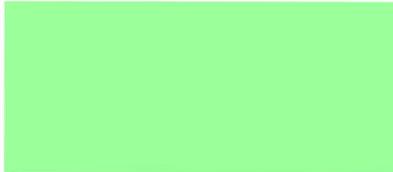


(b)(6)

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



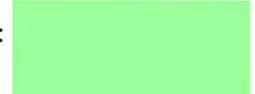
U.S. Citizenship  
and Immigration  
Services



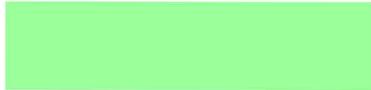
DATE: JUL 23 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE:

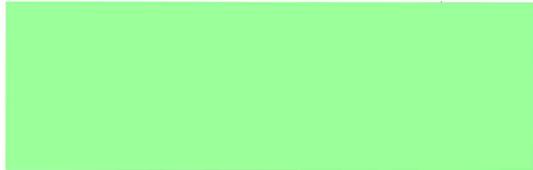


IN RE: Petitioner:  
Beneficiary:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The petitioner filed a motion to reopen. The AAO granted the motion, the previous decision of the AAO was affirmed in part and withdrawn in part, and the petition remained denied. The matter is now before the AAO on a subsequent motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a dairy farm. It seeks to employ the beneficiary permanently in the United States as a dairy farm manager at an offered annual wage of \$97,560. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The priority date of the petition is March 23, 2005, the date the DOL accepted the petitioner's labor certification. *See* 8 C.F.R. § 204.5(d).

In the director's February 4, 2009 denial, the director determined that the submitted evidence failed to establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present. On March 6, 2009, the petitioner appealed the director's denial to the AAO. On January 11, 2011, the AAO dismissed the appeal, affirming the director's determination that the petitioner failed to establish the continuing ability to pay the proffered wage since the petition's priority date. Beyond the decision of the director, the AAO also found that the petitioner failed to establish the beneficiary's qualifications for the position offered. The petitioner filed a motion to reopen the AAO's decision, providing sufficient evidence of the beneficiary's qualifications for the position offered. On February 28, 2013, the AAO granted the motion, affirming its prior decision that the petitioner failed to establish the continuing ability to pay the proffered wage since the petition's priority date, and withdrawing the portion of its decision regarding the petitioner's failure to establish the beneficiary's qualifications for the position offered. Accordingly, the petition remained denied on the ground that the petitioner failed to establish its ability to pay the beneficiary the proffered wage. On April 2, 2013, the petitioner filed the instant motion to reopen, submitting new evidence to establish the petitioner's ability to pay the proffered wage in 2006 and 2009.

The record shows that the motion is properly filed, timely and meets the applicable requirements for a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2). 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.

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 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 AAO previously found that petitioner's tax returns demonstrate net income of \$(1,005,896) in 2006 and \$(412,490) in 2009, and net current assets<sup>1</sup> of \$43,598 in 2006 and \$(310,099) in 2009,<sup>2</sup> amounts insufficient to demonstrate its ability to pay the proffered wage in these years. Therefore, the petitioner must establish its ability to pay the beneficiary the proffered wage of \$97,560 per year in 2006 and 2009.

In its February 28, 2013 decision, the AAO determined that the petitioner failed to establish its ability to pay the proffered wage in 2006 and 2009. The record reflects that the petitioner argued that its 2006 federal income tax return overstated its year-end current liabilities by mistakenly including amounts due on three long-term loans as current liabilities. On prior motion, the petitioner submitted documentation regarding the three loans, the balances of which it claims its accountant misclassified on its 2006 income tax return as current liabilities. The documentation included two promissory notes and a letter regarding the loans. The petitioner also submitted copies of its 2007 and 2008 federal income tax returns, which counsel asserted were consistent with the long-term liability amounts on its amended 2006 return.

In its decision, the AAO noted discrepancies which raised doubts about the petitioner's explanation of the misclassification of the loans' balances on its 2006 tax returns. Specifically, the AAO noted that in a March 2, 2009 letter that the petitioner previously submitted, the petitioner's accountant stated that one loan was a note payable to [REDACTED]. The accountant said he originally reported the loan on the petitioner's 2006 tax return as reflecting \$257,635.97 in current liabilities. He said he amended the return to reflect \$72,635.97 in current liabilities, and \$185,000 in long-term liabilities because most of the loan was not due within the next 12 months. In a February 7, 2011 letter submitted with this motion, the accountant states the balance of the [REDACTED] loan was \$185,000 at year-end 2006, \$185,000 at year-end 2007 and \$182,135 at year-end 2008.

The copy of the promissory note that the petitioner submitted was dated March 1, 2008 and indicated a "principal sum" of \$182,133.67, payable on February 28, 2010 at an annual interest rate of 9% to [REDACTED].

