(b)(6)

**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

DATE: FEB 0 1 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

**DISCUSSION**: The Director, Nebraska Service Center, denied the immigrant visa petition and the petitioner's timely filed motion to reopen and reconsider. The petitioner appealed the denial of its motion to the Administrative Appeals Office (AAO), which, on August 16, 2010, dismissed the appeal. The petitioner timely filed a motion to reopen and reconsider[1] the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner is an automobile repair shop owned by a husband and wife. The petitioner registered as a limited liability company in Maryland in 1998, but operated under its current name, before incorporating. The petitioner seeks to employ the beneficiary permanently in the United States as an auto mechanic at an offered wage rate of $25.00 an hour (or $52,000 a year based on a 40-hour work week).

As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).[2] The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 USC § 1153(b)(3)(A)(i), as a skilled worker capable of performing skilled labor requiring at least two years of training or experience.

The director determined that the petitioner failed to demonstrate that it has had the continuing ability to pay the offered wage rate since the May 1, 2001 priority date. *See* 8 C.F.R. § 204.5(g)(2). The director denied the petition and the motion accordingly.

In its August 16, 2010 appeal dismissal, the AAO noted that the petitioner improperly filed the Form I-140, Petition for Alien Worker, which was signed by the beneficiary, not the petitioner. *See* 8 C.F.R. § 204.5(c)(employers, not aliens, must file petitions under section 203(b)(3) of the Act). Nevertheless, the AAO issued a substantive decision on the appeal, finding that the petitioner, for 2001 and 2002, failed to demonstrate the ability to pay both the beneficiary and another worker with the same priority date that the petitioner sponsored for an immigrant visa.[3] *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2).

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[1] The petitioner entitled its motion a "motion to reconsider." The AAO, however, will refer to the motion as a motion to reopen and reconsider because it includes new documentary evidence. *See* 8 C.F.R. § 103.5(a)(2)(motion to reopen includes affidavits or other documentary evidence). The petitioner's motion also meets the requirements for a motion to reconsider, as it asserts that U.S. Citizenship and Immigration Services (USCIS) incorrectly applied the law in determining the petitioner's ability to pay the offered wage. *See* 8 C.F.R. § 103.5(a)(3).

[2] The DOL approved the labor certification application for the worksite address of In an amended Form I-140, Petition for Alien Worker, submitted with the motion, the petitioner indicates that the beneficiary would work at Because the two worksites are in the same Metropolitan Statistical Area (MSA), the labor certification remains valid despite the worksite change. *See* 20 C.F.R. §§ 656.3 (definition of "area of intended employment"), 656.30(c)(2).

[3] According to USCIS records, USCIS approved the petition for the other worker on January 30, 2009.

The AAO rejected the petitioner's arguments that the 2001 offered wages should be prorated from their May 1, 2001 priority dates to the end of the year and that the petitioner's owners could pay the offered wages from their personal funds. The AAO also rejected the petitioner's argument that the wages it paid to temporary workers would have been available to pay the offered wages of the sponsored workers, finding that the petitioner did not provide enough corroborative evidence about the sponsored workers' purported replacement of the temporary workers. In addition, the AAO considered the totality of circumstances and found that the petitioner did not merit approval under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In its motion, the petitioner submits an amended Form I-140, properly signed by one of the petitioner's owners, and asks the AAO to reconsider its determination under *Sonegawa, supra*. The petitioner submits additional copies of federal tax returns of the petitioner and its owners to evidence that the petitioner's owners have operated a business called since at least 1996 and that the petitioner's profits, income and staff have grown since the 2001 priority date. The petitioner also submits copies of state wage reports to evidence its employment of temporary workers to be replaced. In addition, the petitioner submits a 2008 bill from . as evidence that one of the petitioner's owners suffered an abdominal blockage and underwent a liver transplant operation in 1998, causing neither owner to since manage or work for the petitioner. Counsel argues that the incomes of the petitioner's owners in 2001 and 2002 were thus not compensation for services rendered, but rather were "passive business profits" available to pay the offered wages of the sponsored workers.

The AAO will first consider whether the petitioner has established that the wages it paid to temporary workers in 2001 and 2002 were available to pay the offered wages of the sponsored workers. In general, wages already paid to others are not available to prove the ability to pay the wages proffered to beneficiaries. Where the petitioner has established that the beneficiaries will replace other workers performing the duties of the proffered positions, however, the wages already paid to those employees may be shown to be available to pay the proffered wages. The evidence in the record must name the temporary workers, contain competent indicia of their wages paid and full-time employment status, verify that their duties are those of the proffered positions as set forth on the Forms ETA 750, and show that the petitioner has replaced or will replace the workers with the beneficiaries.

In its appeal dismissal, the AAO determined that the petitioner's stated net income of $4,768 on its 2001 federal tax returns left a difference of $97,152 to reach the $101,920 in combined offered wages of the beneficiary and the other sponsored worker. In 2002, the petitioner's stated net income of $74,342 left a difference of $27,578 to reach the combined offered wages. In an affidavit submitted with the petitioner's AAO appeal, the petitioner's owners stated that the petitioner hired three temporary workers who worked between 2001 and 2007. According to the owners, one worker left the petitioner's employment in 2002, and the two others left in 2007. The owners said the petitioner paid the workers $35,000 to $50,000 a year and hired them as auto mechanics until the beneficiary and the other sponsored worker became available to work for the petitioner.

