(b)(6)

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

[redacted]

DATE: NOV 19 2013 OFFICE: NEBRASKA 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,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition and rejected the petitioner's subsequent motion to reopen and motion to reconsider. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal and affirmed the director's decision in response to the petitioner's motion to reconsider. The petitioner then filed a motion to reconsider before the AAO, which the AAO granted and, upon review, affirmed its previous decision. The petitioner has filed another motion to reopen with the AAO. That motion will be granted. The AAO will adjudicate the merits of the appeal. The appeal will be dismissed.

The petitioner is a construction business. It seeks to employ the beneficiary permanently in the United States as a field supervisor, taping foreman. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary as a skilled worker. The director determined that the record did not establish that the offered position required at least two years of training or experience as required for the classification as a skilled worker under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). The director also questioned the credibility of the petitioner's description of the duties of the offered position and further concluded that the record did not establish the petitioner's ability to pay the proffered wage. The director denied the petition accordingly on February 13, 2008.

The petitioner filed a motion to reopen and a motion to reconsider the director's decision, which the director rejected on March 17, 2008 for failure to include the filing fee. The petitioner filed the motion with fee on April 11, 2008. On May 23, 2008, the director rejected the April 11, 2008 filing of the motion to reopen and the motion to reconsider as being untimely.

On June 24, 2008, the petitioner appealed the director's decision to the AAO, claiming that the motion to reopen and motion to reconsider had been submitted with a check for the $585 filing fee, which was lost either by United States Citizenship and Immigration Services (USCIS) or in the mail, and that the motion to reopen and motion to reconsider should be considered timely. In support of this claim, the petitioner provided a copy of the face of a check for $585, dated March 13, 2008 and made out to USCIS, and copies of correspondence from its counsel to the [redacted] relating to this check. On June 7, 2011, the AAO dismissed the appeal.

On July 7, 2011, the petitioner filed a motion to reconsider with the AAO, contending that the delay in filing the motion to reopen and the motion to reconsider, which resulted from the loss of the filing fee, was reasonable and beyond its control and, therefore, should be excused pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i). In support of this claim, the petitioner submitted a declaration from its counsel and again provided his correspondence with the [redacted] and a copy of the face of the check dated March 13, 2008. On February 12, 2013, the AAO granted the petitioner's motion but affirmed its prior decision finding that the record did not establish that the petitioner's failure to file the motion within 33 days of the director's decision was reasonable and beyond the petitioner's control. The AAO indicated that the argument that the check was lost, as

advanced by the petitioner's counsel, was speculative and that if USCIS failed to believe that a fact stated in a petition was true, it could reject that fact, referencing the authority found in section 204(b) of the Act, 8 U.S.C. § 1154(b), as well as the holdings in *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001)

On March 14, 2013, the petitioner filed a motion to reconsider before the AAO, contending that the authorities relied on by the AAO do not support its assertion that his claims regarding the submission of the filing fee may be rejected and that the AAO has offered no description of the evidence on which it relied in dismissing the petitioner's July 7, 2011 motion to reconsider. Counsel further states that the petitioner has established its ability to pay the proffered wage. Counsel claims that in cases with compelling humanitarian factors where there has been government error or delay, an exercise of discretion resulting in an "extraordinary favorable outcome" may be considered. The AAO granted the motion to reconsider and affirmed the prior decision on July 19, 2013.

On August 16, 2013, the petitioner filed a motion to reopen before the AAO. Accompanying the motion are counsel's bank statements showing when checks in a sequence were issued and negotiated through the bank. Counsel contends that this evidence establishes that the check with the filing fee was issued in March 2013 and only USCIS error kept the motion to reconsider from being timely filed. Counsel's submissions also included citations to numerous Circuit Court cases concerning abuse of discretion by the agency in adjudicating petitions.

The requirements for motions to reopen and reconsider are found at 8 C.F.R. §§ 103.5(a)(2) and (3):

> (2) *Requirements for motion to reopen.* A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence . . . .
>
> (3) *Requirements for motion to reconsider.* 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 record reflects that the motion to reopen is properly filed and timely. The petitioner submitted additional evidence concerning the filing fee check that it asserts was included with its motion to reopen before the director as well as counsel's explanation as to how that evidence supports its position. The petitioner has satisfied the requirements for a motion to reopen. Accordingly, the motion is granted and the AAO will reconsider the matter.

The AAO now turns to a consideration of the record and whether it establishes the timely filing of the petitioner's motion to reopen and motion to reconsider or that the late filing of the motion to

reopen may be excused because the delay in filing was "reasonable and was beyond the control of the . . . petitioner," pursuant to the regulation at 8 C.F.R. § 103.5(a)(1)(i).

