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: OCT 16 2014 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)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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 Director, Nebraska Service Center (Director), denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and affirmed its decision after the petitioner moved to reopen and reconsider the determination on two prior occasions. The matter is now before us on the petitioner's third motion to reopen and reconsider. The motion will be granted, and the appeal's dismissal will be affirmed.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as an assistant manager. It requests classification of the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i), which provides preference classification to qualified immigrants who are capable of performing permanent, skilled labor, requiring at least two years of training or experience, for which qualified United States workers are unavailable.

As required by statute, an Application for Alien Employment Certification (Form ETA 750), certified by the United States Department of Labor (DOL), accompanies the petition. The petition's priority date is July 18, 2003, the date the DOL received the labor certification application. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner did not establish its continuing ability to pay the beneficiary the proffered wage beginning on the petition's priority date. Accordingly, on April 17, 2009, the director denied the petition. On June 27, 2013, we dismissed the petitioner's appeal on the same ground.

On November 26, 2013, and May 8, 2014, we granted the petitioner's prior motions to reconsider. However, both times, we affirmed our dismissal of the petitioner's appeal on the ground that the petitioner did not establish its continuing ability to pay the proffered wage. In the May 8, 2014, decision, we specifically found that the petitioner did not demonstrate its ability to pay the proffered wage in 2005, 2007, and 2008.

The instant motion is properly and timely filed. *See* 8 C.F.R. § 103.5(a). We will grant the motion because it states new facts, is supported by documentary evidence, and argues that U.S. Citizenship and Immigration Services (USCIS) erred in applying law or policy. *See* 8 C.F.R. §§ 103.5(a)(2), (3). We exercise *de novo*, appellate review. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

A visa petitioner must demonstrate its ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* In the instant case, the labor certification states that the proffered wage is $16.90 per hour for a 35-hour, work week, or $30,758 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner employed the beneficiary during the relevant time period. If a petitioner establishes that it paid the beneficiary a salary equal or greater than the proffered wage during the relevant period,

USCIS will consider the evidence as *prima facie* proof of the petitioner's ability to pay the proffered wage.

The instant record contains copies of an Internal Revenue Service (IRS) Form 1099-MISC, indicating that the petitioner paid the beneficiary $21,886.14 in 2008. The petitioner's payment to the beneficiary does not demonstrate its ability to pay the proffered wage in 2008 because the amount does not equal or exceed the annual proffered wage of $30,758. The record does not contain any evidence that the petitioner employed the beneficiary in 2005 and 2007, the other years for which the petitioner has not demonstrated an ability to pay the proffered wage.

USCIS may also determine a petitioner's ability to pay by examining the net income figures indicated on its federal income tax returns, without consideration of depreciation or other expenses. *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880-01 (E.D.Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011)); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1053-54 (S.D.N.Y. 1986); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 535-37 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083-84 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (Table) (all upholding USCIS's reliance on net income, as indicated on a petitioner's federal income tax returns without consideration of depreciation or other expenses, as a basis for determining a petitioner's ability to pay).

In the instant case, the petitioner's IRS Forms 1120S state the following annual net income amounts[1]: $(172,733) in 2005; $(97,319) in 2007; and $(29,623) in 2008.[2] Because the petitioner's annual net income amounts for 2005, 2007, and 2008 are negative, it has not established its ability to pay the proffered wage, or the difference between the annual proffered wage and the amount it paid the beneficiary, for the relevant years.

A petitioner may also demonstrate its ability to pay the proffered wage with net current assets reflected on its federal income tax returns. Net current assets are the difference between a petitioner's current assets and current liabilities.[3] If the total of an S corporation's year-end current assets (as indicated on lines 1 through 6 of Schedule L of its IRS Form 1120S) exceeds the year-end current liabilities (as indicated on lines 16 through 18 of its Schedule L) by at least the annual proffered wage amount, USCIS presumes the corporation's ability to pay that year.

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[1] If an S corporation like the petitioner adjusts its net income with income from sources other than a trade or business, USCIS refers to the adjusted net income amount on Schedule K of the company's IRS Form 1120S. Because the instant petitioner adjusted its net income in all relevant years, USCIS refers to the adjusted net income figures on Line 17e of the petitioner's 2005 Schedule K and lines 18 of its 2007 and 2008 Schedules K.

[2] Numbers in parentheses reflect negative amounts.

[3] Current assets generally consist of items that can be liquidated within one year, such as cash, marketable securities, inventory, and prepaid expenses. Current liabilities, on the other hand, generally include obligations payable within one year, such as accounts payable, short-term notes, and accrued expenses like taxes and salaries. *Barron's Dictionary of Accounting Terms*, 117-18 (3d ed. 2000).

