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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: NOV 0 1 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed the decision to the Administrative Appeals Office (AAO) and on February 5, 2013, the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider on March 4, 2013. The AAO granted the motions, affirmed its previous decision, and the petition remained denied. The matter is now before the AAO on another motion to reopen and reconsider. The motion to reopen will be granted, the previous decisions of the AAO dated, February 5, 2013 and July 26, 2013, will be affirmed, and the petition will remain denied.

The petitioner describes itself as a refrigeration and air conditioning business. It seeks to employ the beneficiary permanently in the United States as a refrigeration and air conditioning technician. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor 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. The petitioner submitted additional documents on appeal and the AAO determined that the petitioner failed to establish its ability to pay the proffered wage in 2002, 2003, 2004, 2005, 2006, and 2007. On December 3, 2009, the AAO dismissed the appeal. The petitioner submitted additional documents on motion. On July 26, 2013, the AAO again determined that the petitioner had failed to establish its ability to pay the proffered wage in 2002, 2003, 2004, 2005, 2006, 2007 and in 2009. The petitioner now files another motion to reopen and reconsider.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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] In this matter, the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner presented additional Form W-2s issued by the petitioner to the beneficiary. Thus, the evidence submitted on motion will be considered a proper basis for a motion to reopen.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that "[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 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 motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the motion is not supported by any pertinent precedent decision.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. 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.

---

[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).

As set forth in the AAO's previous decision, dated July 26, 2013, the 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

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 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on September 12, 2002. The proffered wage as stated on the Form ETA 750 is $33,051 per year. The Form ETA 750 states that the position requires a Bachelor of Engineering degree.

The AAO conducts 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 upon motion.[2]

---

[2] The submission of additional evidence on motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1984 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. However, on motion, the petitioner provides a copy of a February 27, 2013 letter from the petitioner's manager, stating that beneficiary started working with the petitioner in January 2008. The petitioner also submits copies of the beneficiary's Forms W-2 issued by the petitioner for 2009 through 2012, and resubmits a copy of the beneficiary's Form W-2 for 2008 and other previously submitted documents.

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'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 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. The beneficiary's Forms W-2 for 2008 through 2012 demonstrate that the petitioner paid the beneficiary the below wages.

- In 2002 to 2007, the petitioner did not submit any evidence of wages.
- In 2008, the beneficiary's Form W-2 stated wages paid of $34,680.
- In 2009, the beneficiary's Form W-2 stated wages paid of $35,360.
- In 2010, the beneficiary's Form W-2 stated wages paid of $36,040.
- In 2011, the beneficiary's Form W-2 stated wages paid of $35,360.
- In 2012, the beneficiary's Form W-2 stated wages paid of $35,360.

In the instant case, the petitioner has established that it employed and paid the beneficiary wages in excess of the proffered wage in 2008 through 2012. As noted in the AAO's previous decision, the petitioner did not submit any wage information for 2002 through 2007. Therefore, the petitioner has established the ability to pay the proffered wage in the years 2008 through 2012 through wages paid, but has not established its ability to pay the proffered wage in any other relevant year during the timeframe from the priority date in 2002 through 2007 through wages paid to the beneficiary, as the petitioner did not employ the beneficiary during that time period.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the entire period from the priority date onward, 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 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.
>
> We find that the AAO has a rational explanation for its policy of not adding 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 record before the director closed on July 31, 2009 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2009 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2008 was the most recent return available. On motion, the petitioner did not submit its 2009 income taxes, or any year thereafter in the instant motion. The petitioner's tax returns demonstrate its net income for 2002 to 2007, as shown in the table below.

- In 2002, the Form 1120S stated net income[3] of ($4,803).
- In 2003, the Form 1120S stated net income of ($9,343).
- In 2004, the Form 1120S stated net income of $4,767.
- In 2005, the Form 1120S stated net income of $12,248.
- In 2006, the Form 1120S stated net income of $5,401.
- In 2007, the Form 1120S stated net income of $17,224.

Therefore, for the years 2002 through 2007 the petitioner did not have sufficient net income to pay the proffered wage in any year.