As stated in the previous AAO decision, counsel asserted that the AAO has offered no clear description of the evidence it relied upon to dismiss the petitioner's previous motion other than "the presumed report that the $585 check of March 14, 2008, was not found within the packet submitted by the petitioner's attorney." He contends that there has been no investigation in the petitioner's case, "nor any process, described that would reflect a reliable basis from which to reach a reasonable conclusion." As in *Lu-Ann Bakery Shop*, counsel asserts, he has provided an affidavit and is now submitting a second declaration and statements from two paralegals who worked on the March 14, 2008 submission of the petitioner's motion to reopen and motion to reconsider. These statements, counsel contends, should be accepted by USCIS. In support of this claim, he points to the decision in *Doyle v. U.S.A. I.R.S., Ebasco Services, Inc.*, 817 F.2d at 1235, as well as those in *Davis v. Veslan Enterprises*, 765 F.2d at 500 n. 12 and *Maria Ruggiero v. Albina Costa*, 28 Mass.App.Ct.967, 551 N.E.2d at 1226 which, he states, relied in part on unopposed affidavits.

Counsel also asserted that courts may review USCIS decisions under section 5 U.S.C. § 706(2)(A) of the Administrative Procedures Act if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." With the instant motion, counsel cites *Chung Hak Hong v. USCIS*, 662 F.Supp.2d 1195 (2009); and *Mt. St. Helens Mining & Recovery Ltd. Partnership v. United States*, 384 F.3d at 727, for the premise that a federal agency decision is capricious where the agency finds that no fee payment has been made where a third party source documents that checks from the same series as the check claimed to have been sent by counsel were processed. Counsel also cites *Wong Hing Hang v. INS,* 360 F.2d 715 (2d Cir. 1966), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), and *Judulang v. Holder,* 565 U.S. __ (2011), for the premise that an agency may not act without rational explanation and upon a rational basis and must act within established procedures. Counsel also cited *Henry v. INS*, 74 F.3d 1 (1st Cir. 1996), *Tukhowinich v. INS,* 64 F.3d 460 (9th Cir. 1995), *Watkins v.* INS, 63 F.3d 844 (9th Cir. 1995), *Rodriguez-Gutierrez v. INS,* 59 F.3d 504 (5th Cir. 1995), *Lauvik v. INS,* 910 F.2d 658 (9th Cir. 1990), and *Avagyan v. Holder,* 646 F.3d 672 (9th Cir. 2011), as examples of courts finding that an agency abused its discretion where it disregarded evidence and claims presented by the petitioner or otherwise inappropriately weighted an inappropriate factor.

The previous AAO decision considered two declarations from counsel, dated June 23, 2008 and March 13, 2013, in which he states he personally wrote the check for the $585 fee and included it in the Form I-290B, Notice of Appeal or Motion, packet sent to USCIS on March 14, 2008 by express mail. Counsel indicates that he received a Form I-797C, Notice of Action, from USCIS on April 7, 2008 notifying him that no filing fee had been attached and that during the period April 8-10, 2008, he and his staff checked with the bank to see whether the check, numbered 4598, had been cashed. The bank, he states, could not verify whether the check had been cashed and on April 10, he decided to stop payment and to resubmit the Form I-290B with a second check. Counsel included an April 10, 2008 letter counsel sent to the Bank of the Orient requesting that it stop payment on the $585 check, as well as a Stop Payment Form, dated April 10, 2008, and a demand deposit inquiry. The previous decision also considered a March 11, 2013 statement from [redacted] a paralegal in

counsel's firm, who states that on or about March 14, 2008, she prepared the Form I-290B packet and cover letter to USCIS. [redacted] further indicates that this submission included a law firm check, numbered 4598, issued on March 13, 2008, and that she observed counsel include this check in the Form I-290B packet before she sealed the envelope. [redacted] also asserts that she photocopied the entire Form I-290B packet, including the $585 check, for the petitioner's file before passing the packet on to [redacted], another paralegal in counsel's firm, on March 14, 2008 for delivery to the post office. It also included a March 11, 2013 statement from paralegal [redacted] who states that before delivering the Form I-290B packet to the United States Postal Service (USPS) office for express delivery, she confirmed with [redacted] that the $585 check was in the packet. [redacted] statement is accompanied by a copy of USPS tracking documentation and a receipt dated March 14, 2008. The tracking documentation indicates that delivery to the Nebraska Service Center occurred on March 17, 2008.

On motion, counsel submitted a copy of check, number 4598, dated March 13, 2008 as appears in counsel's files and a copy of the [redacted] account to demonstrate that check [redacted] was not negotiated and that checks in the same sequence were negotiated in March 2008.

