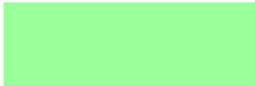


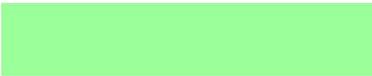
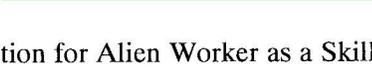


U.S. Citizenship  
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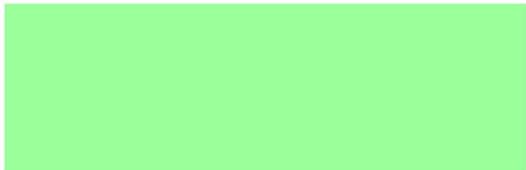


DATE: **AUG 30 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on August 25, 2010. The petitioner filed a motion to reopen the AAO decision. On July 7, 2011, the AAO granted the motion; however, the petition remained denied. The petitioner filed a second motion to reopen. The AAO again granted the motion, but the petition remained denied. The matter is now before the AAO on a third motion to reopen.<sup>1</sup> The motion will be granted; the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is in the business of designing and manufacturing [REDACTED] for commercial and residential use. It seeks to employ the beneficiary permanently in the United States as a designer, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>2</sup> As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The AAO dismissed the appeal, finding that the petitioner failed to establish the continuing ability to pay the proffered wage of the beneficiary from the priority date.

On prior motion, the AAO determined that the petitioner may be a viable business; however, the petition was not approvable solely on the overall magnitude of the company's activities and reputation alone, especially when the petitioner has not established the ability to pay the beneficiary's proffered wage for more than one year. Accordingly, the AAO, in a decision dated May 6, 2013, found that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward including in 2006 and 2007. The petition remained denied.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The record shows that the motion is properly filed, timely and supported by new evidence. On motion, counsel maintains that the petitioner has the continuing ability to pay the proffered wage from the priority date and again urges the AAO to consider the totality of the circumstances, consistent with the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) (*Sonogawa*). Specifically, counsel

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<sup>1</sup> On the Form I-290B submitted on June 7, 2013, the petitioner checked Box A, which states "I am filing an appeal;" however, the accompanying brief indicates that it is an "Appeal/Motion to Reopen." It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the 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 (effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion to reopen on its brief, it was accepted as one, despite the incorrect box being checked on the form.

<sup>2</sup> 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.

contends that the petitioner's inability to pay the proffered wage was a matter of temporary, unforeseen circumstances due to a spike in the cost of materials used to manufacture and produce the ornamental decorations.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because counsel submits the following copies of evidence: the petitioner's general ledgers from 2006 through 2008; a handwritten price comparison for certain items in 2006 through 2008 from [REDACTED] accounts receivable statements; [REDACTED] invoices; documentation and news articles regarding the cost of [REDACTED]; documentation regarding the price of [REDACTED] a cost of goods sold to gross sales spreadsheet; additional invoices from suppliers; and an incomplete copy of the petitioner's tax returns for 2005, and 2008 through 2012. However, as set forth below, following careful consideration, the petition remains denied and the AAO's prior decisions are affirmed. The remaining 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.

The AAO conducts this 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 in this proceeding.<sup>3</sup>

In its prior decision, the AAO determined that it could not sustain the appeal and approve the petition based solely on the overall magnitude of the company's activities and reputation alone, especially when the petitioner has not established the ability to pay the beneficiary's proffered wage for more than one year. Specifically, the AAO found that the petitioner failed to demonstrate the connection between the rise in material prices and its overall profitability.

On motion, counsel argues that the petitioner experienced a temporary and unforeseen spike in the primary materials for the company's products, which caused a temporary but significant negative impact on the profitability of the company, resulting in the petitioner's inability to demonstrate its ability to pay the proffered wages in 2006 and 2007.

In support of its claim, the petitioner submitted a February 12, 2007 article regarding [REDACTED] prices. The article describes a concern or anticipation of rising [REDACTED] costs, and states that first-quarter 2007 prices were anticipated to be four to five percent higher than in the fourth quarter of 2006. The petitioner also submitted a document regarding the monthly price of [REDACTED] from April 1998 through April 2013, indicating a spike in the price in 2006. It also reflects that the price of [REDACTED] consistently fluctuates from 2006 through April 2013. The petitioner submitted a CRS Report for Congress, [REDACTED] *Price and Policy Issues*, dated [REDACTED] 2006. The report indicates the

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<sup>3</sup> The submission of additional evidence on appeal and on motion 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 motion. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

cost of [REDACTED] “rose sharply in 2004 than declined.” The report also reflects the cost of [REDACTED] was \$700-800 per [REDACTED] in 2004; it decreased to \$500 per [REDACTED] in 2005; and then increased to \$640 per [REDACTED] in the middle of 2006. The record contains a document regarding [REDACTED] cost trends for 2005 through 2012, indicating that there was a relatively slight increase in costs from 2005 to 2006; a spike in 2008; a decrease in 2009; and an increase in 2010 through 2012.

