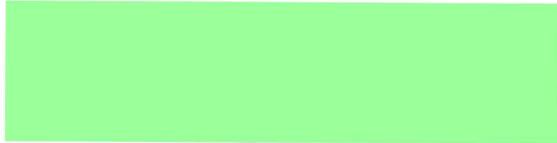




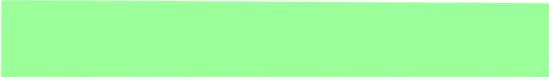
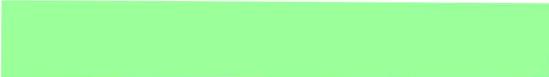
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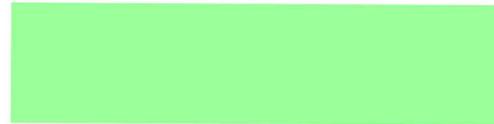
DATE: JUN 04 2013 Office: TEXAS SERVICE CENTER

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 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 appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is a truck trailer repair business. It seeks to employ the beneficiary permanently in the United States as a welding supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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. The director denied the petition accordingly. The AAO upheld the director's decision on appeal.

On motion, the petitioner submitted a copy of the petitioner's sole shareholder's affidavit of intent, copies of the shareholder's Forms W-2 for the 2008, 2009, 2010, and 2011 tax years; copies of the beneficiary's Forms W-2 for the 2008, 2009, 2010, and 2011 tax years; an affidavit from the beneficiary; and photos of the beneficiary's work tools and his driver's license. This documentation constitutes new facts and evidence under 8 C.F.R. § 103.5(a)(2). Therefore, the motion is granted.

As set forth in the director's decision dated November 8, 2008 and the AAO's decision dated May 11, 2012, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date in this matter is December 8, 2004. On motion, counsel asserts that the petitioner has established its ability to pay the proffered wage and submits the above noted evidence.

Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage since 2004.

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.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 8, 2004. The proffered wage as stated on the Form ETA 750 is \$30.00 per hour at 35 hours per week (\$54,600.00 per year). The Form ETA 750 at part 14 states that the position requires eight years of experience in the job offered.

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>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on March 9, 2001 and that it employs 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on December 2, 2004, the beneficiary claims to have been employed by the petitioner since January 2001.

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

On motion, counsel asserts that the decision of the AAO was in error and that the evidence in the record coupled with the evidence submitted on motion is more than sufficient to establish the petitioner's ability to pay the proffered wage in the relevant years.

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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 at 8 C.F.R. § 103.2(a)(1).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will 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 proffered wage in this matter is \$54,600.00.

The petitioner submitted a copy of Forms W-2 issued in the name of the beneficiary for 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. The Forms W-2 contain inconsistencies which undermine their credibility and their applicability to the beneficiary. The Forms W-2 for 2004, 2005, and 2006 indicate that the recipient of the wages was a person having social security number 184-16-5205. However, this employee's social security number changed to 145-19-4474 on the 2007, 2008, 2009, and 2010 Forms W-2. The record of proceeding contains a copy of the beneficiary's Forms 1040, U.S. Individual Income Tax Return, and the beneficiary listed a taxpayer identification number as 903-77-7299, not a social security number. On the Form I-140 petition dated July 27, 2007, in the box designated for the beneficiary's social security number, the petitioner did not indicate any. On the Form I-485, Application to Register Permanent Residence or Adjust Status, signed by the beneficiary and dated July 27, 2007, the beneficiary did not list any social security number in the designated box. In addition, on the Form G-325A, Biographic Information, signed by the beneficiary on July 2, 2007, he did not list a social security number in the designated box.

On motion, the petitioner submits an affidavit signed by the beneficiary who states that the social security number [REDACTED] was assigned to him by the Social Security Administration based upon his work authorization document issued to him by USCIS in 2007. The beneficiary also states that prior to 2007 he used his Colombian identification number [REDACTED] (adding a zero) as his social security number in order to find a job and to earn a living. The beneficiary states that he has a tax identification number [REDACTED] which he uses in filing his income tax returns.

The beneficiary's explanation is insufficient to overcome the inconsistencies found in the record of proceeding. There has been no explanation given for not including his newly acquired social security number on any of the immigration applications or petitions submitted by him or on his behalf in 2007. Furthermore, in reviewing the petitioner's Form 1120S tax returns, the petitioner indicated at page 1, Line 8 that it paid in wages and salaries \$60,470.00 in 2004, \$66,847.00 in 2005, \$8,752.00 in 2006, and \$51,463.00 in 2007. It is also noted that the petitioner stated on the Form I-140 that was signed by its representative on July 7, 2007 that it currently employed 20 workers.

There has been no explanation given for these multiple inconsistencies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Absent objective, independent evidence resolving the

inconsistencies, USCIS will not accept the Forms W-2 as credible evidence of wages paid to the beneficiary.<sup>2</sup> The credibility of the Forms W-2 is undermined by the social security number discrepancies. However, even accepting the Forms W-2, the petitioner has failed to establish that it paid the full proffered wage to the beneficiary in 2005, 2006, 2007, 2008, and 2011.

The petitioner submitted copies of the beneficiary's IRS Forms W-2, Wage and Tax Statements as shown in the table below:

- In 2004, the Form W-2 stated wages of \$62,479.80.
- In 2005, the Form W-2 stated wages of \$49,084.20 (a deficiency of \$5,515.80).
- In 2006, the Form W-2 stated wages of \$48,390.00 (a deficiency of \$6,210.00).
- In 2007, the Form W-2 stated wages of \$47,145.00 (a deficiency of \$7,455.00).
- In 2008, the Form W-2 stated wages of \$53,690.00 (a deficiency of \$910.00).
- In 2009, the Form W-2 stated wages of \$57,555.00.
- In 2010, the Form W-2 stated wages of \$56,190.00.
- In 2011, the Form W-2 stated wages of \$51,090.00 (a deficiency of \$3,510.00).

