(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

[redacted]

DATE: AUG 2 7 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a corporation that owns and operates an automotive service station. It seeks to permanently employ the beneficiary in the United States as an auto mechanic. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The priority date of the petition, which is the date an office within the DOL employment services system accepted the labor certification for processing, is April 27, 2001. *See* 8 C.F.R. § 204.5(d).

On April 28, 2009, the director denied the petition, concluding that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. After examining the annual net income and net current asset amounts stated on the petitioner's federal income tax returns from 2001 to 2007, the director found that the petitioner failed to demonstrate its ability to pay the annual proffered wage of $46,300.80 in any of those years.

On appeal, the AAO affirmed the director's decision. In its November 1, 2012 decision, the AAO found that the petitioner demonstrated sufficient net current assets to pay the proffered wage in 2008. But the AAO determined that the petitioner failed to establish its ability to pay the annual proffered wage from 2001 through 2007, as the director found.

The motion to reopen and reconsider complies with the regulation at 8 C.F.R. § 103.5(a)(2) because it states new facts and is supported by documentary evidence. The motion also complies with the regulation at 8 C.F.R. § 103.5(a)(3) because counsel asserts that the AAO misapplied law or policy.

The record documents the procedural history in this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

The AAO conducts 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 on motion.[2]

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[1] Section 203(b)(3)(A)(i) of the Act grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] The instructions to Form I-290B, Notice of Appeal or Motion, which the regulation at 8 C.F.R. §

In its motion, the petitioner submits copies of its federal tax returns, its quarterly payroll tax reports, the beneficiary's federal tax returns, and the beneficiary's Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements from 2009 through 2011. The petitioner also submits: copies of the tax returns of its sole shareholder from 2008 through 2011; letters from its shareholder and his accountant; its monthly bank statements from 2009 through October 31, 2012; and documentary evidence of the disposition of the mortgage and deed to the petitioner's premises.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS next examines whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[3] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner did not previously establish that it had ever employed the beneficiary. The copies of the beneficiary's Forms W-2 in this motion, however, show that the petitioner paid him the following annual amounts: $46,300.80 in 2009 and 2010; and $47,191.20 in 2011. Because these amounts equal or exceed the annual proffered wage of $46,300.80, the petitioner has established its ability to pay the proffered wage in 2009, 2010 and 2011.

The petitioner, however, must demonstrate a "continuing" ability to pay the proffered wage from the petitioner's priority date onward. *See* 8 C.F.R. § 204.5(g)(2). The petitioner's ability to pay the beneficiary's proffered wage from 2008 through 2011 therefore fails to establish its ability to pay the proffered wage from 2001 through 2007.

Counsel argues that the closing balances on the petitioner's monthly bank account statements "added together and in some cases each month" demonstrate its ability to pay the beneficiary's proffered wage. In addition to the monthly bank statements from 2009 through October 31, 2012 in the petitioner's motion, the petitioner previously submitted copies of its monthly bank statements from 2000, and from 2002 through 2008.[4]

103.2(a)(1) incorporates into the regulations, allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[3] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

[4] A November 27, 2012 letter from the petitioner's sole shareholder states that basement flooding

As the AAO explained in its previous decision, a petitioner's bank account statements do not constitute evidence of funds available to pay a proffered wage. First, bank statements are not among the three types of evidence that the regulation at 8 C.F.R. § 204.5(g)(2) requires to demonstrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not explained why the annual reports, federal tax returns, or audited financial statements that the regulation at 8 C.F.R. § 204.5(g)(2) requires is inapplicable or otherwise paints an inaccurate financial picture of it. Second, bank statements show only the amounts in accounts on given dates and do not reflect a sustainable ability to pay a proffered wage. Third, the petitioner did not submit any evidence to demonstrate that the funds in its bank account show additional available funds not included in its tax returns as taxable income (income minus deductions) or as cash specified on Schedule L to IRS Form 1120 U.S. Corporation Income Tax Return. USCIS has already considered the petitioner's taxable income and cash, as reported in its tax returns, as part of the petitioner's annual net income and net current asset amounts in determining the petitioner's ability to pay.