Based on the evidence submitted, the AAO acknowledges that the price of [REDACTED] and [REDACTED] did increase in 2006 from the previous year. However, it appears that the nature of the business is one in which the costs of materials are cyclical and commonly fluctuate. Further, the fluctuation in market prices of the commodities does not appear to be due to a single temporary event, but rather appears to be the general nature of the industry. The petitioner’s inability to absorb these common fluctuations in prices raise concerns regarding the overall viability of the petitioner’s business, and its continuing ability to pay the proffered wage onwards.

A review of the petitioner’s tax returns reflects that the petitioner had the following net income and net current assets for the years 2006 and 2007:

<i>Tax Year</i>	<i>Net Income (Loss)<sup>4</sup> – in \$</i>	<i>Net Current Assets<sup>5</sup> – in \$</i>	<i>The Proffered Wage – in \$</i>
2006	1,309	(27,107)	33,841.60
2007	8,961	(25,337)	33,841.60

Counsel’s assertions on motion cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the labor certification was accepted for processing by the DOL.

The record also contains an incomplete copy of the petitioner’s Form 1120 tax returns for 2005 through 2012. The petitioner’s tax returns reflect the following:

<u>Year</u>	<u>Gross Receipts or Sales</u>	<u>Cost of Goods Sold</u>	<u>Purchases</u>
2005	\$375,048	\$146,617	\$144,117
2006	\$440,529	\$207,098	\$211,198
2007	\$526,872	\$280,536	\$278,076
2008	\$525,956	\$269,515	\$270,375
2009	\$305,993	\$106,868	\$108,368

<sup>4</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120.

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

2010	\$250,036	\$97,872	\$95,672
2011	\$110,622	\$40,682	\$39,282
2012	\$319,472	\$99,111	\$98,611

The petitioner's cost of goods sold and purchases reflect an increase in 2006 and 2007; however, the petitioner's gross receipts or sales also increased correspondingly. Given this, the petitioner has failed to establish how the price of raw materials affected the petitioner's profitability. The AAO notes that the petitioner, and the position offered, appears to be in the business of creating value-added [REDACTED] products. Therefore, while the cost of goods may change, it is not clear how these costs impact the petitioner's sales of its value-added goods. It is also noted that the petitioner's 2007 and 2008 tax returns reflect similar figures, raising questions as to whether the petitioner would be able to demonstrate its ability to pay the proffered wage in 2008 as well. Further, while the cost of goods may have increased from 2005 to 2006, the petitioner has not demonstrated that it did not, or could not, offset or accommodate these temporary price fluctuations.

The record also contains the petitioner's general ledgers for 2006 through 2008. The ledgers reflect purchases, but they do not state the amounts of each purchase or details regarding each purchase. Therefore, the ledgers do not document that the petitioner's costs increased or decreased unexpectedly for any given product. Similarly, the record contains accounts receivable statements from [REDACTED] and invoices from [REDACTED] as well as invoices from other suppliers. However, the amounts vary and no credible comparison is provided throughout the years, preventing the AAO from observing a pattern of increased costs for the same item with the same quantity over the years. It is unclear how these documents establish a rise in the cost of materials that was not otherwise anticipated or accounted for through the petitioner's sales of its finished goods. Further, no evidence was submitted to demonstrate that the amounts reported on the above statements somehow reflect additional costs that were not reflected on the petitioner's tax returns. Therefore, these documents do not establish the petitioner's ability to pay the proffered wage.

The record contains a handwritten price comparison for certain items for 2006 through 2008 from [REDACTED] as well as a cost of goods sold to gross sales spreadsheet. The documents are not signed or dated. No indication is given as to who compiled the list and what source of authority was used for the prices. Given this, the documents lack credibility and will be given minimal weight as evidence in support of the petitioner's claim. The AAO notes that the handwritten comparison only lists five items, several of which do not appear to be [REDACTED] products. Further, the writer of the note acknowledges that "other items [sic] prices difficult to compare because different sizes and different styles." Therefore, this comparison does not provide a credible basis upon which to conclude that the petitioner's cost of goods sold rose during the relevant time period. While the spreadsheet comparing the gross sales to cost of goods sold indicates "percentage of cost" higher in 2006 and 2007, the spreadsheet does not document that any increase in the petitioner's cost of goods sold were caused by unanticipated, uncharacteristic business expenditures.

It is also noted that the petitioner claimed to have three employees on the instant petition and in a letter, dated November 27, 2006, from the petitioner's president. However, the petitioner's 2006 tax

return indicates wages paid of only \$14,440, suggesting that some wages may be factored into or otherwise included in the petitioner's cost of goods. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

For the reasons stated above, the petitioner has failed to demonstrate the connection between a rise in material prices and its overall profitability, and the AAO does not find that 2006 and 2007 were unusual years for the petitioner.

After careful review of the totality of the circumstances, the AAO finds that the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives his lawful permanent residence, including in 2006 and 2007.

Accordingly, the AAO concludes that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date onwards.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the motion will be granted and the previous decision of the AAO will be affirmed.

**ORDER:** The motion is granted. The previous decision of the AAO, dated May 6, 2013, is affirmed. The petition remains denied.