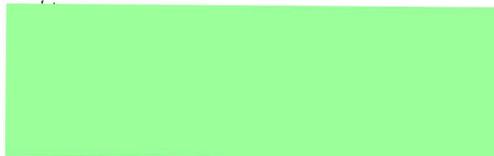




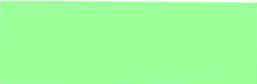
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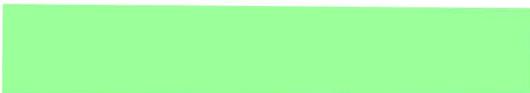


DATE: **DEC 05 2013**

OFFICE: TEXAS SERVICE CENTER

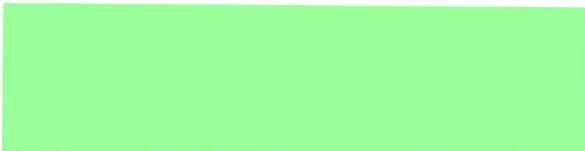
FILE: 

IN RE:        Petitioner:  
              Beneficiary:



PETITION:    Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of  
                  the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a publishing company. It seeks to employ the beneficiary permanently in the United States as a digital online version designer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). On March 8, 2013, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On April 16, 2013, the petitioner filed a motion to reopen and reconsider with the director. On May 22, 2013, the director dismissed the motions as untimely. On June 13, 2013, the petitioner filed a second motion to reopen and reconsider with the director, who subsequently accepted the initial motion but ultimately dismissed the motions pursuant to 8 C.F.R. § 103.5(a)(4). The director determined that the evidence submitted in connection with the April 16, 2013 motion did not meet the requirements for filing a motion to reopen. On August 16, 2013, the petitioner filed the instant appeal.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

On appeal, counsel asserts that the director's denial of the Form I-140 and subsequent motions was based on an incorrect application of law or policy. Counsel further asserts that the petitioner's totality of the circumstances and supporting documentation establish that it has the ability to pay the proffered wage.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The matter is properly before the AAO on appeal. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

A basis of the director's July 18, 2013 decision on the petitioner's second motion was whether the evidence submitted in connection with the petitioner's April 16, 2013 motion to reopen and reconsider met the regulatory requirements under 8 C.F.R. § 103.5(a)(2).

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

documentary evidence.” Based on the plain meaning of “new,” a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>2</sup>

The record before the director closed on December 5, 2012 with receipt of the petitioner’s response to the director’s November 10, 2012 Notice of Intent to Deny (NOID). After the director’s March 8, 2013 decision, the petitioner presented additional facts or evidence on motion. The petitioner submitted the following relevant evidence:

- a copy of the petitioner’s Form 941, Employer’s Quarterly Federal Tax Returns for the 4<sup>th</sup> Quarter of 2011 and 4<sup>th</sup> Quarter of 2012;
- a copy of the beneficiary’s pay stubs for the period December 16, 2012 to December 31, 2012, and February 16, 2013 to February 28, 2013;
- a copy of the petitioner’s Profit and Loss Standard, dated April 2012 through March 2013;
- a copy of the Petitioner’s Balance Sheet Standard as of March 31, 2013;
- a letter from the petitioner’s accountant; and
- a copy of financial statements for the fiscal year ending March 31, 2012 (Profit and Loss Balance Sheet).

Some of the above evidence submitted on motion was not previously available and could not have been discovered or presented prior to the director’s March 8, 2013 decision. It is noted that the petitioner’s Form 1120 tax returns for 2011 submitted on motion was originally requested in the director’s November 10, 2012 NOID. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the petitioner’s 2011 tax returns would not be considered “new” and standing alone would not be considered a proper basis for a motion to reopen. Notwithstanding, the matter is before the AAO on appeal, and the entire record of proceeding will be considered in this *de novo* review.

As set forth in the director’s March 8, 2013 decision, the director determined that the petitioner failed to submit regulatory required evidence to demonstrate its ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 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

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<sup>2</sup> The word “new” is defined as “1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . .” *Webster’s II New Riverside University Dictionary* 792 (1984) (emphasis in original).

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, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on February 27, 2012. The proffered wage as stated on the ETA Form 9089 is \$44,658 per year. The ETA Form 9089 states that the position requires a Bachelor's degree in Fine Arts and 18 months of experience in the job offered, or a "Suitable combination of education, training or experience" and one year of experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of \$1.3 million, and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year runs from April 1 through March 31 of each year. On the ETA Form 9089, signed by the beneficiary on September 13, 2012, the beneficiary claims to have worked for the petitioner since 2010.

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, 144 (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, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The record contains copies of the beneficiary's pay stubs for calendar year 2012. The stub for pay period December 16, 2012 through December 31, 2012 shows year-to-date gross earnings of \$43,508.52, including \$33,538.95 base earnings and

\$9,969.57 overtime earnings, which is less than the proffered wage of \$44,658.<sup>3</sup> The petitioner has failed to establish its ability to pay the proffered wage from the priority date onward through wages paid.

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 the Service 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.

<sup>3</sup> It is noted that the petitioner provided the beneficiary's pay stubs, not its 2012 Form W-2, Wage and Tax Statement. Therefore, it is unclear whether the year-to-date gross earnings amount was paid in 2012 or if the final pay period payment occurred in 2013.