Even if the bank account statements reflected available funds to pay the proffered wage, counsel's proposal to add the monthly closing balances together would overstate the amount available. The record shows that the bank statements refer to the same, single checking account, the monthly closing balances of which fluctuate depending on the business deposits received and/or checks written in the relevant months. The monthly closing balances are therefore like snapshots of the amount of money in the account at the end of each month. Combining the monthly closing balances would reflect a greater account balance than actually exists because the monthly closing balances provide the basis for the opening balances of the immediately following months. For the foregoing reasons, the petitioner's bank statements do not demonstrate its ability to pay the beneficiary's proffered wage from 2001 through 2007.

Counsel also asserts that the petitioner's service station property, which a 2009 appraisal of record values at $1.75 million to $2 million, proves its ability to pay the proffered wage. Counsel argues that the petitioner could have used the property as collateral in obtaining a loan to pay the proffered wage since the 2001 priority date. The petitioner submits evidence that the property's mortgage was discharged in 1997 and that the petitioner's sole shareholder and his wife transferred the property to the petitioner in 2006. The petitioner also submits letters from its shareholder and his accountant, stating that the shareholder's personal tax returns from 2001 through 2010 erroneously reported mortgage interest that should have been classified as repair expenses on rental property.[5]

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destroyed the petitioner's monthly bank statements from 2001 and part of 2003. The letter states that the bank did not save its records long enough to issue new statements.

[5] In its previous decision, the AAO noted that the mortgage interest expenses reported on the shareholder's personal tax returns appeared to undermine the petitioner's claim that no mortgage remained on the service station property. On motion, the petitioner has not submitted any evidence - such as amended, certified copies of the shareholder's personal tax returns - to corroborate its claim of inadvertent errors on the shareholder's tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

As the AAO explained in its previous decision, the petitioner's ability to obtain a loan does not constitute a reliable measure of its ability to pay the proffered wage. The loan would incur debt, increasing the petitioner's liabilities and potentially harming its financial condition. In addition, the record shows that the petitioner's sole shareholder and his wife owned the service station property from 1992 until 2006. Thus, it does not appear that the petitioner could have obtained an equity loan against the property before it acquired ownership of the property in 2006. Before 2006, the property constituted an asset of the petitioner's shareholder and his wife, which USCIS cannot consider to demonstrate the corporate petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980) (a corporation is a separate and distinct legal entity from its owners and shareholders); *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) ("[N]othing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.") The petitioner therefore has not established its continuing ability to pay the proffered wage through its ability to obtain a loan against the service station property.

Counsel also argues that the petitioner's tax returns report cash, accounts receivable, inventories, depreciation, total wages paid, and net incomes that it could have used to pay the beneficiary's proffered wage from the petitioner's priority date onward.

The AAO rejected this argument in its previous decision. USCIS has already considered the annual net income amounts reflected on the petitioner's tax returns in determining the petitioner's ability to pay the proffered wage and found them insufficient. USCIS also considered the petitioner's cash, inventories and accounts receivable when analyzing the petitioner's annual net current asset amounts for the relevant years. Moreover, the consideration of current assets like cash, inventories and accounts receivable, without offsetting them against current liabilities for the relevant periods, fails to provide an accurate picture of a petitioner's financial condition.

Although depreciation costs do not represent actual cash expenditures, USCIS will not consider depreciation as available funds to pay a beneficiary's proffered wage. Depreciation reflects an actual cost of doing business through either the decrease in value of deteriorating buildings and equipment, or the accumulation of funds to replace them. Federal courts have upheld USCIS's disregard of depreciation in determining a petitioner's ability to pay the proffered wage. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d at 118; *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537. USCIS will therefore not consider the petitioner's depreciation as available funding to pay the beneficiary's proffered wage.

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proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972). Further, a petitioner may not materially alter a deficient petition in an effort to make it conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

In addition, the amount of wages that the petitioner has paid to others does not establish its ability to pay the proffered wage to the beneficiary, unless the petitioner demonstrates that the beneficiary has or will replace an existing worker(s) or contractor. The petitioner, however, has not claimed that the beneficiary has or will replace anybody. Nor has the petitioner submitted evidence of: the names of the workers or contractors to be replaced; their wages; their current or past employment; and that the petitioner has or will replace them with the beneficiary. The petitioner would also have to establish that the positions of any workers to be replaced involve the same duties as those set forth on the labor certification for the offered position of auto mechanic.

