U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
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 17 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: The employment-based visa petition was denied by the Director, Texas Service Center, and the Administrative Appeals Office (AAO) dismissed the subsequent appeal on August 22, 2012. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion to reopen will be denied, the motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1] A review of the evidence reveals no fact that could be considered "new" under 8 C.F.R. § 103.5(a)(2). All evidence submitted was either previously available or could have been discovered and presented in the previous proceeding. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted in support of the motion will not be considered "new" and will not be considered a proper basis for a motion to reopen

The regulation at 8 C.F.R. § 103.2(a)(3) states, "[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 [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." The record shows that the motion to reconsider is properly filed and timely. The motion to reconsider asserts that the AAO erred in its conclusions in its dismissal of the appeal and cites pertinent decisions, and therefore, qualifies for consideration under 8 C.F.R. § 103.5(a)(3). The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 petitioner is a hair salon. It seeks to employ the beneficiary permanently in the United States as a fashion consultant and head trainer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly. The AAO concurred with the director's decision. Beyond the decision of the director, the AAO also concluded that the petitioner failed to establish that the beneficiary is qualified for the proffered position.

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[1]The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

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 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 Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is $59,000 annually.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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. Comm. 1967).

In its August 22, 2012 decision, the AAO concluded that the petitioner did not have the ability to pay the beneficiary in 2002, and 2005-2007. Therefore, in this decision, we will address the petitioner's ability to pay only for 2002, 2005, 2006, and 2007.

On motion, the petitioner, through its counsel, asserts that the beneficiary's Internal Revenue Service (IRS) Forms W-2 alone do not reflect the beneficiary's authorized deductions and the AAO should consider other financial documents such as paychecks and bank records in calculating the beneficiary's actual wages. Among other documents, the petitioner submits the beneficiary's bank statements from October 2002 to December 2007; the petitioner's fourth quarter report for 2006 and the first quarter report for 2007; the petitioner's "Payroll Journal" from January 2007 to December 2011; and the beneficiary's individual federal tax returns for 2009 and 2011, New York state tax returns for 2009-2011, and IRS Forms W-2 for 2003-2009 to demonstrate that the beneficiary was participating in a group health insurance plan by having tax-exempt premiums deducted from his pay, which were not reflected on the IRS Forms W-2. The petitioner also submits a statement from [redacted] its president, as well as a statement from the beneficiary attesting to the actual wages paid to the beneficiary by the

petitioner. According to these statements, the beneficiary's actual wages were as follow:

Year	Asserted Actual Wage
2003	$52,158.62
2004	$53,790.00
2005	$52,013.91
2006	$53,564.00
2007	$57,980.14
2008	$60,132.00
2009	$61,583.00
2010	$59,262.00
2011	$62,901.00

The AAO first notes that although the beneficiary states that he has been working for the petitioner since 2000, neither the petitioner nor the beneficiary makes any assertions about the beneficiary's purported actual wages prior to 2003. The record does not contain the beneficiary's IRS Forms W-2 for 2001 and 2002. Moreover, the AAO cannot accept the asserted actual wages without supporting evidence as prescribed in the regulation at 8 C.F.R. § 204.5(g)(2). Here, the petitioner has not submitted such evidence of group health insurance premiums or other claimed deductions. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Further, a review of the evidence submitted on motion reveals several inconsistencies in the information provided by the petitioner. The petitioner's corporate federal tax return for 2006 indicates that it paid $36,541 in salaries and wages, which is less than the purported wages it paid to the beneficiary alone in 2006. Page four of the petitioner's 2006 quarterly report[2] for the fourth quarter lists nine employees to whom it paid a total of $236,065.15 in wages in 2006. The wages and salaries it reported to the IRS on its 2006 tax return are inconsistent with the wages on the petitioner's 2006 quarterly report and the purported 2006 actual wage for the beneficiary.

A similar inconsistency is found for the year 2005. The petitioner's 2005 tax return indicates that it paid only $726 in wages, which also is significantly lower than $52,013.91 it purportedly paid to the beneficiary alone. Considering that the petitioner claims to employ more than 50 employees, salaries it reported on its tax returns are grossly misrepresented. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. at 591. The record fails to explain the discrepancies between the salary information the petitioner provided to USCIS and the salary information it provided to the IRS. The petitioner has failed to

[2] The petitioner submitted only page four of the quarterly reports.

submit independent, objective evidence indicating where the truth lies. We conclude that evidence submitted in support of the petitioner's ability to pay the proffered wage is inaccurate and unreliable.

