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 5 2013 Office: TEXAS SERVICE CENTER [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 AAO 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.

Thank you,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the director's decision which was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and reconsider the AAO's decision. The matter is again before the AAO. The motion to reopen is rejected, and the motion to reconsider is granted. The AAO's previous decision is affirmed, and the petition remains denied.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a hotel housekeeping supervisor. 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 the priority date of the visa petition. The director denied the petition accordingly. On March 6, 2009, the petitioner filed a Form I-290B, Notice of Appeal or Motion, of the director's decision to the AAO. On August 7, 2012, the AAO dismissed the petitioner's appeal under its authority for *de novo* review. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In its decision, the AAO found that the petitioner did not have the ability to pay the prevailing wage. The AAO dismissed the appeal accordingly.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "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]

In the instant case, the petitioner submits with the motion the following evidence: copies of the petitioner's Forms 1120 U.S. Corporate Income Tax Return for 2009, 2010, and 2011; copies of the beneficiary's Forms W-2 for 2009, 2010, and 2011; a copy of a letter from the petitioner's accountant dated March 4, 2009; an affidavit from the petitioner's president, dated September 4, 2012; a copy of a property appraisal; a copy of Form 1120 U.S. Corporate Income Tax Return for for 2002; and photographs of the petitioner's location and information regarding the zip code .

In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

As the petitioner did not present any new facts with supporting documentation not previously submitted, the petitioner has not established a proper basis for a motion to reopen.

8 C.F.R. § 103.5(a)(3) states, in pertinent part:

> 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 Service policy. A motion to reconsider a decision on an

[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).

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.

In the instant case, the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy.

On motion, the petitioner, through counsel, argues that the AAO erred in determining that the petitioner did not have the ability to pay the proffered wage based on the totality of the circumstances. In her brief on motion, counsel argues that although the petitioner cannot demonstrate its ability to pay the proffered wage for the years 2003, 2004, 2005, 2006, and 2007 through its net income or net current assets, the petitioner's "long-term business existences and activities" should be considered.

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 (Reg'l Comm'r 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.

In the instant case, counsel argues that the petitioner's long-term growth and value of its property should be considered in evaluating the totality of circumstances. Counsel claims that the petitioner has been in existence for nineteen years and continues to grow. Additionally, counsel claims that despite the petitioner's location in an area which limits its income potential and the recession, the petitioner is still in business and has increased its payroll.

Despite counsel's claim that the petitioner has experienced long-term growth over the past nineteen years, there is no evidence to support this assertion. As stated in the AAO's decision dated August 7, 2012, the gross receipts and wages as reported on the petitioner's tax returns have shown minimal

growth since 2001. For example, gross receipts increased from $175,932 in 2001 to $181,897 in 2002, an increase of only 3.9%. From 2003 to 2004, gross receipts declined from $186,665 to $175,566, a decrease of 5.94%. Additionally, counsel contends that the petitioner has experienced "incremental growth" between 2009 and 2011 as evidenced by its tax returns. However, the petitioner's gross receipts declined from $243,106 in 2009 to $233,294 in 2010, a decrease of 4.03%. Additionally, the petitioner's net income in 2009 was $3,814 while in 2010 it was -$26,941.

Furthermore, the petitioner's wages paid to employees have shown minimal growth and contain inconsistencies. Based on the Forms W-2 in the record for the petitioner's employees for 2005, 2006, the petitioner employed two employees plus the petitioner's president in 2005, three employees plus the petitioner's president in 2006, and four employees plus the petitioner's president in 2008. The total wages paid to employees as indicated on the petitioner's tax returns were $55,056 in 2005, $80,710 in 2006, and $106,233 in 2008. However, of the wages paid in those years, the petitioner's owner was paid $27,000 in 2005, $30,000 in 2006, and $36,000 in 2008, thus reducing the amount paid to employees accordingly. The AAO further notes that in 2010, no salaries and wages were reported on the petitioner's 2010 tax return, however, the beneficiary's 2010 Form W-2 shows wages paid to the beneficiary in the amount of $18,000. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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 independent, objective evidence pointing to where the truth lies. *Id.* at 592.

The petitioner must demonstrate its ability to pay the proffered wage regardless of the location in which it chose to establish its business. Additionally, the record of proceeding contains no evidence specifically connecting the petitioner's business decline to the recession in 2008; not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of the recession. A broad statement by counsel that because the hospitality industry as a whole was negatively impacted by the economic crisis, the petitioner's business was likewise impacted adversely cannot, by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the recession. The AAO also notes that the petitioner's tax returns suggest that gross receipts did not vary much between the years 2008 and 2011. In fact, the petitioner exhibited its strongest growth between the years 2007 to 2008 and 2010 to 2011 with growth of 10.87% and 23.67%, respectively.

On motion, counsel also contends that the petitioner "knows how to meet its obligations even during difficult years in order to surmount difficulties, survive and turn a profit." In support of this contention, counsel refers to a $79,000 loan that the petitioner borrowed in 2005 from [redacted], a member of the same controlled group. Counsel further contends that the petitioner could have borrowed more, if necessary, or could borrow from another source.

Counsel's statement that the petitioner could borrow from or another source is not supported by evidence in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. There is additionally no evidence in the record to demonstrate that will extend a loan or be in a position to do so. Even if they did state that they would be willing to do so, they have no legal obligation to extend a loan to the petitioner. Additionally, comparable to the limit on a credit card, the promise of a loan cannot be treated as cash or as a cash asset. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

On motion, counsel asserts that the AAO erred in finding that was not the sole shareholder of the petitioner and that her income was not discretionary. In support of this assertion, the petitioner re-submits a letter from its accountant. In the accountant's letter, dated March 4, 2009, the petitioner's accountant states that a mistake was made and they inadvertently indicated that the petitioner's president was the sole shareholder on its tax returns. The petitioner's accountant notes that the mistake was corrected on the 2007 and 2008 tax returns. The AAO notes, however, that the petitioner's previous tax returns were not amended to reflect the correct information.

In the petitioner's president's affidavit, she states that she would forgo her own wages to pay the wages of her employees. As discussed in the AAO's decision, the evidence suggests that the petitioner's president was drawing a steady wage throughout the year, thus, casting doubt on whether the petitioner's president's salary was discretionary. Furthermore, the affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)).

The petitioner also submits a stock certificate bearing the petitioner's president's name for shares issued in 1993. However, the tax returns establish that there were three shareholders for the years 2003, 2004, 2005, and 2006. Thus, even if the petitioner's president was a shareholder in those years, she did not own a 50% or greater interest during those years, and thus, would not have had the authority to allocate expenses such as discretionary payments to herself. As discussed in the AAO's

previous decision, the petitioner failed to submit evidence to show that the wages paid to the petitioner's president were not fixed by contract or otherwise. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has not established through independent, objective evidence that she was the petitioner's sole shareholder, and therefore, had the authority to allocate expenses such as discretionary payments to herself. Therefore, the AAO rejects counsel's argument that the petitioner could forgo officer's compensation to pay the proffered wage.

The petitioner has not demonstrated that it has paid the beneficiary the proffered wage for each year since the priority date, nor has it demonstrated sufficient net income or net assets to pay the proffered wage in all relevant years. The petitioner also failed to include any evidence of historical growth, the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses, such as those in *Sonegawa*. 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 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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

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