The AAO determined that the petitioner failed to explain why the promissory note was dated March 1, 2008 for a "principal" balance amount of only \$182,133.67 if the petitioner owed \$257,635.97 on the same loan at the end of 2006. The AAO found that the petitioner failed to submit evidence to support the assertions of counsel and its accountant that it owed more than \$257,635.97 on the loan as of the end

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<sup>1</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

<sup>2</sup> The record reflects that the beneficiary did not claim to have worked for the petitioner in either 2006 or 2009.

<sup>3</sup> The copy of the promissory note identifies the lending company as [REDACTED].

of 2006. Rather, the documentation submitted only established that the petitioner owed \$182,133.67 on the loan as of March 2008, but does not establish the loan amount as of 2006.

In the instant motion, counsel submits a March 27, 2013 declaration from the petitioner's accountant, stating that the author of the promissory note "is not a licensed CPA nor does he have a background in accounting." He states that he has conferred with the author and "confirmed that his usage of the phrase 'principal sum' was never intended to describe the original amount of debt, nor the balance remaining as of December 2006." Rather, the phrase "principal sum" was used to memorialize the balance remaining as of March 2008. The accountant states that there is no inconsistency between the balance of the debt stated in the March 2008 promissory note (\$182,133.67) and year-end 2008 balance due (\$182,135) stated in the February 7, 2011 letter. Counsel submits copies of previously submitted documents as attachments to the declaration.

The AAO acknowledges that while the debt stated in the March 2008 promissory note and the year-end 2008 balance due stated in the February 7, 2011 letter differ slightly, they remain consistent in that they reflect the balance owed at two different periods of time. However, the petitioner's claim of misclassification of the loan balances on its 2006 tax returns remain in doubt. The petitioner failed to submit evidence of the original promissory note, the terms and conditions of the loan, the date the original promissory note was signed, statement of loan payments, or balance statements for 2006 and 2007 to support the accountant's statements regarding the appropriate distribution of the [REDACTED] loan during the relevant period. No audited financial statements were provided in support of the accountant's assertions. 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 failed to demonstrate that it amended its 2007 and 2008 tax returns, or its financial records (or "books"), based on the 2006 amendments. The accountant's statements do not provide objective evidence of the loan amounts or due dates. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The AAO also noted another discrepancy in a second loan balance with [REDACTED]. In his 2009 letter, the accountant stated that he originally reported \$275,000 in current liabilities on the petitioner's 2006 tax return regarding a loan from [REDACTED]. He stated that he amended the return to reflect \$55,000 in current liabilities and \$210,000 in long-term liabilities. In his 2011 letter, the accountant said the balance of the [REDACTED] loan totaled \$210,000 at year-end 2006, \$210,000 at year-end 2007, and \$150,000 at year-end 2008. The petitioner submitted a letter dated December 12, 2006 from [REDACTED], a subsidiary of [REDACTED]. According to the letterhead, [REDACTED] also includes [REDACTED] as a subsidiary. The letter, which was addressed to the petitioner's CEO, indicates a balance to the petitioner of \$475,000 at a "service fee" of 10.5%.

The AAO stated that if the petitioner's accountant originally listed the loan to reflect \$275,000 in current liabilities and then amended the tax return to reflect \$55,000 in current liabilities and \$210,000

in long-term liabilities on the amended return, then there is \$10,000 unaccounted for on the amended return, as \$55,000 plus \$210,000 equals \$265,000, not \$275,000. The AAO also noted that the December 12, 2006 letter from [REDACTED] stated a balance of \$475,000 for the petitioner; whereas, the petitioner's accountant indicated the year-end 2006 loan balance was \$275,000.

In the instant motion, counsel asserts that "the missing \$10,000 is attributable to clerical error." In his March 27, 2013 declaration, the petitioner's accountant states that his 2009 letter was "prepared during the height of the tax-filing season and the missing \$10,000 was an inadvertent error." He further states that there is no inconsistency between the stated balance of \$475,000 in the [REDACTED] letter, dated December 12, 2006, and the year-end 2006 loan balance of \$275,000 in his letter. He states that the petitioner "made a payment in the amount of \$200,000 on December 20, 2006 which reduced the balance to \$275,000." Counsel submits a copy of a check dated December 20, 2006 in the amount of \$200,000 issued by the petitioner to [REDACTED]

Even if the AAO accepts the petitioner's explanation for the scrivener's error, the AAO finds that the petitioner has failed to provide sufficient evidence to support its claim of misclassification of the loan balances on its 2006 tax returns. The petitioner failed to submit contemporaneous evidence of loan payments, balance statements or promissory notes for 2006 and 2007 to support the accountant's statements regarding the appropriate distribution of the [REDACTED] loan during the relevant period. No audited financial statements were provided in support of the accountant's assertions. Further, the petitioner failed to demonstrate that it amended its 2007 and 2008 tax returns, or its financial records (or "books"), based on the 2006 amendments. 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)). The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Since "current" is set at the time, the petitioner appears to have considered the loan current in 2006, and amending now is retrospective. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). The petitioner has not provided contemporaneous evidence of the loan terms, such as the original loan documents or promissory notes. Therefore, the AAO is prevented from assessing the terms of the loans.

