiary in 2003 through 2005, the petitioner is also obligated to show that it had sufficient funds to pay the beneficiary in addition to the remaining sponsored beneficiaries with the same priority date year and subsequent. In 2002, the petitioner did not have sufficient funds to pay the difference of $46,802 between the proffered wage of $81,952 and the actual wages paid to the beneficiary in 2002 of $35,150 along with the additional wages of the remaining sponsored beneficiaries with the same priority date year and subsequent from its net current assets in 2002. In 2006, the petitioner did not have sufficient funds to pay the entire proffered wage of $81,952 and the additional wages of the remaining sponsored beneficiaries with the same priority date year and subsequent from its net current assets in 2006.

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.

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[2]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.

In response to the director's RFE, counsel claims that the petitioner has established its ability to pay the proffered wages to the beneficiary based on its net income figures, net current asset figures, and on *Matter of Sonegawa,* 12 I&N Dec.612 (Reg. Comm. 1967). Counsel makes no reference to the additional wages of the remaining sponsored beneficiaries with the same priority date year and subsequent years and fails to address the petitioner's ability to pay the additional sponsored workers.

Counsel is mistaken; the petitioner has not established its ability to pay the proffered wage. It should be noted from the outset that the petitioner has not submitted complete income tax returns for any of the years, 2002 through 2006, which would include its Schedules K-1, Shareholder's Share of Income, Deductions, Credits, etc.

Counsel advocates combining the petitioner's net income with its net current assets to demonstrate the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. USCIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, USCIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, USCIS may consider the totality of the circumstances concerning a petitioner's financial performance. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonegawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of $6,240 was considerably in excess of the employer's net profit of $280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional

Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner's tax returns indicate it was incorporated on March 22, 2000. The petitioner has provided its tax returns for 2002 through 2006, with none of the tax returns establishing the petitioner's ability to pay the proffered wage of $81,952 and the additional wages of the remaining sponsored beneficiaries with the same or subsequent priority date year.[3] If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition which it has not done. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry or of any temporary and uncharacteristic disruption in its business activities. 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 and the additional salaries for the additional petitions from the priority date and continuing to present.[4]

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[3] While an employer's ability to pay the proffered wage may not be an issue before USCIS in adjudicating nonimmigrant petitions, the instant petition is an immigrant petition and the petitioner's ability to pay is at issue. The number of nonimmigrant and immigrant petitions that the petitioner has filed for other workers does not suggest that the petitioner has the available funds to pay the instant beneficiary the proffered wage or the other sponsored workers.

[4] The AAO also notes that the Federal Employer Identification Number (FEIN) the petitioner lists on Form I-140 is different than that on the petitioner's Form 1120S. Therefore, it is unclear if the petitioner and the entity to which the tax returns belong are one and the same. If the petitioner wishes to pursue the instant case, this issue must be resolved. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether the pre-existing family, business, or personal relationship may have influenced the labor certification. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). It appears that the beneficiary may be part owner of the petitioner. The beneficiary is listed as an officer and director on the petitioner's Statement of Information, filed on August 25, 2003. In addition, the beneficiary's name is listed on the petitioner's 2003 and 2004 business licenses.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor advisory opinion in invalidating the labor certification. The regulation at 20 C.F.R. § 656.30(d) provides that [USCIS], the Department of State or a court may invalidate a labor certification upon a determination of fraud or willful misrepresentation of a material fact involving the application for labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

Given that the beneficiary appears to be part owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. The observations noted above suggest that further investigation, including consultation with the Department of Labor may

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shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

be warranted, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

For the reasons discussed above, the petition may not be approved.[5]

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 director's decision of December 11, 2007 is affirmed, and the petition is denied.

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[5] The AAO notes that the petitioner failed to address another issue raised in the AAO's decision of July 27, 2007. That issue was documented in footnote 3. The AAO noted the name and address changes of the employer and the status of all entities and , and informed the petitioner that any future proceedings should clarify where the beneficiary will work, for whom the beneficiary will work, and the current status and relationships of all the entities.