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 St. 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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record before the director's initial decision closed on December 5, 2012 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date, the petitioner's 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 was the most recent return available at the time of the director's initial decision. The petitioner's Form 1120 tax return demonstrates its net income for fiscal year 2011 as \$(32,820.00). Therefore, the petitioner did not have sufficient net income to pay the proffered wage in fiscal year 2011, or the difference between any wages paid and the proffered wage. The petitioner did not provide its fiscal year 2012 on subsequent motions or with its appeal.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 Form 1120 tax return demonstrates its end-of-year net current assets for fiscal year 2011 as \$(37,451.00). Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage in fiscal year 2011, or the difference between any wages paid and the proffered wage.

Therefore, 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.

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<sup>4</sup> 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). *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

The record also contains the petitioner's bank statements in support of the petitioner's ability to pay the proffered wage. The petitioner's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L is considered in determining the petitioner's net current assets.

The record also contains copies of the petitioner's financial statements, including its Profit and Loss Standard for 2011, 2012 and 2013, and its Balance Sheet Standard as of March 31, 2013. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, the record contains an April 11, 2013 letter from the petitioner's accountant, stating that funds from shareholders and compensation of officers "will be made readily available for payment of the Beneficiary's salaries." However, 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'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The sole shareholder of a corporation does, however, have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income. The documentation presented here indicates that the sole shareholder holds 100% percent of the company's stock. According to the petitioner's 2011 IRS Form 1125-E (Compensation of Officers), the shareholder elected to pay herself \$36,106 as officer compensation. However, it is unclear whether the officer compensation is an amount fixed by contract or otherwise. The amount of officer compensation is relatively consistent between fiscal

year 2010 and fiscal year 2011 suggesting that it may be a fixed salary. In an April 11, 2013 affidavit, the petitioner's accountant states that the officer compensation is variable and not fixed; however, the limited information provided on appeal does not sufficiently document this assertion. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, the officer compensation paid each fiscal year is relatively low. Without evidence to establish this figure is not fixed by contract or otherwise, and to document that the shareholder is otherwise able to forgo their officer compensation, the accountant's assertion alone is insufficient to establish the petitioner's ability to pay. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, the petitioner's tax returns were prepared pursuant to the accrual method of accounting, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. See <http://www.irs.gov/publications/p538/ar02.html#d0e1351> (accessed November 26, 2013). The accountant's letter states that, under this accounting system, expenses intended to benefit the next accounting period (or next year expenses) are recorded and shown as payable in the current year under "Other current Liabilities". The accountant states that these funds are available at the end of the fiscal year. Further, the accountant states that the petitioner also set up discretionary funds categorized as "Due to Shareholder" under "Other current Liabilities", which is an amount available to the company in the event that ready cash is needed. The accountant asserts that this action is taken for the purpose of reducing tax liabilities, in reality it is not a current liability but a current asset. However, no documentation supports these assertions, which is not sufficient evidence to meet the burden of proof on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Further, 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).

This office would, in the alternative, have accepted tax returns prepared pursuant to cash 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 accrual method then the petitioner, whose taxes are prepared pursuant to accrual, 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.<sup>5</sup> The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not pursuant to the accountant's assertions.

The petitioner's assertions on appeal 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.

Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage as of the priority date onwards.

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 *Sonegawa*, 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not submitted sufficient evidence based upon the totality of circumstances to conclude it has the ability to pay the proffered wage from the priority date onward to the beneficiary. The record of proceeding contains only a limited financial history. The petitioner has failed to establish its historical growth, and in fact demonstrated negative net income and negative net current assets in all relevant years and consistent or declining revenue, income, and salaries. The petitioner did not establish any uncharacteristic business expenditures or losses, nor did it offer any evidence of its reputation within the industry which would conclude the ability to pay the proffered wage in line with *Sonegawa*. Thus, assessing the totality of the circumstances in this

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<sup>5</sup> Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed November 26, 2013).

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.

Beyond the decision of the director,<sup>6</sup> the evidence submitted does not establish that the petition requires a minimum of a bachelor's degree, or a foreign degree equivalent to a U.S. bachelor's degree, for classification as a professional.

Here, the Form I-140 was filed on October 5, 2012. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(1)(2).

The labor certification states the position offered requires a Bachelor's degree in Fine Arts and 18 months of experience in the job offered. However, at Part H, Question 8, where asked whether an alternate combination of education and experience was acceptable, the petitioner stated "Yes." At Question 8-A, where asked to specify the alternate level of education required, the petitioner checked the box "Other." At Question 8-B, where asked to indicate the alternate level of education required, the petitioner stated, "Suitable combination of education, training or experience." At Question 8-C, where asked to indicate the number of years experience acceptable in question 8, the petitioner stated "1." Given this, the labor certification alternate requirements would permit an individual to qualify for the position offered with a degree less than a bachelor's degree. Therefore, the petition does not qualify for the professional classification. However, the petitioner requested the professional classification on the instant Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification 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).

Therefore, the evidence submitted does not establish that the petition requires a minimum of a bachelor's degree such that the beneficiary may be found qualified for classification as a professional under Section 203(b)(3)(A)(ii) of the Act.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish

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<sup>6</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

(b)(6)

*NON-PRECEDENT DECISION*

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

**ORDER:** The appeal is dismissed.