(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: JUN 04 2013 OFFICE: TEXAS 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,

Elizabeth M. McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the preference visa petition. A 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 appeal will be dismissed.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a motel manager, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). 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). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on June 18, 2003, the date of filing or the priority date of the visa petition. The director denied the petition accordingly. The petitioner appealed, and the AAO dismissed the appeal on July 2, 2012.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The record shows that the motion is properly filed, timely and make a specific allegation of error in law or fact. Thus the motion will be granted. Upon review, however, the appeal will be dismissed. 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.

The single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien Employment Certification, 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).

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.

Here, the Form ETA 750 was accepted on June 18, 2003. The proffered wage as stated on the Form ETA 750 is $12.00 per hour or $24,960.00 annually. The Form ETA 750 states that the position requires eight years of grade school, four years of high school, no training, and two years of experience in the proffered position or two years of experience in the alternate occupation of "similar business management."

On motion, counsel reasserts that the petitioner has demonstrated the ability to pay the proffered wage from the priority date. The AAO disagrees.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on November 3, 1978, and failed to list the number of its current workers. According to the tax returns in the record, the petitioner's fiscal year runs from November 1 of each respective year to October 31 of the successive year. On the Form ETA 750B, signed by the beneficiary on April 3, 2003, the beneficiary claimed to have worked for the petitioner since April 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, 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

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[1] 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).

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).

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.

On appeal, the petitioner submitted copies of payment vouchers dated the fifth day of every month beginning July 5, 2003 through January 5, 2007, purpotedly reflecting the monthly payment of $2,100.00 in cash by the petitioner to the beneficiary. The payment voucher dated July 5, 2003 is numbered 70415, with the remaining 41 payment vouchers being consecutively numbered from 70421 through 70462. The petitioner also provided photocopies of checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, May 30, 2007, and June 20, 2008, purpotedly reflecting the payment of $2,100.00 by the petitioner to the beneficiary on these dates. The checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, and May 30, 2007, are consecutively numbered 3134, 3135, 3136, 3137, and 3138. The petitioner included copies of bank statements containing photocopies of cancelled checks dated June 30, 2007, August 2, 2007, September 5, 2007, October 1, 2007, October 30, 2007, November 30, 2007, December 31, 2007, January 31, 2008, March 1, 2008, March 31, 2008, refecting the payment of $2,100.00 by the petitioner to the beneficiary on these dates. The checks dated October 30, 2007, November 30, 2007, and December 31, 2007, are consecutively numbered 3225, 3226, and 3227. The petitioner also submitted the imprint copy of check 3274 that is dated May 30, 2008, purportedly reflecting the payment of $2,100.00 by the petitioner to the beneficiary on this date.

In dismissing the appeal, the AAO determined to be questionable the documents provided to demonstrate the petitioner's continuing ability to pay the proffered wage of $24,690.00 to the beneficiary since the priority date of June 18, 2003. The AAO noted that the record contains no evidence to establish that wages paid to the beneficiary as reflected in these documents has been reported to the Social Security Administrastion (SSA), Internal Revenue Service (IRS), or Pennsylvania state and local tax authorities. In addition, the AAO noted that the record contains no independent evidence such as the beneficiary's federal tax returns, state tax returns, or bank records for 2003, 2004, 2005, 2006, 2007, and 2008, to corroborate any of the claimed payments made by the petitioner to the beneficiary as reflected in these documents. The AAO noted further, that the credibility of the payment vouchers is diminshed by the fact that 41 of 42 payment vouchers dated the fifth day of every month beginning July 5, 2003 through January 5, 2007, purportedly reflecting the monthly payment of $2,100.00 in cash by the petitioner to the beneficiary are consecutively numbered from 70421 through 70462; that checks dated January 31, 2007, February 24, 2007, March 31, 2007, April 30, 2007, and May 30, 2007, are consecutively numbered 3134, 3135, 3136, 3137, and 3138, respectively, and checks dated October 30, 2007, November 30, 2007, and December 31, 2007, are consecutively numbered 3225, 3226, and 3227, respectively, raises questions as it does not appear that these checks were written as dated; that the imprint copy of

check 3274 that is dated May 30, 2008, cannot be considered credible evidence of wages paid to the beneficiary without additional independent documentation to corroborate that such payment was made; and, that the payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check are not reflective of a commercially viable employer-employee relationship because the record is absent any independent evidence establishing the petitioner's payment of a regular salary to the beneficiary, purportedly a full-time employee working forty hours per week and being paid an annual wage of $24,960.00. The AAO determined, therefore, that absent clarification of these inconsistencies in the record, it would not accept the payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check as persuasive evidence of wages paid to the beneficiary.