Based on the above, the petitioner has failed reconciled the noted inconsistencies with the [REDACTED] debt and the [REDACTED] debt. The AAO finds that the petitioner has failed to adequately support its claim of errors in its net current asset amount on its original 2006 tax return. Therefore, the AAO

finds that the petitioner has failed to establish its ability to pay the beneficiary the proffered wage in 2006.

Further, in its prior decision, the AAO found that the petitioner failed to demonstrate its ability to pay the proffered wage in 2009 and failed to identify any unusual business losses or expenditures that otherwise explain its inadequate financial resources in 2009.

In the instant motion, counsel submits a March 27, 2013 declaration from the petitioner's owner, stating the history of his business established in 1997, the growth of his business over the years, and a description of the industry and his business' role within the industry. Counsel submits copies of articles highlighting the petitioner's owner; documentation regarding the Recommendations of the Governor's Task Force on Global Warming and the petitioner's partnership program with [REDACTED] two articles from [REDACTED] the petitioner's Schedule L for 2009; and the petitioner's Schedule F for 2005 through 2012.

Counsel asserts that the petitioner experienced higher than average expenses in "repairs and maintenance," as well as an increase in "supplies" expense due to wiring and piping upgrades. He states that the 2009 "repairs and maintenance" expense was second highest in years 2005 through 2012, and the 2009 "supplies" expense was the highest in years 2005 through 2012. He states that these costs were due to "building the infrastructure for the anaerobic digester" and "wiring and piping upgrades." Counsel submits a spreadsheet detailing "repairs and maintenance" and "supplies" costs for 2005 through 2012, which is consistent with the petitioner's Schedule F (Form 1040) for 2005 through 2012 also submitted. Counsel also provides the average "repairs and maintenance" expense (\$181,540.50) and "supplies" expense (\$135,266.75) for years 2005 through 2012 to highlight the disparity in year 2009 of \$222,321 "repairs and maintenance" expense and \$212,058 for "supplies" expense.

While the petitioner's average expenses from 2005 through 2012 were reviewed, reliance on the average amounts across these years is not an accurate measure of a given year's expenses. Further, the AAO notes that the petitioner's "repairs and maintenance" expenses decreased from year 2008 to 2009. In year 2008, where the petitioner was able to establish its ability to pay, the "repairs and maintenance" expense was \$311,605; whereas, in year 2009 it decreased to \$222,321. It is further noted that while the "supplies" expense increased from year 2008 to year 2009, it appears to be offset by the decrease in "repairs and maintenance" expense from year 2008 to year 2009. The total sum of "repairs and maintenance" and "supplies" expenses remained very similar in year 2008 (\$453,274) and 2009 (\$434,379). Considering that the petitioner established its ability to pay in 2008, the AAO has doubts as to whether counsel's assertion that the petitioner's higher than average expenses in "repairs and maintenance" and "supplies" were unusual, like the case in *Sonegawa*, and explain its inadequate financial resources in 2009. It is noted that the petitioner's tax returns reflect its net income to have inconsistent growth from 2005 through 2008, and it decreased from 2008 to 2009. The petitioner does not address the decrease in its income in 2009. It is also noted that the claimed unusual business expenses were not raised when the petitioner submitted its 2009 tax returns on prior motion, but were only raised after the grounds for denial were issued in the AAO's prior decision. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Further, because of the inconsistencies and discrepancies in the petitioner's

documentation regarding the loan balances in 2006, the petitioner failed to adequately support its claim of errors in its original 2006 tax return.

In its previous *Sonegawa* analysis, the AAO acknowledged that the petitioner has conducted business since 1997, and according to its tax returns, has generated revenues of more than \$4 million and paid annual wages of more than \$450,000 from 2005 to 2009. However, based on the above, the petitioner has failed to establish any unusual business losses or expenditures that otherwise explain its inadequate financial resources in 2006 and 2009. Therefore, considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the offered wage since the priority date. The AAO therefore affirms its previous decision.

In visa petition proceedings, it is the petitioner's burden to establish 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 sustained that burden. The motion to reopen is granted; however, the previous decision of the AAO will not be disturbed.

**ORDER:** The motion is granted. The AAO's prior decision, dated February 28, 2013, is affirmed. The petition remains denied.