Therefore, considering the wages paid in the name of the beneficiary, the petitioner has failed to establish its ability to pay the difference between the wages paid and the proffered wage for 2005, 2006, 2007, 2008, and 2011.

If, as in this case, 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> 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

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<sup>2</sup> The beneficiary's IRS Forms 1040 filed jointly with his wife indicate a higher wage amount than the Forms W-2 issued by the petitioner. The record does not contain social security administration records as crediting the amounts earned to the beneficiary. Without such independent evidence the petitioner has failed to overcome the inconsistencies.

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 petitioner provided copies of its 2005, 2006, and 2007 federal income tax returns. The proffered wage is \$54,600.00. The Forms 1120S<sup>3</sup> tax returns demonstrate the net income as shown in the table below:

- In 2005, the Form 1120S stated net income of -\$41,897.00.
- In 2006, the Form 1120S stated net income of -\$23,524.00.
- In 2007, the Form 1120S stated net income of -\$68,742.00.

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<sup>3</sup> 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 17e (2004-2005) and line 18 (2006-2010) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

Therefore, for the years 2005, 2006, and 2007, the petitioner did not have sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage.

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.<sup>4</sup> 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. The petitioner's tax return demonstrates its net current assets as shown in the table below:

- In 2005, the Form 1120S stated net current assets of -\$3,216.00
- In 2006, the Form 1120S stated net current assets of \$22,408.00.
- In 2007, the Form 1120S stated net current assets of -\$48,231.00.

Therefore, the petitioner failed to establish its ability to pay the difference between wages paid to the beneficiary and the proffered wage in 2005 and 2007.

On motion, counsel asserts that the shareholder's income from compensation to officers should be considered in determining the petitioner's ability to pay the proffered wage and submits as evidence an affidavit from the petitioner's sole shareholder. The shareholders of a corporation 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 1120S, U.S. Income Tax Return for an S Corporation. For this reason, the petitioner's figures for compensation of officers may in certain circumstances be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that according to the petitioner's IRS Forms 1120S, first page at line 7 (Compensation of Officers), the petitioner elected to pay officer compensation in 2005 and 2007. The sole shareholder stated in his sworn statement that he agreed to forego his compensation from the priority date until the beneficiary obtains lawful permanent residence status and submitted copies of his Forms W-2 for 2005 through 2011. The record of proceeding contains copies of the sole shareholder's Forms 1040 for 2004 through 2007, and his statement in which he indicated that his average household expenses; including mortgage and taxes/insurance, utilities/cable/telephone, food, clothing, and miscellaneous expenses, was \$3,300.00 per month or \$39,600.00 per year. The petitioner submits on motion copies of the evidence in the record to

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<sup>4</sup>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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

demonstrate that the petitioner paid one of its shareholders the following compensation in 2004 through 2011:

Year	Form W-2 (B)	Deficiencies <sup>5</sup>	Officer Comp.	HH Expenses	Surplus \$
2005	\$49,084.20	\$5,515.80	\$52,000.00	\$39,600.00	\$12,400.00
2007	\$47,145.00	\$7,455.00	\$78,000.00	\$39,600.00	\$38,400.00
2008	\$53,690.00	\$910.00	\$78,000.00	\$39,600.00	\$38,400.00
2011	\$51,090.00	\$3,510.00	\$70,200.00	\$39,600.00	\$30,400.00

Sole shareholders who received officer compensation in general must show that they can sustain themselves and their dependents, if any, in addition to paying the proffered wage from their officer compensation. In the instant case, although the sole shareholder's compensation exceeds the wage deficiency amounts, the petitioner did not submit copies of its Forms 1120S or the sole shareholders Forms 1040 for 2008, 2009, 2010, and 2011. On appeal, counsel states that the petitioner paid officer compensation in each year. Counsel asserts that this officer compensation is discretionary and could have been used to pay the proffered wage. However, the petitioner failed to submit tax returns to show that officer compensation payments were paid in 2008, 2009, 2010, and 2011 and were not fixed by contract or otherwise. Without such evidence, the AAO does not find counsel's claim persuasive. 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). The tax returns are necessary to ensure that officer compensation was paid out and not wages. The shareholder's Forms 1040 for the above noted years will corroborate the household expenses and ensure consistency with the petitioner's assertions that its shareholder is both willing and able to forego officer compensation.

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. 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

<sup>5</sup> The figures in this column are based upon the deficiency between amounts paid in wages to the beneficiary and the proffered wage.

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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. In addition, the beneficiary does not qualify for a visa classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Overall, the record is not persuasive in establishing that the job offer was realistic.

The AAO determined that although the petitioner indicated on the Form ETA 750B, at part 15, that the beneficiary was required, as a special requirement, to own his own tools and to possess a valid driver's license, there was no evidence in the record of proceeding to demonstrate that the beneficiary owns his own tools or that he possessed a valid driver's license. On motion, the beneficiary states that he owns his own tools but that his driver's license expired in February of 2011, and that he is unable to renew his license because his application to extend his work authorization was denied by USCIS. This is a reasonable explanation and overcomes the AAO's concerns.

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.

**ORDER:** The AAO's prior decision, dated May 11, 2012, is affirmed. The petition remains denied.