The AAO further noted that, assuming any of these payments were ever made to the beneficiary, the record does not establish that these payments represent the payment of wages in exchange for labor by the beneficiary; that gratuitous transfers of funds between the petitioner and the beneficiary does not establish a continuing ability to pay the proffered wage; and, that given that the petitioner's tax returns in the record do not reflect the payment of wages, it is not credible that the various vouchers and checks in the record represent the continuous payment of a salary to the beneficiary.

On motion, the petitioner submits documentation to establish payment to the beneficiary of the proffered wage. Specifically, the petitioner submits the following:-

- Copies of five (5) checks from the petitioner, numbered 3134 through 3138, each for $2100, indicating the petitioner as the maker, the beneficiary as the payee, written against the petitioner's checking account at the Check # is dated January 31, 2007, check # Febraury 30, 2007, check # is dated March 31, 2007, chenk 3137 is dated April 30, 2007, and check # is dated May 30, 2007. Typed below each of these checks is the "Date 6/22/2007" (puportedly the date the checks were presented to the the payor bank).

- Copies of two (2) deposit tickets, dated June 21, 2007 and June 22, 2007, indicating deposits into the beneficiary's account at PNC Bank of checks numbered 3134 through 3138, each for $2100.

- Forms 1099 Misc., for the years 2007 through 2011. The Form(s) 1099-MISC indicate in box 7 (Nonemployee compensation) the amount of $25,200 paid by the petitioner to the beneficiary for each of the years 2007 to 2011.

- Copies of the beneficiary's Income Tax Returns, Form(s) 1040, for years 2007, 2008, and 2009. Each of the tax returns include an Internal Revenue Service (IRS) Form Schedule C, Profit and Loss from Business, for the beneficiary's Hotel Management Business. For each of 2007, 2008, and 2009, the beneficiary reports receipt of $25,200, on Part 1, Line 6, as "Other Income. Also included in each return is a form Schedule SE, Self-Employment Tax, showing the self-employment tax computed for each of these years. The tax returns do not

indicate any other income. The tax returns indicate that for each of the years 2007 to 2011, the beneficiary reported the $25,200 on the Form 1040, Schedule C, Profit or Loss From Business. On each Schedule C, the beneficiary states its principal business as "Motel Management Services," reports $25,200 as Gross Income; deducted business expenses, specifically, Car and truck expense, Legal and professional services, Office expense, Other Business property, Travel, Deductible meals, and Utilities; and, Net Profit. Included in each of the tax returns is Self-Employment Tax, Schedule SE, on which the beneficiary reports its net profit as self-employment income.

With respect to the five checks #s [redacted] it seems unusual that an employer would issue five sequential checks to an employee or independent contractor for a period of five months, and that the five checks would be deposited by the worker on two sequential days six months after the first check was dated. While the beneficiary deposited the five checks into his account on June 21 and June 22, 2007, the petitioner's bank statement records stop at May 2007, so it does not reflect the deposits withdrawn from the petitioer's account. Further, the checks clearing the petitioner's bank account in January 2007 were numbered [redacted] those clearing in February were numbered [redacted] in April 2007 the checks numbered [redacted] in May 2007 the checks cleared were numbered [redacted] The checks written for monthly work in January through May 2007 are numbered subsequent to the petitioner's cleared checks in May 2007. Thus, these checks were not written contemporaneously with the beneficiary's claimed work with the petitioner. As the checks do not appear to have been written in the normal course of the beneficiary's work with the petitioner, they cast doubt on the other evidence of record.

The above discrepancies cast further doubt as to whether any of the claimed payments by the petitioner to the beneficiary as wages are genuine. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, as noted in the previous decision, the amounts paid to the beneficiary by the petitioner and reflected by checks, vouchers and other handwritten documents are not reflected as having been withdrawn from the petitioner's asset balances. The petitioner's tax returns of 2001-2005 do not reflect payment of wages or contract labor. This inconsistency has not been resolved.

With respect to the Forms 1099-MISC issued to the beneficiary, the record reflects the following:

2003	no 1099 submitted
2004	no 1099 submitted
2005	no 1099 submitted
2006	no 1099 submitted
2007	reflects $25,200 payment to the beneficiary
2008	reflects $25,200 payment to the beneficiary
2009	reflects $25,200 payment to the beneficiary
2010	reflects $25,200 payment to the beneficiary

2011 reflects $25,200 payment to the beneficiary[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, 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

[2] In any further filings, the petitioner should submit evidence in the form of federal tax returns or audited financial statements that labor costs have been deducted appropriately for the years 2007-2011.

> depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[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).

The AAO reviewed the record which closed before the director on June 27, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE) issued on May 29, 2008. Therefore, the petitioner's income tax return for 2006 is the most recent return available as its fiscal year runs from November 1 of each respective year to October 31 of the successive year. The AAO noted that the record contained the petitioner's Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns for 2002, 2003, 2004, and 2005, despite the fact that the director specifically requested the petitioner's 2006 federal tax return in the RFE issued on May 29, 2008. 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).

These Form(s) 1120-A tax returns demonstrate the following financial information concerning the petitioner's ability to pay the beneficiary the proffered wage of $24,960. per year from the priority date of June 18, 2003:

- In 2002, the Form 1120-A stated a net income (loss)[3] of ($3,338.)
- In 2003, the Form 1120-A stated a net income (loss) of ($9,712.)
- In 2004, the Form 1120-A stated a net income (loss) of ($25,438.)
- In 2005, the Form 1120-A stated a net income (loss) of ($41,663.)
- The petitioner's net income for 2006 cannot be determined as the petitioner failed to provide its Form 1120-A tax return.

Therefore, the petitioner did not have sufficient net income to pay the proffered wage for the fiscal years 2002, 2003, 2004, 2005, and 2006. The petitioner has established that it paid the beneficiary the proffered wage from 2007-2011.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown

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[3] Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A, U.S. Corporation Short-Form Income Tax Return.

[4] 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

on the Form 1120-A tax return at Part III, lines 1 through 6. Its year-end current liabilities are shown on the Form 1120-A tax return at Part III, lines 13 and 14. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002, 2003, 2004, 2005, and 2006 as shown in the table below.

- In 2002, Part III of the Form 1120-A stated net current assets of $1,284.
- In 2003, the petitioner's net current assets cannot be determined as Part III of the Form 1120-A was not provided.
- In 2004, Part III of the Form 1120-A stated net current assets of $1,373.
- In 2005, Part III of the Form 1120-A stated net current assets of $3,360.
- In 2006, the petitioner's net current assets cannot be determined as Part III of the Form 1120-A was not provided.

Consequently, the petitioner did not have sufficient net current assets to pay the proffered wage in 2002, 2003, 2004, 2005, and 2006. The petitioner has established that it paid the beneficiary the proffered wage from 2007-2011.

The AAO also noted that the record contained monthly bank statements from Community Bank & Trust Co., dated from January 31, 2003 through May 31, 2007 for the petitioner's business checking account as evidence that the petitioner possesses the continuing ability to pay the beneficiary the proffered wage since the priority date of June 18, 2003. However, the petitioner's business checking account represents cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to pay the proffered wage to the beneficiary since the priority date. In addition, the balances in this account are well below the proffered wage and many of these monthly statements are incomplete with missing pages. Finally, the amounts reflected on the bank statement should be included in the petitioner's net current assets.

The AAO further noted, that the petitioner's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate 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 demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Part III of its Form 1120-A tax returns in determining the petitioner's net current assets.

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salaries). *Id.* at 118.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, counsel reasserts that the petitioner has paid the beneficiary at the proffered wage rate since the priority of June 18, 2003, and according to the language in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004). Counsel reasserts that the Mr. Yates makes a clear distinction between past and current salaries and, since he used the conjunction "or" in the context of evidence that the petitioner "has paid or currently is paying the proffered wage," counsel urges USCIS to consider the wage rate paid as reflected in the payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check contained in the record as satisfying that particular method of demonstrating a petitioning entity's ability to pay.

We reiterate that the Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, as the AAO determined in its dismissal of the appeal, counsel's reassertion on motion that the payment vouchers, copies of checks, photocopies of checks from the petitioner's bank statements, and an imprint copy of a check should be accepted as evidence must be rejected as these documents could not be considered as credible for the reasons discussed in the AAO dismissal of the appeal, and discussed above.

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,* 12 I&N Dec. 612. 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, 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, 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.

As the AAO discussed in its dismissal, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonegawa*. Unlike *Sonegawa*, the petitioner has not submitted any evidence reflecting the company's reputation or historical growth since its inception on November 3, 1978. Nor has it included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. The credibility of the petitioner's evidence of payment to the beneficiary remains a concern. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reason. 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. The appeal is dismissed. The denial of the petition is undisturbed.