

(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

DATE: **APR 09 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion will be granted, and the previous decision of the AAO, dated March 13, 2002, will be affirmed.

The petitioner is a construction material testing firm. It seeks to employ the beneficiary permanently in the United States as a civil engineer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and denied the petition accordingly.

On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and in a decision dated March 13, 2012, denied the petitioner's appeal.

On April 13, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision. 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. 8 C.F.R. § 103.5(a)(2). 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. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner submits evidence in an attempt to establish that it has the ability to pay the proffered wage. The record shows that the motion to reopen is properly filed and timely. Further, the motion provides new facts and is supported by documentary evidence. The motion to reopen is granted. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of March 13, 2012 is affirmed. The remaining 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.

As set forth in the AAO's previous decision, the only 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), 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted by the DOL on June 20, 2007. The proffered wage as stated on the ETA Form 9089 is \$65,582 per year. The ETA Form 9089 states that the position requires at least a bachelor's degree in civil engineering and a minimum of 48 months (four years) of work experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation with one stockholder (owner). On the petition, the petitioner claimed to have been established on March 30, 1992 and to currently employ 19 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on September 19, 2007, the beneficiary claimed to have worked for the petitioner from January 15, 2007 until the filing of the labor certification.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 Sonogawa*, 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.

Based on the evidence submitted, the petitioner paid the beneficiary the following actual wages for the years 2007 through 2010:

Tax Year	Actual Wage (AW) (Box 1, Form W-2)	Yearly Proffered Wage (\$ 65,582) minus AW
2007	\$ 24,142.50	\$ 41,439.50
2008	\$ 30,296.00	\$ 35,286.00
2009	\$ 39,990.00	\$ 25,592.00
2010	\$52,000.00	\$ 13,582.00

In the instant case, the record demonstrates that the petitioner paid the beneficiary less than the proffered wage for each of the four years from 2007 to 2010. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in each of those years.

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).

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 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 September 22, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence, which included the petitioner’s 2007 income tax returns. On motion, the petitioner has supplemented the record with its income tax returns for the years 2008 to 2010. At that time, the 2011 tax returns were not yet due. Therefore, the petitioner’s income tax return for 2010 is the most recent return available. The petitioner’s tax returns demonstrate its net income for the years 2007 through 2010, as shown in the table below.

- In 2007, the Form 1120S stated net income¹ of \$9,000.

¹ 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 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 27, 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 each of the years from 2007 through 2010, the petitioner’s net income is found on Schedule K of its tax returns.

- In 2008, the Form 1120S stated net income of \$123,680.
- In 2009, the Form 1120S stated net income (Loss) of (\$212,116).
- In 2010, the Form 1120S stated net income of \$41,190.

The petitioner has not shown an ability to pay the difference between the actual wages it paid the beneficiary and the proffered wage using its net income for the years 2007 and 2009. The petitioner's net income in 2008 and 2010 would be sufficient to cover the difference in the beneficiary's actual wages and the proffered wage during those two years. However, as the AAO noted in its prior decision, since 2009, the petitioner has filed other immigrant petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant case. USCIS records indicate that the petitioner has filed several petitions since the petitioner's establishment in 1992, including both I-129 petitions, and I-140 petitions. Specifically, the records indicate that the petitioner filed five Form I-140 petitions since 2007, including one on January 16, 2009 for A.A., (Receipt No. [REDACTED]), with a priority date of June 20, 2007. The beneficiary in that case has not yet obtained lawful permanent residence based on his I-140 petition, which has been approved. The remaining four I-140 petitions have priority dates in 2011 and 2012. The AAO notes again that the petitioner is required to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).²

The AAO's March 13, 2012 decision reiterated this obligation to the petitioner. The petitioner had previously submitted, on appeal, copies of the 2007 Form W-2 for A.A. and for two beneficiaries of employment based nonimmigrant petitions filed by the petitioner. However, the record lacks evidence that would enable the AAO to determine whether A.A.'s 2007 wages equal the full proffered wage as set forth on the labor certification filed on his behalf. As noted, if it does not, the petitioner would need to demonstrate that it had the ability to pay the difference between actual wages and the proffered wages from 2007 onward to both A.A. and to the beneficiary in this case. The petitioner also has not submitted evidence any evidence of the actual wages it paid A.A. after 2007. Based on the petitioner's net income in 2010, without knowing the other sponsored worker's proffered wage, and what wages the petitioner paid that worker, it is unclear whether the petitioner's net income would be sufficient to pay the remainder of this beneficiary's and the second sponsored worker's proffered wages. Therefore, the petitioner has not demonstrated that the net income from 2007 through 2010 is sufficient to pay the full proffered wages to both the beneficiary here and the second worker sponsored in this time period.

