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: JUN 0 6 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) 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: On September 28, 2011 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director), to revoke the approval of the petition. The petitioner subsequently filed a motion to reopen the AAO's decision, and the director, on January 5, 2012, granted the motion and reopened the matter but dismissed and affirmed his prior decision. The petitioner has now appealed the director's January 5, 2012 decision to the AAO. Upon review, the appeal will be dismissed, and the approval of the petition will remain revoked.

Preliminarily, before adjudicating the matter in this case, we note that procedurally, the director erroneously granted the motion filed by the petitioner and reopened the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(ii) states that the official having jurisdiction is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. Here, the AAO made the latest decision, and the petitioner – the affected party – did not request to move to a new jurisdiction; therefore, the AAO, not the director, should have had the jurisdiction to adjudicate the motion to reopen. We deem this error, however, to be a harmless error, because it does not alter or change our decision in this case (had we adjudicated the motion, we would have granted the motion and dismissed the appeal).

The petitioner describes its business as a mid-sized traditional American casual dining restaurant with a broad menu which includes seafood, meat dishes, sandwiches, burgers, salads, and other offerings. It seeks to employ the beneficiary permanently in the United States as a cook, 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).[1] 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 AAO earlier dismissed the appeal, finding that the petitioner failed to establish the continuing ability to pay the proffered wage of the beneficiary and of the other beneficiaries as previously indicated from their respective priority dates.[2]

The record shows that the appeal is properly filed, timely and supported by new evidence. 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.[3]

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[1] 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.

[2] In adjudicating the appeal, we found that the petitioner had filed ten immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding in the past. The petitioner did not deny this fact.

[3] The submission of additional evidence on appeal is allowed by the instructions to the Form I-

On motion to reopen and appeal to the AAO, counsel for the petitioner maintains that the petitioner has the continuing ability to pay the proffered wage from the priority date and urges the AAO to consider the totality of the petitioning business' circumstances, i.e. the size of its gross receipts/sales, its good name reputation, length in the business, and the historical growth over the years, consistent with the decision in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Throughout these proceedings, counsel repeatedly states that the petitioner has been in a competitive business for more than 25 years and makes more than a million dollars in sales every year. Counsel also states the fact that the petitioner has become such a state institution that "last year [in September 2010] the candidate for state senate held his primary party and delivered his primary-campaign victory speech from the restaurant." Counsel additionally states, "When an infamous department store and large employer in began closing stores in the mid-2000, laid off employees and retirees from the area organized a party at [the petitioner]." Moreover, counsel makes a reference to the size of the petitioner's payroll – the petitioner spends between a third and half a million on payroll (about 25/30% of overall gross income/sales) every year – and indicates that it should have the ability to pay the proffered wage of $22,877.40 per year. To substantiate the assertions above, counsel submitted copies of the petitioner's federal tax returns filed on Internal Revenue Service (IRS) Forms 1120S U.S. Income Tax Return for an S Corporation for the years 2000 through 2010 and various newspaper articles talking about the petitioner's good name and reputation.[4]

As indicated earlier in the AAO decision dated September 28, 2011, U.S. Citizenship and Immigration Services (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. at 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

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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).

[4] The AAO notes that the petitioner submitted copies of its 2000 tax return. However, it is noted that the petitioner's 2000 tax return is for year prior to the priority date of the visa petition; and, therefore, it has little probative value when determining the petitioner's continuing ability to pay the proffered wage from the priority date of April 24, 2001. Therefore, the AAO will not consider the petitioner's 2000 tax return when determining the petitioner's ability to pay the proffered wage except when considering the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

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.

The AAO acknowledges the reputation of the petitioner, and that it has grown since its inception in 1988. However, we cannot 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 in any single year since the priority date. Unlike the facts in *Sonegawa*, the petitioner in the instant case did not have one bad year, rather it has not had the ability to pay in any year, during the relevant period from the priority date.

In addition, as noted earlier, the petitioner in this case has filed nine other employment-based immigrant visa petitions in the past (10 petitions including one for the beneficiary). Therefore, consistent with the regulation at 8 C.F.R. § 204.5(g)(2), the petitioner is required to establish the ability to pay the proffered wages *not only* for the current beneficiary but also for the other sponsored beneficiaries until each beneficiary receive his or her lawful permanent residence (LPR), or until each petition is withdrawn, denied, or revoked.

As the petitioner has filed nine other employment-based petitions, we must take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these other workers and intends to employ all nine of them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. We do not have specific information with regards to these nine other beneficiaries which the petitioner sponsored, i.e. we do not know the proffered wages and proffered job positions, but assuming that the proffered wage for each of these eight workers is the same as that for the beneficiary, the petitioner would be required to establish that it has the ability to pay an additional amount of $205,896.60 per year in addition to the beneficiary's proffered wage of $22,877.40 per year from 2001 to 2010 (for a total of $228,774/year).

A review of the petitioner's tax returns reflects that the petitioner had the following net income and net current assets for the years 2001 through 2010:

Tax Year	*Net Income (Loss)*[5] *– in $*	*Net Current Assets*[6] *– in $*	*Combined Proffered Wage – in $*
2001	3,608	(44,629)	228,774
2002	1,591	(60,617)	228,774
2003	(10,356)	(69,107)	228,774
2004	(27,152)	(74,717)	228,774
2005	(27,714)	(44,747)	228,774
2006	40,558	(57,112)	228,774
2007	8,678	(78,923)	228,774
2008	(30,257)	(48,902)	228,774
2009	(46,550)	(49,121)	228,774
2010	(3,622)	(68,232)	228,774

Given that the number of immigrant petitions reflects a significant increase of the petitioner's workforce, we cannot solely rely on the magnitude of the petitioner's business activities or the totality of its circumstances. Therefore, we find 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.

The appeal will be dismissed, and the approval of the petition will remain revoked for the reason stated above. 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 met that burden.

ORDER: The appeal is dismissed. The director's decision to revoke the approval of the petition is affirmed.

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[5] For an S Corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S if the S corporation's income is exclusively from a trade or business. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) line 17e (2004-2005) line 18 (2006-2010) of Schedule K. *See* Instructions for Form 1120S, 2010, at http://www.irs.gov/pub/irs-prior/i1120s--2010.pdf (last accessed May 18, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In the instant case, the net income from 2001 to 2010 is found on line 23 (2001-2003), 17e (2004-2005), and 23 (2006-2010) of schedule K.

[6] 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 salaries). *Id.* at 118.