The petitioner also states that the beneficiary sets his own hours and has a potential wage greater than the proffered wage of $59,000. However, the AAO is unable to approve a petition based on speculations.

On motion, counsel further asserts that the personal assets of the owner of the petitioner should be considered, and submits a statement from a certified public accountant, summarizing the personal assets of the owner of the petitioner, which amount to $6,870,000. The record indicates that the petitioner established itself as a C corporation in 1989 and elected to be an S corporation in 2006. USCIS has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 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, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Consequently, 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.

Counsel also states that the petitioner has been in the business for over 20 years and is a highly-regarded salon in the field of contemporary hairstyling and beauty fashion. Counsel asserts that the petitioner opened its second location in 2012. The petitioner states that its loyal clientele includes celebrities. The petitioner submits three New York City pocket travel guides – two in English and one in Japanese - containing the petitioner's advertisements.

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 (BIA 1967). 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 in *Matter of Sonegawa,* USCIS may, at its discretion, consider evidence relevant to a 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 that 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 to be relevant to the petitioner's ability to pay the proffered wage.

However, unlike *Sonegawa*, the petitioner in the instant case has failed to demonstrate its ability to pay the proffered wage for several years. The pocket travel guides that the petitioner submitted showing the petitioner's advertisements only corroborates its efforts to promote itself, not that the petitioner is well-known or successful. Furthermore, the petitioner submits no evidence corroborating his loyal celebrity clientele, nor does it submit independent evidence demonstrating that it is recognized by the industry. The assertions of the petitioner are relevant evidence and have been considered. However, absent supporting documentation, these assertions are insufficient proof. *See Matter of Kwan,* 14 I&N Dec. 175 (BIA 1972). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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.

In its appeal decision, the AAO also noted that if the petitioner has filed multiple petitions for multiple beneficiaries, it must establish that it has the continuing ability to pay the proffered wages to each beneficiary. On motion, counsel submits five other approved From I-140 petitions for other beneficiaries whom the petitioner is sponsoring. However, counsel does not elaborate on the current immigration status of these beneficiaries, nor does he provide information regarding whether any of these beneficiaries are employed by the petitioner and wages it paid to them since the priority date in order for the AAO to make a determination on the petitioner's ability to pay each proffered wage. Therefore, the petitioner also has failed to demonstrate that it has the ability to pay the proffered wage to the other beneficiaries for whom it petitioned.

Beyond the director's decision, the AAO concluded that the petitioner also has failed to demonstrate that the beneficiary is qualified for the offered position. To be eligible for approval, a beneficiary

must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In this case, the Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of fashion consultant and head trainer. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of two years of experience in the job offered plus two years of European hair styling training. The duties listed by the petitioner at Item 13 of the Form ETA 750 are:

> To train hairstylists in advent-grade hairstyling techniques, to give consultation to the company, including its top executives on fashion trends, which would influence company's services, and to stay abreast and analyze new fashion trends for the company.

The petitioner indicated on the labor certification that the beneficiary qualifies for the offered position based on his experience as a hairstylist at (through its subsidiary) in France from January 1991 until January 1995; and as a fashion consultant and trainer at (through its subsidiary) in New York from January 1995 until January 2000. The beneficiary signed the labor certification on April 27, 2001.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO concluded that information indicated on the experience letter, signed by , was in conflict with the information provided on ETA Form 750. On motion, counsel reiterates that , are subsidiaries of and states that letter confirms the beneficiary's employment with both subsidiaries. Counsel submits a copy of the same letter from dated December 10, 1996. The AAO first notes that could not confirm the beneficiary's experience beyond December 10, 1996, the date of the letter. Second, although letter is on letterhead and contains contact information,

nowhere in the letter does refer to the beneficiary's experience with rather, specifically states that the beneficiary was employed in their Paris, France office from 1989 until he was transferred to New York City in January 1995.

Furthermore, letter simply states that the beneficiary works in a management position and does not provide any details about the beneficiary's duties. Moreover, although signs the letter as the "President," it is unclear whether is the president of in New York, or the president of in Paris. The AAO concludes that the petitioner failed to submit independent, objective evidence resolving the inconsistencies within letter, as well as the inconsistencies between information provided in the experience letter and the information provided on the ETA Form 750. Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary meets the qualification as required by the labor certification.

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. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen is denied, the motion to reconsider is granted, the previous decision of the AAO is affirmed, and the petition remains denied.