Counsel asserts that the preceding declarations should be accepted as proof that the petitioner submitted its motion to reopen and motion to reconsider with the $585 filing fee and points to the reliance placed on affidavits by the courts in *Doyle v. U.S.A. I.R.S., Ebasco Services, Inc.*, 817 F.2d at 1235, and states that the affidavit is supported by a third party independent source: the corporate bank statements.

The previous AAO decision noted that the decision of the U.S. Circuit Court of Appeals for the Fifth District in *Doyle* relied on affidavits from government attorneys in assessing attorney fees under Rule 11 of the Federal Rules of Civil Procedure. In *Doyle,* the Court stated that under Rule 11, the signature of an attorney acted as a certificate that a motion is warranted by existing law or by a good faith argument for the extension of existing law. The AAO did not find persuasive the court's deference to affidavits in the procedural matters considered by the courts described in *Doyle*.

On motion, counsel asserts that its contention that USCIS lost the fee that it sent was no longer speculative because it submitted third party corroboration through the bank statements. He further states that the cases noted above lead to the conclusion that the evidence submitted may not be overlooked and that the resulting conclusion must be USCIS error.

The AAO acknowledges the declarations provided by counsel and two of his co-workers as well as the bank statements stating that check number 4598 was not negotiated through its bank but would have been written in March 2008. It does not find this evidence sufficient to overcome the evidence offered by the Form I-797C that no filing fee was found with the Form I-290B packet delivered to the Nebraska Service Center on March 17, 2008. The evidence presented also indicates that counsel's office wrote a check number 4598 that was not negotiated by the bank. Under these circumstances and considering the most recent evidence submitted with the current motion, the AAO will accept the initial appeal as timely filed and adjudicate the appeal.

Upon review, the petitioner has not demonstrated its eligibility for the relief sought. Specifically, the director held that the labor certification requirements did not support the immigrant category requested, that the petitioner did not demonstrate that the beneficiary had the experience required by the terms of the labor certification, and that the petitioner did not demonstrate its ability to pay the proffered wage from the priority date onwards.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that one year of experience is required for the proffered position. However, the petitioner requested the skilled worker classification on the Form I-140. There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The director's February 13, 2008 decision notes that the original Form ETA 750 submitted with the Form I-140 contained corrective fluid and appeared to have been altered. As a result, the director requested a certified duplicate copy from the DOL, which was provided on November 16, 2007. The duplicate Form ETA 750, which bears the same ETA Case Number of D-05118-80967, clearly states that one year of experience is required for the position. A September 11, 2007 letter from Farrokh Hosseinyoun, the petitioner's president submitted in support of the Form I-140 petition, states that the minimum requirements for the position are "a basic level of reading and writing with minimum of one year supervised on the job training."

With the motion to reopen and reconsider before the director, counsel stated that although the copy submitted is difficult to read, Section 14 of the Form ETA 750 requires four years of experience. The petitioner submitted a second letter from dated March 5, 2008, stating that his previous letter erred in stating that only one year of experience was required for the position, but instead four years of experience was required. Counsel does not address the duplicate labor certification obtained from the DOL, and the petitioner submitted no evidence to demonstrate that the terms of the labor certification required the four years of experience claimed. As a result, the evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

Concerning the beneficiary's qualifications for the position, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 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); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

As stated above, the Form ETA 750 requires one year of experience as a field supervisor, taping foreman with the stated duties: "Recruiting tapers, supervising the crew of tapers and assigning each crew on a specific site. Providing the proper equipment and materials to dispatch tapers. Monitoring the site [to] assure th[at] quality work is performed. Knowledgeable of various drywall finish level[s] and capable of conducting different textures." On the labor certification, the beneficiary claims to qualify for the offered position based on experience with from February 1989 onwards. On the labor certification, the beneficiary describes his work with the petitioner as "field supervisor, taping foreman," and his duties as "manual work, hanging tool in relation to drywall, experience in spray machines for texturing and painting interior and exterior, high grade or touch-up work." This work experience does not indicate that the beneficiary has experience as a field supervisor. The beneficiary also stated on the labor certification that he was a construction worker previously, but provided no identification of the previous employer or dates of employment.

A September 11, 2007 letter from , president of , states that the beneficiary has been employed "in the same capacity since February 1989." states that the beneficiary works as a full-time drywall finisher yet lists the job duties as the same as those listed for a supervisor on the Form ETA 750. The director's decision stated that the description of duties did not match the job title and, therefore, could not accept the letter as appropriate verification of the beneficiary's experience.

Where an inconsistency or discrepancy has been noted, competent, objective evidence must be submitted pointing to where the truth lies. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988).