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 on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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

---

[3] Where an S corporation's income is exclusively from a trade or business, 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. 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 (1997-2003), line 17e (2004-2005), and line 18(2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed October 24, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income deductions and other adjustments shown on its Schedule K for 2002, 2003, 2004, 2005, 2006, and 2007, the petitioner's net income is found on Schedule K of its tax returns for those years.

[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 salaries). *Id.* at 118.

proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002 to 2008, as shown in the table below.

- In 2002, the Form 1120S stated net current assets of $750.
- In 2003, the Form 1120S stated net current assets of ($1,884).
- In 2004, the Form 1120S stated net current assets of $6,147.
- In 2005, the Form 1120S stated net current assets of ($13,479).
- In 2006, the Form 1120S stated net current assets of ($5,904).
- In 2007, the Form 1120S stated net current assets of ($1,310).

Therefore, for the years 2002 to 2007, the petitioner did not have sufficient net current assets to pay the proffered wage in any year.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has 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.

In the instant motion, counsels reasserts that, based on the Memo dated May 4, 2004 from William R. Yates, the petitioner may submit a financial statement in lieu of initial evidence. The petitioner resubmits audited financial statements, a copy of a July 20, 2009 letter from the petitioner's accountant, copies of the petitioner's tax returns for 2002 through 2008, a copy of the Interoffice Memorandum from William R. Yates, and copies of other previously submitted documents.

The AAO acknowledges that the petitioner may submit a financial statement; however, as stated in the AAO's previous decisions, the financial statements dated July 17, 2009, in the record are not persuasive evidence.

The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. *See* http://www.irs.gov/publications/p538/ar02.html#d0e1136 (accessed October 29, 2013). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

In its July 26, 2103 decision, the AAO further stated that this office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage

during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.[5] The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.[6] On motion, the petitioner has not submitted any information which would sufficiently demonstrate why financial statements prepared based on one method although its income taxes were prepared based on another accounting method should be accepted.[7]

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

On motion, counsel reasserts that the owner of petitioning firm has investments which reflect deposits in excess of the proffered wages since 2002. Counsel resubmits copies of the owner's investment account statements. As stated in the AAO's July 26, 2013 decision, these are not funds which may be considered in the instant case. 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."

Although the petitioner's officer compensation could be considered; the petitioner's tax returns reflect that no officer compensation was paid in 2002 or 2003, and minimal amounts in 2004 and 2005, which would be less than one-third of the proffered wage, even if the full amounts were considered. Further, a review of the petitioner's tax returns for years 2004 through 2007 reflect insufficient officer compensation amounts to offset the shortfall in the proffered wage for those years. Given the above, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage in years 2002 through 2007.

---

[5] Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See* http://www.irs.gov/publications/p538/ar02.html#d0e2874 (accessed July 5, 2013).

[6] The petitioner submitted pages from an accounting book on appeal and motion, however, this information is not specific to the petitioner and therefore, cannot establish its ability to pay the proffered wage.

[7] On motion the only evidence not previously submitted and analyzed by the AAO are the beneficiary's Forms W-2 for 2009 through 2012, and the petitioner's corporate status with the New York Department of State, Division of Corporations on August 23, 2013.

As stated in its July 26, 2013 decision, the AAO considered the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage pursuant to *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).[8] 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. The AAO also stated that the petitioner has not submitted sufficient evidence based upon the totality of circumstances to conclude it had the ability to pay the proffered wage from the priority date onward to the beneficiary. The petitioner failed to establish its historical growth, and in fact demonstrated low net income and negative net current assets in a majority of the relevant years. The petitioner also did not establish any uncharacteristic business expenditures or losses, nor did it offer any evidence of its reputation within the industry which would conclude the ability to pay the proffered wage in line with *Sonegawa.* Furthermore, the petitioner's tax returns reflect total wages paid in 2002, 2003 and 2004 to all workers which are less than the beneficiary's proffered wage. On motion, the petitioner has not submitted any information which would overcome the AAO's previous findings. 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.

Based on the above, the evidence submitted on motion and in the record does not establish that the petitioner has the continuing ability to pay the proffered wage to the beneficiary beginning on the priority date onwards.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

---

[8] 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.

ORDER: The motion to reopen the previous decision of the AAO is granted. The prior decisions of the AAO dated February 5, 2013 and July 26, 2013, are affirmed. The petition remains denied.