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

[redacted]

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DATE: NOV - 3 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director also dismissed the petitioner's subsequent motion to reconsider and affirmed the petition's denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a ceramic machining firm. It seeks to employ the beneficiary permanently in the United States as a supervisory ceramic machinist. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage to the beneficiary from the priority date onward. The director denied the petition on June 7, 2011.

The petitioner, through counsel, filed a motion to reconsider and submitted additional evidence. The director dismissed this motion on July 27, 2011 and reaffirmed the petition's denial.

On appeal, counsel contends that the director should have granted the motion to reconsider and that the petitioner has demonstrated the ability to pay the proffered wage. Counsel indicates on the Notice of Appeal or Motion, Form I-290B that a brief/and or additional evidence would be submitted to the AAO within 30 days. As nothing further has been received to this office, the AAO will render this decision on the record as it stands.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

For the reasons set forth below, the AAO concurs with the director's finding that the petitioner has not established the continuing ability to pay the proffered wage, although notes that counsel's motion to reconsider would more properly be considered as a motion to reopen as it was accompanied by additional evidence.[1]

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

[1] The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

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 ETA Form 9089, 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 the ETA Form 9089, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, the priority date is February 12, 2010. For the certified position of a supervisory ceramic machinist, the ETA Form 9089 requires no education, no training and 24 months (two years) of work experience in the job offered of supervisory ceramic machinist. Part H.10 indicates that experience in an alternate occupation is not acceptable. The job duties are described in Part H.11 as; "read blue print drawing (both Metric and English), operate and read all shop tools. Supervise and oversee the work of 5 employees." The proffered wage is stated as $19.01 per hour, which amounts to $39,540.80 per year.

On Part 5 of the Immigrant Petition for Alien Worker, (Form I-140), filed on November 5, 2010, it is claimed that the petitioner was established in 1959 and employs five workers.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the

evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In support of its ability to pay the proffered wage of $39,540.80 per year the petitioner has submitted copies of financial statements for 2009 and 2010 that are compilations. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

With the compilation, counsel also submitted a letter, dated May 31, 2011, from its accountant, [redacted] states that it is the intention of the petitioner's president to remove staff in order to employ the beneficiary. [redacted] states that "[i]f everything else remained the same, [the petitioner's president] would have to remove 1.032 employees in order to employ [the beneficiary] at an annual rate of $39,540.80." The AAO is not persuaded that the petitioner has demonstrated an ability to pay the proffered wage by this statement. It is further noted that the workers to be dismissed are not identified, nor has evidence been submitted that shows their full-time employment and wages paid for the performance of the offered position. If that worker performed other kinds of work, then the beneficiary is not considered as a potential replacement.[2]

The petitioner has also provided copies of its 2009 and 2010 Form 1120, U.S. Corporation Income Tax Return.[3] They indicate that the petitioner's fiscal year is a standard calendar year. The director issued a Request for Evidence (RFE) on May 2, 2011. Relevant to the ability to pay the proffered wage, the petitioner's 2010 tax return reflects the following information:

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[2] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

[3] As the 2009 return represents information prior to the priority date of the instant case, it will only be considered generally in a review of the petitioner's overall circumstances.

Net Income[4]	$ 17,050
Current Assets	$ 63,009
Current Liabilities	$ 82,086
Net Current Assets	- $ 19,077

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.[6]

It is noted that if a 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given period, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In

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[4]The petitioner is was a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[6] A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

this case, the ETA Form 9089 indicates that the petitioner employed the beneficiary as a machinist from March 12, 2004 until November 1, 2007, but the record contains no evidence that the petitioner has employed and paid the beneficiary during any period from the priority date onward.

It is noted that the director issued a request for evidence on May 2, 2011, requesting *inter alia*, for copies of the petitioner's state unemployment and wage reports for 2010 identifying the workers employed and the wages paid by the petitioner. The petitioner did not submit this evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses as suggested by counsel in this case. *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.

With respect to depreciation as claimed by counsel, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

> accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 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).

As set forth above, in 2010, neither the petitioner's $17,050 in reported net income nor its net current assets of -$19,077 could cover the proffered wage of $39,540.80 or demonstrate the petitioner's continuing ability to pay the proffered wage. Therefore, the petitioner has not established that it could pay the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date onward.

It is noted that counsel asserts that the petitioner has demonstrated sufficient assets to pay the proffered wage. In support of this contention, she submitted a letter, dated June 27, 2011, from [redacted] the petitioner's accountant, in which it is stated that the $85,056 listed on Schedule L as "loans to shareholders" of the 2010 tax return may be considered a current asset because it is an obligation that would be paid back in less than a year.

It is noted that "loans to shareholders" is set forth on line 7 of Schedule L, which is not included as part of the current assets listed on line(s)1 through 6. It is additionally noted that the $85,056 is not set forth on the petitioner's compiled 2010 financial statement as a current asset. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, loans to shareholders cannot be used to establish the petitioner's ability to pay the beneficiary's proffered wage.

It is noted that counsel cites *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) on appeal. *Matter of Sonegawa* is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa*

petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In this case, as noted above, the petitioner has not submitted requested evidence in the form of state unemployment and wage reports for 2010 identifying the workers employed and the wages paid by the petitioner. It is also noted that as shown by the 2009 corporate tax return that is contained in the record, the petitioner reported negative net income and negative net current assets. Neither the 2009 nor the 2010 tax return show sufficient net income to cover the proffered wage or present such analogous factual circumstances to *Sonegawa* present in this case that would overcome the evidence reflected in the tax returns. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude, based on the current record that the petitioner has established that it has had the continuing ability to pay the proffered wage.

For the reasons explained above, the petition may not be approved. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage from the priority date onward.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary has acquired two years of employment experience in the job offered as a supervisory ceramic machinist.[7] The employment verification letter contained in the record is from [redacted]

[7] The regulation at 8 C.F.R. § 204.5(l)(3) further provides in pertinent part:

> (ii) *Other documentation*—
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> > (A). *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the

[redacted] It is dated June 30, 2010 and signed by [redacted] No job title is given as is required by 8 C.F.R. § 204.5(l)(3). It is stated that the beneficiary worked as a ceramic machinist from March 30, 1990 to March 1, 2001. The letter does not state whether the work was part-time or full-time and, although describing the beneficiary's duties, fails to confirm that he performed as a supervisory ceramic machinist, which is the offered job as stated on the ETA Form 9089. The petitioner does not allow for qualification based on any alternate occupation. Finally, the Form I-140, Immigrant Petition for Alien Worker states that the beneficiary arrived in the United States on June 8, 1998, whereas the employment verification letter states that the beneficiary worked for the Atico Co. from March 1990 to March 2001. The petitioner has not offered any clarification or explanation of this discrepancy. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not established that the beneficiary had two years of employment experience in the job offered as a supervisory ceramic machinist.

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

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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experience of the alien.

(B) Skilled Workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.