Counsel further argues that the tax returns of the petitioner's sole shareholder show that he has sufficient personal income to pay the beneficiary's proffered wage, if necessary. As discussed previously, however, USCIS cannot consider the personal assets of a shareholder to demonstrate a corporate petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N at 530 (a corporation is a separate and distinct legal entity from its shareholders and owners); *Sitar v. Ashcroft*, 2003 WL 22203713.

Finally, counsel asserts that USCIS abused its discretion by failing to consider "the totality of the circumstances" in determining the petitioner's ability to pay the proffered wage. Counsel argues that tax returns do not accurately reflect a petitioner's financial abilities and that USCIS should consider such factors as the number of years the petitioner has been in business, its historical record of growth, its number of employees, and its reputation.

Contrary to counsel's assertion, the AAO, in its previous decision, considered the very factors that counsel cites in accordance with *Matter of Sonegawa*, 12 I&N Dec. at 612. In light of the petitioner's additional evidence in its motion, the AAO will reconsider the totality of the circumstances regarding the petitioner's ability to pay the proffered wage.

In *Sonegawa*, the petitioner 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 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, its 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 longevity of the petitioner's business weighs in its favor. The record shows that the petitioner was incorporated in 1992 and has been doing business for more than 20 years. According to the petitioner's tax returns, its revenues and total wages paid to employees have generally increased from 2001 through 2011. Its number of employees has also increased. It claimed two employees when it filed the petition in January 2008. The evidence submitted in its motion shows that, as of the third quarter of 2012, it employed five workers.

But the petitioner's tax returns also show that the annual proffered wage of $46,300.80 exceeded the total annual wages that the petitioner paid to all of its employees in 2001, 2002, 2006 and 2007. Also, the petitioner has not submitted any evidence of uncharacteristic business losses or expenses that prevented it from establishing its ability to pay the proffered wage, nor has it claimed that the beneficiary has or will replace other employees or contractors. Counsel argues that the longevity of the petitioner's business establishes its "solid" reputation. However, the petitioner has not submitted any evidence of its business reputation. *See Matter of Soffici*, 22 I&N Dec. at 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190 (going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO concludes that the petitioner has not established its ability to pay the proffered wage from the petition's priority date onward.

Beyond its previous decision and the director's decision,[6] the AAO also finds that the petitioner has not established that the beneficiary met the qualifications for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the beneficiary's qualifications, USCIS must examine the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-*

[6] The AAO may deny an application or petition that fails to comply with the technical requirements of the law, even if the director 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Red Commissary of Massachusetts, Inc. v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered. The labor certification also states the job duties of the offered position as maintaining and repairing "European autos," including models by Volvo, Mercedes Benz, and Bayerische Motoren Werke (BMW).

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an auto mechanic at in New Rochelle, New York from February 1998 to January 2001.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a signed letter, dated April 11, 2001, on the letterhead of stating that the beneficiary worked there as a European auto mechanic from February 1998 to January 2001. The letter describes the beneficiary's experience as maintaining and repairing "European trucks (Volvo, Isuzu, Mack Scandinavian, Iveco)."

The experience letter from does not contain the title of its signer as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires. In addition, the beneficiary's described experience does not match the duties of the offered position on the labor certification. The experience letter states that the beneficiary maintained and repaired "European trucks," while the labor certification states that the offered position involves maintaining and repairing "European autos." Moreover, the experience letter from does not state that the beneficiary maintained and repaired Volvo, Mercedes Benz and BMW autos as the job duties of the offered position require. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Because the experience letter from does not indicate that the beneficiary maintained and repaired "European autos," including models by Volvo, Mercedes Benz and BMW, as the labor certification specifies, the petitioner has not established that the beneficiary possessed the required two years of experience in the job offered as of the petitioner's priority date.

In summary, the AAO grants the petitioner's motion to reopen and reconsider. After careful consideration, however, the AAO affirms its decision that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. The AAO also finds that the petitioner has not established the beneficiary's qualifications for the offered position as set forth on the labor certification by the petition's 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 motion to reopen and reconsider is granted and the decision of the AAO dated November 1, 2012 is affirmed. The petition is denied.