Counsel stated in his brief:

On the attached Maryland unemployment Quarterly tax return of 10/31/2001, for example, the two highlighted employee names are temporary auto mechanic employees, who performed the same job and had the same skills as the beneficiary. Note that their names do not appear on the corresponding Maryland Dept. Of Labor Quarterly Employment report for 09/30/2004, showing that they were no longer employed by the company as of September 2004.

In the records submitted with the motion, however, the AAO is unable to find a quarterly report dated "10/31/2001" as counsel indicated. Rather, the records appear to be copies of Maryland Unemployment Insurance Quarterly Employment Reports regarding the petitioner for the quarters ended March 31, 2002 and dated April 30, 2002, ended September 30, 2002 and dated October 31, 2002, and two identical reports for the quarter ended September 30, 2004. There are three employees highlighted on the April 30, 2002 report, indicating that, during the first quarter of 2002, the petitioner paid "[redacted]" $9,753, "[redacted]" $2,567, and "[redacted]" $5,417. The report for the third quarter of 2002 indicates that the petitioner paid "[redacted]" $2,433 and "[redacted]" $8,233, with no indication of payment to "[redacted]" The report for the third quarter of 2004 does not show that the petitioner paid any wages to [redacted]" "[redacted]

These unemployment insurance reports are insufficient to establish that the wages of temporary workers to be replaced were available to pay the 2001 and 2002 offered wages of the sponsored workers. The reports, the earliest of which is for the first quarter of 2002, do not corroborate that the petitioner paid temporary workers in 2001. The reports also do not corroborate that the temporary workers were in the same positions as the offered jobs. These records therefore are insufficient to show that wages of temporary workers to be replaced in the same position were available to pay the combined offered wages in 2001 and 2002. *See 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)(Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

The AAO also notes discrepancies between the statement of the petitioner's owners and the unemployment insurance quarterly reports. The owners stated that the petitioner employed the two remaining temporary workers until 2007, while the unemployment insurance reports indicate that the petitioner stopped paying the workers before the third quarter of 2004. Also, the owners stated that the temporary workers were each paid $35,000 to $50,000 a year, but the unemployment insurance reports indicate that the quarterly wages of one of the remaining workers, "[redacted]" would total much less than $35,000 if projected over a year. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner has the burden of resolving inconsistencies by independent, objective evidence).

The AAO also rejects counsel's argument that the passive business profits of the petitioner's owners were available to pay the offered wages of the sponsored workers in 2001 and 2002. Because the owners have not actively managed or worked at the petitioner since the 1998 illness of one of its owners, according to counsel, the owners' income was not compensation for services rendered and was therefore available to pay the offered wages. Because limited liability companies are separate and distinct legal entities from their owner/members, the AAO cannot generally consider the assets

of a company's owner/members (or of other enterprises or corporations) in determining the petitioning entity's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the federal court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The AAO recognizes that owners of closely held entities, like the petitioner, often have the authority to allocate the entities' expenses for various legitimate business purposes. Therefore, in appropriate situations, the AAO can consider the compensation of officers and/or owners as additional financial resources available to petitioners. But the owners of closely held entities in those cases must show that they can cover their existing business expenses, as well as pay the proffered wages from their adjusted gross income or other available funds. In addition, they must show that they can sustain themselves and their dependents while paying the offered wages. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Here, the petitioner's owners have not shown that they can cover their existing business expenses in addition to the proferred wages. As discussed previously, for 2001, the petitioner must show that it can pay $97,152, the difference between its 2001 net income of $4,768 and the combined offered annual wages of $101,920. According to the 2001 W-2 forms of the petitioner's owners, they received total income of $89,133.41, less than the $97,152 difference between the petitioner's net income and the combined offered wages. Moreover, the owners have not indicated the personal expenses of themselves and any dependents. The AAO therefore cannot determine how much of the owners' total income would be available to pay the offered wages. For these reasons, the petitioner has not demonstrated that its owners' incomes was available to pay the offered wages in 2001 and 2002.

As the petitioner requests, the AAO will reconsider its analysis under *Sonegawa* in light of the additional evidence that the petitioner has submitted. USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa, supra*. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net

income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's number of years in business is a factor in its favor. The petitioner has established that it has operated an auto repair shop since 1998 and that its owners have operated a repair shop under the same name since at least 1996. The petitioner's federal tax returns also show that it has generally grown its net income each year and, to a more modest extent, its revenues, from 2001 to 2008. But the petitioner's tax returns also show that the amount of wages it has paid has fallen annually from 2005 to 2008. As discussed above, the petitioner has not demonstrated that the sponsored workers will replace temporary workers in the same positions. And, unlike the petitioner in *Sonegawa*, the petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in 2001 or 2002, or an outstanding reputation in its industry. Counsel asserts that the petitioner has a "well-regarded reputation in the community" and "has been favorably rated in local newspaper reports." But the petitioner provides no evidence of its reputation. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (The assertions of counsel do not constitute evidence). Considering the totality of the circumstances, the AAO does not find that the petitioner merits a favorable determination under *Sonegawa*.

Furthermore, the petitioner's 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 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 of 8 C.F.R. § 103.5(a)(1)(iii)(C), it must be dismissed.

Motions to reopen and/or reconsider immigration proceedings are disfavored for the same reasons that petitions for rehearing and motions for a new trial on the basis of newly discovered evidence are disfavored. *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 therefore be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER**: The motion is dismissed.