The instant petitioner's Schedules L state the following annual net current asset amounts: $(179,126) in 2005; $(253,653) in 2007; and $(461,571) in 2008. Because the annual net current asset amounts for 2005, 2007, and 2008 are negative, the petitioner's net current assets do not demonstrate its ability to pay the proffered wage, or the difference between the proffered wage and the amount paid to the beneficiary, in the relevant years.

Therefore, the petitioner has not demonstrated its continuing ability to pay the proffered wage based on examinations of the wages it paid the beneficiary, its net income, and its net current assets.

The petitioner argues that it could have paid the annual proffered wage in 2005, 2007, and 2008 with officer compensation amounts. The petitioner's federal income tax returns indicate that it paid annual officer compensation amounts of $26,524 in 2005, $38,936 in 2007, and $42,728 in 2008.

USCIS cannot consider the assets or salaries of shareholders in determining a corporation's ability to pay a proffered wage because a corporation is a legal entity separate from its shareholders. *See Matter of Aphrodite Invs., Ltd.*, 17 I&N Dec. 530, 530 (Comm'r 1980); *Sitar v. Ashcroft*, No. Civ.A. 02-30197-MAP 2003 WL 22203713 *2 (D. Mass. Sept. 18, 2003) (stating that "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"). However, USCIS can consider a corporation's discretionary distributions of officer compensation from its profits as evidence of its ability to pay a proffered wage.

In a June 1, 2009 letter and a December 17, 2013 affidavit, respectively, the petitioner's former vice president and sole shareholder, and her husband, the company's former president, state that they would have foregone their officer compensation amounts to pay the proffered wage in 2005, 2007, and 2008.[4] In support, the instant motion includes copies of the couple's joint, federal income tax returns for those years.

However, the couple's 2005 tax return reflects a joint adjusted gross income amount of $21,789, which does not equal or exceed the annual proffered wage amount of $30,758. The couple also claims three dependents on its 2005 tax return, indicating that the couple must also support the dependents from the adjusted gross income amount. *See Ubeda v. Palmer*, *supra*, at 650 (finding an employer's ability to pay an annual proffered wage of $6,000 "highly unlikely" where he reported net taxable income of $13,000 from which he must also support his wife and five children).

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[4] The record contains a stock purchase agreement, which indicates that the sole shareholder sold all of the petitioner's shares to another individual on July 25, 2012. Online records state that the petitioner remains an active corporation and that the former president remains an officer of the petitioner. *See* Fla. Dep't of State, Div. of Corps., at search.sunbiz.org. In a February 10, 2013 letter, the petitioner's new owner stated that the company continues to operate the same business and to offer the position described in the petition to the beneficiary.

Also, the record contains inconsistencies in the annual amounts paid to the couple by the petitioner in 2005 and 2007. Information on the IRS website states that "Subchapter S corporations should treat payments for services to officers as wages and not as distributions of cash or property or loans to shareholders." *See* Internal Revenue Serv., "Wage Compensation for S Corporation Officers," at http:/www.irs.gov/uac/Wage-Compensation-for-S-Corporation-Officers (accessed Sept. 17. 2014). Copies of the couple's IRS Forms W-2 state that the petitioner paid its former vice president/sole shareholder wages of $20,371.34 in 2005 and $38,935.66 in 2007, and its former president wages of $35,131 and $44,355.94 in the same respective years. However, the petitioner's tax returns reflect annual officer compensation amounts of only $26,524 in 2005 and $38,936 in 2007.

The inconsistencies between the reported annual officer compensation amounts and the total W-2 wages received by the couple in 2005 and 2007 cast doubt on the accuracy of the petitioner's financial documentation. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of a petition). The inconsistencies also suggest that the officer compensation amounts in those years were part of salaries that employment agreements required the petitioner to pay the couple, rather than distributions from profits that it was free to distribute at its discretion. Therefore, the petitioner has not established its ability to pay the proffered wage from officer compensation amounts in the relevant years.

The petitioner also argues that it could have paid the proffered wage in 2005 and 2007 with money it would have saved in outsourcing expenses. In her June 1, 2009 letter, the petitioner's former vice president/sole shareholder stated that, had the petitioner employed the beneficiary in the offered position of assistant manager, it would not have needed to pay his employer, [redacted] $31,674.37 in 2005 and $61,103.85 in 2007 for consulting services.

The record contains copies of numerous checks, dated in 2005 and 2007, from the petitioner to [redacted] However, the record does not contain independent, objective evidence that [redacted] in those years provided the same services to the petitioner that the beneficiary would have provided in the offered position. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (BIA 1998) (stating that going on the record without corroborating, documentary evidence is insufficient to meet the burden of proof in visa petition proceedings) (citation omitted).

