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

(b)(6)

[redacted]

DATE: FEB 05 2013 OFFICE: NEBRASKA 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) 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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). 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 appeal will be dismissed.

The petitioner provides engineering and consulting services to the steel industry.[1] It seeks to employ the beneficiary permanently in the United States as a project site manager.[2] As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

The 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.

In its previous decision dated September 17, 2010, the AAO determined that the petitioner did not establish its ability to pay the proferred wage in 2006. Beyond the director's decision, the AAO determined that the petitioner did not establish that it would be the beneficiary's employer. Further, the AAO determined that it was not clear that the petitioner intended to employ the beneficiary in the position offered.

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.

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

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[1] The petitioner's tax returns state that the petitioner's "product of service" is "employee leasing."

[2] The AAO notes that the labor certification lists the proffered position as project site manager, but the Form I-140, Immigrant Petition for Alien Worker lists the proffered position as "chairman and managing director."

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, Application for Permanent Employment Certification, 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 its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on August 9, 2006. The proffered wage as stated on the ETA Form 9089 is $80,000 per year. The ETA Form 9089 states that the position requires an associate's degree in mechanical engineering, two years experience in the proffered position, and specifies a number of other specific skills.

The AAO conducts 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 upon appeal.[3]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ 12 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on August 28, 2006, the beneficiary claimed to have worked for the petitioner from February 1, 2003 to June 22, 2004.

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 Form 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'l Comm'r 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 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'l Comm'r 1967).

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[3] The submission of additional evidence on appeal 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 appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the 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. In the instant case, the petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006 or subsequently.

On motion, the petitioner states that its tax returns do not indicate sufficient net income or net current assets in 2006 to establish the ability to pay the beneficiary the proffered wage of $80,000. The petitioner asserts that the monies it has paid to should be credited to the petitioner to establish ability to pay the beneficiary the proffered wage, as the beneficiary was the only employee of

In his brief on motion and in an undated affidavit, counsel and the beneficiary state that the beneficiary is the only employee of "a United Kingdom company authorized to conduct business in the United States." The petitioner also lists the various projects that the beneficiary personally worked on as a subcontractor to the petitioner. These statements are inconsistent with the petitioner's memorandum dated June 15, 2004 indicating that would "supply all of the field service employees" for four different large jobs in and not listed in counsel's brief. 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).

In the previous decision, the AAO indicated that wire transfers to were not sufficient to establish the ability to pay in 2006 and 2007. On motion, the petitioner submitted additional evidence of wire transfers and bank records for and stated that the wire transfers were payment for the beneficiary's services as a subcontractor. The total wire transfers to are in excess of the proffered wage in 2006 and 2007. As noted in the first decision, however, the AAO cannot credit the amounts the petitioner paid to to establish its ability to pay the beneficiary the proffered wage. The petitioner has not established by independent objective evidence that the beneficiary was the sole employee of and that the wire transfers were solely for work performed by the beneficiary. Further, the monies paid to are not monies paid to . Even though Mr. owns has a separate legal identity from Mr. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation'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 court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5,

[4] The record establishes that is a foreign corporation.

permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In his brief on motion, counsel states that there are no IRS Form 1099 or W-2 for the beneficiary because the petitioner considered the wages a "business to business" transaction and wired payment directly to On motion, counsel submits copies of unsigned consulting agreements. The AAO notes that the agreements list the beneficiary as the subcontractor and not Thus, the record does not clearly establish that monies sent to were for subcontracting work performed solely by the beneficiary. Further, based upon the consulting agreements, it appears that performed distinctly different duties than that of a project site manager, the proffered position. Therefore, the petitioner cannot use the monies paid to to establish the ability to pay the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary. The unsigned consulting agreement dated January 1, 2004 between the petitioner and the beneficiary describes the beneficiary's services under the agreement to include "consulting and advisory services to [the petitioner] with respect to all matters relating [to] design engineering and such other services as from time to time [the petitioner] deems to be necessary." A second unsigned agreement dated January 6, 2009 between the petitioner and lists the beneficiary's title at Annex A as "Hot Dip Galvanizing Equipment Coordinator." There is no evidence that the duties to be performed by the beneficiary under these contracts involve the same duties as those set forth in the ETA Form 9089. If the beneficiary performed other kinds of work, then any amounts paid to the beneficiary for such work cannot be credited to the petitioner as evidence of wages paid for the certified project site manager position.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In its previous decision dated September 17, 2010, the AAO determined that the petitioner did not establish that it would be the beneficiary's employer. The petitioner did not address this issue on motion. As the petitioner has not established that it intends to employ the beneficiary individually, as set forth in the previous AAO decision, for this additional reason, the petition must be denied.

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.