With the motions to reopen and reconsider in front of the director, the petitioner submitted a second letter, dated March 5, 2008, from stating that the beneficiary worked as a drywall finisher from 1989 to 1994 and was then promoted to drywall supervisor in 1995. The petitioner also submitted a letter from dated Marc 6, 2008 stating that he worked as a foreman for the petitioner from 1986 to 1999. states that the beneficiary began working for the petitioner in February 1989 as a drywall finisher and was promoted to a supervisory position in 1995. This evidence conflicts with the Form ETA 750B signed by the beneficiary under penalty of perjury. The evidence is not independent, objective evidence demonstrating the beneficiary's role and/or promotion with the petitioner. It is further noted that the Internal Revenue Service (IRS) Forms W-2 in the record indicate that the beneficiary received a lower salary in 1995 than he did in 1993, which is not indicative of a promotion. As a result, it is insufficient to demonstrate that the beneficiary had the experience required by the terms of the labor certification as of the priority date.

Concerning the petitioner's ability to pay the proffered wage during a given period, 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).

The priority date of the instant petition is April 30, 2001 and the proffered wage is $41,470 based on the required 40 hours of $14.50 per hour pay and the required 10 hours of overtime pay at an hourly rate of $21.75. The evidence in the record shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1980 and to currently employ 40 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year.

USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. 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 petitioner[1] submitted the following IRS Forms W-2 demonstrating wages paid to the beneficiary:[2]

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[1] The name of the petitioner as it appears on the Form I-140 and Form ETA 750 is On motion before the director, the petitioner submitted a statement of fictitious name to demonstrate that is the assumed name of , the

- The 2001 IRS Form W-2 states wages paid by the petitioner to the beneficiary of $42,064.00.
- The 2002 IRS Form W-2 states wages paid by the petitioner to the beneficiary of $42,453.00.
- The 2003 IRS Form W-2 states wages paid by the petitioner to the beneficiary of $31,136.00.
- The 2004 IRS Form W-2 states wages paid by the petitioner to the beneficiary of $29,339.50.
- The 2005 IRS Form W-2 states wages paid by the petitioner to the beneficiary of $29,220.00.
- No evidence of wages paid for 2006 was submitted.
- The 2007 paystubs state year-to-date wages paid of $20,760.00 through September 4, 2007.

The evidence submitted establishes the petitioner's ability to pay the proffered wage in 2001 and 2002 through wages paid to the beneficiary. The petitioner must establish its ability to pay the difference between the actual wages paid and the proffered wage in the additional years, which in 2003 is $10,334, in 2004 is $12,130.50, in 2005 is $12,250, and in 2007 is $20,710. The petitioner must demonstrate its ability to pay the entire proffered wage in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, 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).

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company for which financial documentation was submitted. As a result, the IRS documents for [redacted] will be accepted for the analysis of the petitioner's ability to pay the proffered wage from the priority date onwards.

[2] The petitioner submitted Forms W-2 for 1991 through 2000, but as these documents cover a period of time prior to the priority date, they will be considered only generally.

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 a 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, 558 F.3d 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,* 719 F. Supp. at 537 (emphasis added).

The record before the director closed on September 21, 2007 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 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2003 through 2006 as shown in the table below.

- The 2003 IRS Form 1120S[3] states net income of -$59,918.
- The 2004 IRS Form 1120S states net income of -$354,106.
- The 2005 IRS Form 1120S states net income of -$210,469.

[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 (2003) line 17e (2004-2005), and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed October 10, 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 adjustments shown on its Schedule K for 2005, the petitioner's net income is found on Schedule K of its tax returnfor 2005 alone.

- The 2006 IRS Form 1120S states net income of $39,808.

Therefore, for the years 2003 through 2006, the petitioner did not have sufficient net income to pay the proffered wage.

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 proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003 through 2006, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of $235,329.
- In 2004, the Form 1120S stated net current assets of -$8,892.
- In 2005, the Form 1120S stated net current assets of $39,322.
- In 2006, the Form 1120S stated net current assets of $169,840.

The petitioner's net current assets are sufficient to establish its ability to pay the proffered wage in 2006 and the difference between the actual wage paid and the proffered wage in 2003 and 2005. The petitioner's net current assets are insufficient to demonstrate the ability to pay the proffered wage in 2004.

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

[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.

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, the petitioner's gross receipts declined from 2001 to 2004 and began increasing again in 2005 and 2006. The overall wages paid declined during this same time. The petitioner submitted no evidence to explain this decline in revenue and overall wages paid over a three year period or to otherwise liken such a decline to the situation presented in *Sonegawa.* The petitioner submitted no evidence to demonstrate its standing within the community or reputation or to otherwise demonstrate that one year's net income and net current assets were due to some discreet event outside of its control. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be 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 is granted, the appeal is dismissed, and the petition remains denied.