**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 2 1 2013 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as Skilled Worker or Professional pursuant to § 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i) or (ii)

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 Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reconsider. The motion to reconsider the petition will be granted and the matter reconsidered. Upon review of the matter, the AAO's prior decision (June 4, 2012) is affirmed. The petition remains denied.

The petitioner is an upholstery supply company. It seeks to employ the beneficiary permanently in the United States as a manager of retail sales work. 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 of $24.77 per hour ($51,521.60 annually) beginning on the April 19, 2001 priority date of the visa petition. The director denied the petition accordingly.

Beyond the decision of the director, the AAO further denied the petition on appeal on the grounds that the petitioner failed to sufficiently establish that the beneficiary met the experience requirements of the certified labor certification. The employer letter did not comply with the relevant regulatory requirements to establish that the beneficiary had the required two years of experience in the job offered.

The record shows that the motion to reconsider is properly filed. 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.

A motion to reconsider must: (1) 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; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has stated reasons for reconsideration and cited a precedent decision in support of its request for reconsideration. The motion to reconsider will be granted and the matter, therefore, will be reconsidered.

As set forth in the AAO's June 4, 2012 decision, the petitioner did not submit any evidence of wages paid to the beneficiary in any year, and the petitioner's tax returns submitted pursuant to 8 C.F.R. § 204.5(g)(2) fail to state sufficient net income or net current assets to pay the proffered wage in any year except 2007. Therefore, the petitioner's tax returns failed to establish the petitioner's ability to pay in 2001, 2002, 2003, 2004, 2005, 2006, 2008, 2009, or 2010.[1]

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[1] Additionally, as noted in the AAO's June 4, 2012 decision. The petitioner submitted Form 1120S tax returns for for 2001 through 2004 listing the Employer Identification Number (EIN) as The petitioner submitted Form 1120S tax

Counsel's motion asserts that under *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967) the director may consider the totality of the circumstances, including factors such as the petitioner's gross income, income trends, past profitability and age of the company; the list set forth in the decision was not exclusive; and asserts that United States Citizenship and Immigration Services (USCIS) may properly consider the factor of the consultancy fee charged by the sole shareholder of the company.

Counsel states that the sole shareholder charged a variable commission on top of his salary; the fees were not a necessary expense as contemplated in *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010); the more profitable the petitioner was, the higher the corresponding consulting fee; and the consulting fee in all years except 2009 and 2010 exceeded $82,000 and even combined with a nominal loss, the analysis shows the ability to pay the proffered wage of $51,521.60. Counsel further asserts that in *Matter of Sonegawa* there was a period in which the continuous ability to pay was slightly offset by an uncharacteristic down year; instead of reviewing the Form 1040s to demonstrate the financial health of the sole shareholder, USCIS conducted what counsel terms "an irrelevant audit with a fallacious conclusion;" the shareholder can afford to waive his consulting fee and salary as an officer or employee of the petitioner; USCIS "invalidated" a letter related to the shareholder foregoing his salary and fees; the petitioner's analysis demonstrated a net surplus of funds when adding back the consulting fees and profit in all years through 2008; and 2009 was a down year following the global downturn and the petitioner's tax returns for 2010 showed a loss of less than $12,000.

The AAO does not agree with the foregoing and considered *Sonegawa* in its previous decision dismissing the petitioner's appeal. As previously noted by the AAO in its June 4, 2012 decision, 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

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returns for A for 2005 through 2010 listing the EIN as Although the record includes a letter from Mr. dated October 24, 2007, asserting that the petitioner is known in the industry as either no explanation was given for the difference in the two EINs. Form I-140 lists the petitioner's IRS Tax number as It is incumbent on 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). Counsel does not address this discrepancy on motion.

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.

In its initial decision, the AAO addressed counsel's claims related to the sole shareholder's consulting fees/commission and officer or employee salaries being used to pay the beneficiary the proffered wage. The AAO stated:

> On appeal, counsel asserts that on line 19 of every Form 1120S there is a corresponding Statement attached that reflects other deductions taken by the corporation. One of these deductions is a management or administrative fee, which represents a "commission" or profit taken by the petitioner's sole shareholder, According to a letter submitted by the petitioner's accountant, this profit taking is done in this manner to avoid exposure to over-taxation at the Social Security level. The accountant states the management fee is paid upwards to a management corporation known as then pays a fee and he is charged only the income on his personal tax returns for these various management fees . . . The petitioner did not submit his personal Form 1040 for 2001 through 2005. Further, the actual income Mr. received from the petitioner is not sufficient to pay the proffered wage for years 2006 through 2010. The petitioner's payment of administrative fees to a second corporation which, in turn, pays income to would not be expenses a sole shareholder has the authority to allocate . . . Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to the figures for ordinary income…The officer compensation paid in 2001, 2002, and 2003, when combined with the net income still does not establish the petitioner had the ability to pay the proffered wage for 2001, 2002, and 2003.

The AAO further notes that 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, permits [USCIS] to consider the financial resources of individuals or

entities who have no legal obligation to pay the wage." Funds paid to the shareholder through another corporation cannot be used to establish the petitioner's ability to pay the proffered wage.

The AAO considered the letter provided by the accountant in its June 4, 2012 decision, did not conduct an "irrelevant audit with a fallacious conclusion" and assessed the sole shareholder's Form 1040s. The AAO addressed the issue of the sole shareholder's "commission" and of officer compensation as set forth above. The petitioner did not submit any evidence on motion to address the deficiencies that the AAO raised above in it decision. The petitioner has not established that it has the ability to pay the proffered wage under the totality of the circumstances as discussed in *Matter of Sonegawa*. Additionally, as noted above and in the AAO's June 4, 2012 decision, the petitioner failed to establish its ability to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2008, or 2009. The 2009 global downturn would not explain the petitioner's failure to establish its ability to pay the proffered wage in 2001 through 2008 (with the exception of 2007).

Counsel asserts that the beneficiary submitted a letter of experience and established his qualifications; asserts that USCIS abused its discretion in reopening a settled matter and denying the petition without first issuing a Request for Evidence (RFE) and granting the beneficiary an opportunity to provide supplementary evidence to establish his qualifications; the experience letter is from a general store in Trinidad in which databases are not held on mainframes with gigabytes of hard drive memory; the store is a small mom and pop store without letterhead and special stationary; and USCIS is faulting an unsophisticated for employer with failing to comply with standards which he was not familiar with and never had to satisfy.

The AAO notes that an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). As the AAO's decision was based on the issue identified by the director, the petitioner's failure to establish its ability to pay the beneficiary's proffered wage, the AAO is not required to issue a RFE or a Notice of Intent to Dismiss (NOID) related to the additional ground for dismissal. In addition, there is no basis for counsel's contention that the employer submitting the experience letter should not be required to follow the regulatory requirements for an experience letter. As set forth in the AAO's June 4, 2012 decision, the letter failed to indicate the title of the individual that signed and fails to describe the beneficiary's job duties. An experience letter must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Counsel did not send any evidence with the motion to reconsider to overcome this issue. Therefore, the AAO cannot conclude that the petitioner has established that the beneficiary has the required experience to qualify for the position offered in accordance with 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

The petition will remain 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 motion to reconsider is granted and the petition is reconsidered. The previous decision of the AAO dated June 4, 2012 is affirmed. The petition remains denied.