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.³ A corporation's year-end current assets are shown

² Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

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 the years 2007 through 2010, as shown in the table below.

- In 2007, the Form 1120S stated net current assets (liabilities) of (\$90,032).
- In 2008, the Form 1120S stated net current assets (liabilities) of (\$168,889).
- In 2009, the Form 1120S stated net current assets (liabilities) of (\$428,418).
- In 2010, the Form 1120S stated net current assets (liabilities) of (\$289,945).

Therefore, the petitioner did not have sufficient net current assets to pay the beneficiary the difference between the actual wages paid to him and the proffered wage in the years 2007 through 2009. As noted above, whether the petitioner can pay both of its sponsored workers in 2008 and 2010 based on its net income is unclear. However, the petitioner's net current assets also would not establish its ability to pay either beneficiary in either of those years.

Accordingly, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had 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.

On motion, counsel again seeks to rely on the sole shareholder's 2007 individual tax returns to demonstrate the petitioner's ability to pay the proffered wage for that year. However, as previously noted, USCIS (legacy INS) has long held that 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 M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Similarly, we relied on *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), in which the court 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." Counsel asserts, however, that even if the regulation does not appear to permit USCIS to consider the sole shareholder's personal resources in establishing the petitioner's ability to pay where she has no legal obligation to pay the wage, the regulation does not necessarily prohibit the agency from doing so. Counsel has not cited to any legal or binding authority for this proposition.

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.

The AAO will not consider the adjusted gross income of the petitioner's sole shareholder as evidence of the petitioner's ability to pay the proffered wage.

Additionally, counsel refers to the April 3, 2012 letter of the petitioner's tax preparer and Certified Public Accountant (CPA), indicating that the petitioning company's accounting basis is in fact different from what is reflected in its tax returns and would demonstrate ability to pay the proffered wage. A prior letter by the CPA indicates that petitioner's net income and net current assets would have been much higher if the petitioner had used an accrual basis of accounting, instead of a cash basis method. In support of this assertion, counsel references a decision issued by the AAO, but does not provide its published citation or a copy of the decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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> (last accessed April 1, 2013). This office would, in the alternative, have accepted tax returns prepared pursuant to an accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS). This office is not, however, 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.⁴ The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, and not as proposed by the petitioner's CPA.

Moreover, although tax returns prepared pursuant to cash basis accounting may not facilitate comparing various years to each other, they are at least as good an indicator of the funds that were available to the petitioner during a given year as are returns prepared pursuant to accrual basis of accounting.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

⁴ 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> (last accessed April 1, 2013).

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 record lacks any evidence of the petitioner's reputation evidence, aside from the April 3, 2012 letter of its CPA, who states that the business: has grown steadily since 1992; has employed 32, 44, 66, 68, and 68 employees in the years 2007, 2008, 2009, 2010, and 2011, respectively; and has a reputation that has grown steadily such that it has become one of the well-known in the industry. While the CPA's assertions relate to the strength of the petitioner's reputation within its industry, the AAO will not consider assertions which are not supported by evidence. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972))(which states that going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.) Unsupported assertions are not evidence. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Thus, the CPA's assertions are insufficient to overcome the adverse evidence in the record reflecting the petitioner's low or negative net incomes, its negative net current assets in 2007, and the significantly negative figures for its net current assets from 2008 through 2010. The petitioner has offered no explanation for the particularly high negative net income and net current assets in 2009. We note also that the officer compensation to the sole shareholder of the business has fluctuated greatly between 2006 and 2010, dropping to only \$12,000 in 2010. The petitioner has also failed to address its ability to pay the proffered wages to the multiple beneficiaries it has sponsored. The record contains no evidence of the proffered wages to be paid to the other beneficiaries or their actual paid pages. Without this information, it is not clear that the petitioner has the ability to pay the proffered wage or the difference between the wage paid and the proffered wage in any year, an issue the AAO raised in its prior decision, and which the petitioner has not fully addressed on motion. Absent such

information, the AAO cannot determine that *Sonegawa* should be favorably applied to the petitioner's case. 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 or all its sponsored workers' wages.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The motion will be granted and the petition reopened. However, the appeal remains dismissed, the AAO's decision of March 13, 2012 is affirmed, and the underlying petition remains denied.

ORDER: The motion is granted; the previous decision of the AAO dismissing the appeal, dated March 13, 2012, is affirmed, and the underlying petition remains denied.