In a September 13, 2005 letter in support of a prior petition filed by [redacted] on behalf of the beneficiary, the petitioner's former president identified himself as a [redacted] director and stated that [redacted] employed the beneficiary as president.[5] The former president stated that the beneficiary's duties included directing market research and "due diligence" activities regarding [redacted] agreement to provide management services to the petitioner. However, he did not

[5] The last name of the petitioner's former president is spelled differently in the prior petition. However, biographical information in USCIS records indicate that the petitioner's former president and [redacted] director is the same person and that his last name is misspelled in the instant petition.

state that the beneficiary himself provided services to the petitioner or any other clients of

In addition, the petitioner argues that it could have paid the proffered wage in the relevant years with money it had placed in certificates of deposit (CDs). The record contains bank account statements showing balances of four CDs during the relevant years. The petitioner's former president stated in his affidavit that the petitioner would have been willing to incur early-withdrawal fees to pay the proffered wage from the CD funds in the relevant years.

As indicated above, however, we have already considered current assets in determining the petitioner's ability to pay. The petitioner has not demonstrated that the current assets reflected on its tax returns in the relevant years omitted the CD funds. Also, the petitioner has not established the amount of early-withdrawal fees that it would have incurred to withdraw the CD funds and that sufficient funds to pay the proffered wage would have remained after the payment of the penalty fees.

USCIS may also consider the overall magnitude of the petitioner's business activities in determining a petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967). A petitioner's inability to generate sufficient net income and assets for all calendar years does not necessarily preclude it from establishing its ability to pay. *Id.* at 615. USCIS may consider factors such as: the number of years a petitioner has conducted business; the established, historical growth of its business; its reputation in its industry; its number of employees; whether the beneficiary will replace an employee or an outsourced service; the amount of compensation paid to corporate officers; uncharacteristic business expenditures or losses; and any other evidence of its ability to pay the proffered wage. *Id.*

The instant record indicates that the petitioner has conducted business since 1996 and that it employed eight people when it filed the petition in 2007. However, the petitioner's federal income tax returns reflect a general decline in its gross annual revenues since 2006. The record also does not contain evidence of the petitioner's reputation in its industry.

The petitioner argues that Hurricanes Wilma and Rita inflicted uncharacteristic business losses on it in 2005. Counsel argues that we should take "judicial notice" that the hurricanes affected all Florida businesses in 2005. Counsel cites a property loss deduction claimed by the petitioner's former vice president/sole shareholder and former president in their 2005 joint federal income tax return as evidence of the storms' effect on the petitioner.

The couple's 2005 tax return, however, states that casualties resulting from Hurricane Wilma affected their personal property, not property that the petitioner used to earn income. *See* IRS Form 4684, Casualties and Thefts, Section A. Thus, the tax return does not demonstrate that the 2005 hurricanes inflicted business losses on the petitioner.

Also, whether the storms affected a company's finances is not the type of "commonly known fact" of which a court or administrative agency may take judicial or administrative notice. *See, e.g.,*

Matter of R-R-, 20 I&N Dec. 547, 551 n.3 (BIA 1992). Because hurricanes may affect companies differently depending on the nature of their businesses and other factors, USCIS may not attribute the petitioner's 2005 financial shortcomings to the storms without corroborating evidence that the hurricanes impaired the petitioner's business. The record does not contain any evidence to establish that the storms affected the petitioner's revenue or income in 2005.

In addition, beyond our prior decisions in this matter, USCIS records indicate that the petitioner filed an immigrant visa petition for another beneficiary that remained pending during the pendency of the instant petition. The petitioner must demonstrate its ability to pay the proffered wage of each petition beneficiary. *See* 8 C.F.R. § 204.5(g)(2). Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

Because USCIS has not previously considered the other pending petition, the petitioner must establish its ability to pay the combined proffered wages for each year from the instant petition's 2003 prior date, not just for 2005, 2007, and 2008. However, the record does not indicate the priority date or proffered wage of the petitioner's other petition, or whether the petitioner paid any wages to the other beneficiary. The record also does not indicate whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary obtained lawful permanent residence. Without this information, we are unable to assess the petitioner's ability to pay the combined proffered wages. Thus, the record does not establish the petitioner's continuing ability to pay the combined proffered wages of the instant beneficiary and the beneficiary of its other petition.

After careful review of the entire record, including the overall magnitude of the petitioner's business and the petitioner's arguments on motion, we find that the petitioner has not established its continuous ability to pay the proffered wage from the petition's priority date onward. Thus, although the petitioner's motion will be granted, the dismissal of its appeal will be affirmed.

In visa petition proceedings, the petitioner bears the burden of establishing eligibility for the benefit sought. *See* section 291 of the Act, 8 U.S.C. 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The instant petitioner has not met that burden.

ORDER: The motion to reopen and reconsider is granted. In accordance with this office's previous decisions in this case, the petition remains denied.