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)

DATE: OCT 2 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on May 12, 2008, the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider. On March 29, 2011, the AAO granted the motion but affirmed the prior decision of the AAO dismissing the appeal. The petitioner filed a second motion to reopen and reconsider. On June 7, 2013, the AAO granted the motion but affirmed the prior decisions of the AAO.. The petitioner has filed a third motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The AAO will grant the motion but affirms its prior decisions of May 12, 2008, March 9, 2011, and June 7, 2013. The appeal will remain dismissed. The petition will remain denied.

The petitioner, "[redacted] is a restaurant. It sought to employ the beneficiary permanently in the United States as a Mexican specialty cook.[1] As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director denied the petition on August 16, 2007, concluding that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. On May 12, 2008, the AAO dismissed the appeal[2] and affirmed the director's denial, determining that the petitioner had failed to demonstrate that it has had the continuing ability to pay the proffered wage.[3] On March 29, 2011 and on June 7, 2013, the AAO considered the petitioner's motions to reopen and reconsider the AAO's prior determination that the petitioner failed to demonstrate the continuing ability to pay the proffered wage and found that the petitioner had not overcome the reasons for the dismissal of the appeal.

The petitioner has filed a third motion to reopen and to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, the petitioner submits additional evidence related to the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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[1] Section 203(b)(3)(A)(i) of the Act 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.

[2] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[3] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

> *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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the Form ETA 750, the priority date is April 23, 2001. The proffered wage is $11.87 per hour, which amounts to $24,689.60 per year, based on 40 hours per week. The record does not indicate that the petitioner employed or paid compensation to the beneficiary.

If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear.[4]

In previous decisions, the AAO noted that the petitioner had been incorporated in 2000 but had not become operational until August 2001, at least three months following the priority date of April 23, 2001. No financial evidence of a tax return, audited financial statement or an annual report consistent with 8 C.F.R. § 204.5(g)(2) has ever been provided, which covers the priority date. The petitioner had failed to establish the ability to pay the proffered wage in 2001, 2002, and 2003. With this motion, the petitioner, through counsel, submits copies of the petitioner's federal tax returns for

[4] As indicated in the AAO's previous decision on May 12, 2008 and on March 29, 2011, the instant beneficiary, a nephew of one of the petitioner's shareholders was substituted for the original beneficiary specified on the Form ETA 750. Substitutions of beneficiaries were permitted until July 16, 2007 when the DOL amended the administrative regulations at 20 C.F.R. § 656.11.

2009, 2010, 2011, and 2012; copies of one of the corporate shareholder's individual tax returns for 2000, 2001, 2002, 2003, and 2004; an affidavit signed by [redacted], one of the corporate shareholders; an affidavit signed by [redacted] the petitioner's manager, and a letter from the petitioner's accountant.

On motion, the petitioner, through counsel, reasserts that the petitioner has had the ability to pay the proffered wage and relies on *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). It is asserted that there were large pre-opening expenses in 2001, depreciation should be added back as it does not represent a cash outlay, that the proffered wage should be prorated which could have been covered by cash, that current liabilities in 2001 represented family funds, which did not have to be paid unless a profit was shown, and that the attacks of September 11, 2001 affected the petitioner's business.

These assertions are not persuasive. With regard to proration of the proffered wage, USCIS will not, in general, consider prorating the proffered wage unless the comparison includes evidence of net income or evidence of payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period). In this case, the petitioner submitted evidence of its net income and net current assets as reflected on its 2001 federal corporate tax return, covering a period from August through December 2001. Both net income and net current assets were negative. Moreover, as noted on appeal, the AAO considers the cash amount reflected on Schedule L as part of the calculation of net current assets.

With respect to current liabilities or depreciation, the petitioner cites no legal authority to add back such expenses to net income or net current assets. As indicated on appeal, if a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure or net current assets[5]

[5] Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. For example, a corporate petitioner's year-end current assets and current liabilities are generally shown on line(s) 1 through 6 of Schedule L of its Form 1120 federal tax returns. Current liabilities are shown on line(s) 16 through 18 of Schedule L. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

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.

A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also

reflected on the petitioner's federal income tax return or audited financial statements without consideration of depreciation or other expenses as suggested by counsel in this case. *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.

With respect to depreciation as claimed by counsel, 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.

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include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

River Street Donuts at 116. "[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).

It is further noted that the record of proceeding contains no evidence specifically connecting the petitioner's business losses in 2001 to the events of September 11, 2001, except for [redacted] stating that August 2001 was a difficult month to start a business and that people did not want to spend money, followed by an observation that business increased in 2002. An undated projection of job losses covering various metro areas published by the [redacted] submitted on motion does not particularly support the petitioner's assertion and it does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Similarly, a copy of a [redacted] review and copies of three online articles do not specifically refer to the petitioning restaurant and are of limited probative value.

With regard to [redacted] personal tax returns and his statement that he would have used personal assets to pay the proffered wage, as indicated in the AAO's previous decision of March 29, 2011, the petitioner identified on the labor certification and on the Form I-140, Immigrant Petition for Alien Worker is a corporation not an affiliated entity with a separate Federal Employer Identification Number (FEIN)[6] or an individual person. 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. 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."

As noted in the AAO's previous decisions, the petitioner failed to establish that it has had the *continuing* ability to pay the proffered wage in 2001, the year covering the priority date, 2002 or 2003 through either its net income or net current assets. In the instant case, while the petitioner has shown increasing gross sales since 2001, it is also noted that it filed a labor certification application less than a year after it was incorporated, and as noted above, despite [redacted] statement of necessary training required, the petitioner was not a viable or operational business when it advertised for the job. The AAO does not conclude that this petition merits approval pursuant to *Matter of Sonegawa* and it has not established that it had the *continuing* ability to pay the beneficiary the proffered wage.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The motion to reconsider and motion to reopen is granted. The prior decisions of the AAO, dated

[6] *See* 20 C.F.R. § 656.3. An employer sponsoring a foreign worker must have a valid FEIN.

May 12, 2008, March 29, 2011, and June 7, 2013 are affirmed. The appeal remains dismissed. The petition remains denied. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decisions of the AAO, dated May 12, 2008, March 29, 2011, and June 7, 2013 are affirmed. The petition remains denied.