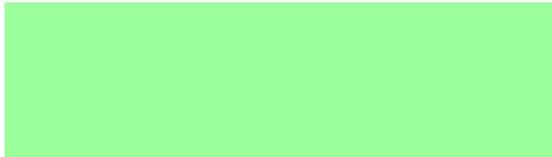


(b)(6)

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, D.C. 20529-2090



U.S. Citizenship
and Immigration
Services

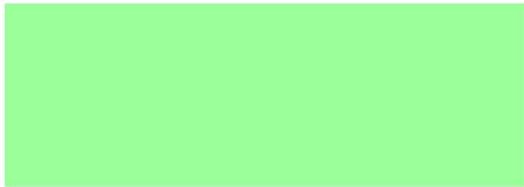


Date: JUN 19 2013 Office: TEXAS SERVICE CENTER FILE: [Redacted]

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:



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,

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, Texas Service Center, The petitioner filed an appeal, which the Administrative Appeals Office (AAO) dismissed on June 24, 2011. The petitioner filed a motion to reconsider. The motion to reconsider will be denied. The petition remains denied. The AAO affirms its decision of June 24, 2011.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stonemason. 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. The director denied the petition accordingly. The AAO affirmed the director's decision finding that the petitioner had not established the petitioner's ability to pay the beneficiary's proffered wage.

The record shows that the motion to reconsider is properly filed. 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 AAO determined, in its decision of June 24, 2011, that the petitioner had not established its ability to pay the proffered wage of the present beneficiary, or other sponsored workers, from the worker's respective priority dates onward. The AAO specifically noted that the petitioner failed to establish that wages paid to an individual named [REDACTED] were actually wages paid to the beneficiary working under the assumed name of [REDACTED]. In support of its motion to reconsider, the petitioner submitted an affidavit from the petitioner's president and a copy of a [REDACTED] Systems photo identification card for [REDACTED]. The petitioner further submitted a copy of a passport page from the beneficiary's passport bearing that individual's photograph and asserting that the photographs establish that these two individuals are the same person. The petitioner also submitted a copy of its previously submitted 2006 tax return and 2006 and 2007 W-2 Forms showing wages paid to [REDACTED] by the petitioner. The affidavit submitted by the petitioner's president contains information previously provided by the president in that the affidavit states that the beneficiary had been employed by the petitioner since 2004 under a different name and that the petitioner first became aware of this in 2009. The AAO noted in its previous decision that the petitioner first filed the ETA Form 9089 on September 14, 2006 and the Form I-140 on November 19, 2007 under the beneficiary's true name. Thus, the assertion of the petitioner's president that he first became aware of the beneficiary's claimed alias in 2009 would appear to be untrue. The petitioner did not address this discrepancy in its motion to reconsider. 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).

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) establish that the decision was incorrect based on the evidence of

record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The motion to reconsider shall be denied as the motion does not state reasons for reconsideration which are supported by pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy, nor does the motion establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

Even if the petitioner's motion to reconsider met the statutory requirements for a motion to reconsider as set forth above, and it does not, the motion would have been denied and the AAO's prior decision affirmed for the reasons set forth below.

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 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 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on September 14, 2006. The proffered wage as stated on the ETA Form 9089 is \$22.59 per hour (\$46,987 per year). The ETA Form 9089 states that the position requires two years experience in the proffered position.

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.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-

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 in 1970 and to currently employ 20 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 August 23, 2006, the beneficiary claims to have worked for the petitioner since June 15, 2004.

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. 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. As set forth on the ETA Form 9089, the beneficiary claims to have worked for the petitioner since June 15, 2004. In support of that assertion, the petitioner submitted copies of W-2 Forms for an employee named [REDACTED] for years 2006, 2007 and 2008. The petitioner's president, [REDACTED] submitted an affidavit wherein he stated that the beneficiary was employed by [REDACTED] beginning on June 15, 2004, and was employed under the assumed name of [REDACTED]. The affiant further states that [REDACTED] and the beneficiary are one and the same person, and that the beneficiary was paid under his correct name beginning in 2009 when it first became known to the petitioner the beneficiary's true identity.

The wage information submitted by the petitioner for [REDACTED] cannot be accepted as wages paid by the petitioner to the beneficiary during the requisite period. In cases where an applicant claims to have met any of the eligibility criteria under an assumed name, the applicant has the burden of proving that he is the person who used that name. In this instance, the evidence submitted to support the assumed name contention are the statements of the petitioner and the beneficiary and copies of W-2 Forms for [REDACTED] for years 2006 through 2008. Those statements and W-2 Form documentation are insufficient to establish that the beneficiary worked and received wages under

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 (BIA 1988).

another name and social security number.² The petitioner also submitted a photo copy of the purported beneficiary's passport picture and a copy of a [REDACTED] identification card for [REDACTED]. The [REDACTED] card states a date of birth of [REDACTED]. The Form I-140 and the ETA Form 9089, as well as the beneficiary's passport, state the beneficiary's date of birth as a different date of [REDACTED]. This discrepancy should be explained in any future filings. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner's president, [REDACTED] submitted an affidavit stating that he had employed the beneficiary since June 15, 2004. [REDACTED] states that the beneficiary was employed under the name of [REDACTED] and that he was first informed of the beneficiary's true name on March 16, 2009. The affidavit is not credible as the petitioner first filed the ETA Form 9089 on September 14, 2006, and the Form I-140 on November 19, 2007, both under the beneficiary's true name. Thus, the petitioner's claim that he was unaware of the beneficiary's identity until March 16, 2009 is, at best, highly speculative. This is especially true given the fact that the petitioner, according to the Form I-140, only had 20 employees when the Form I-140 was filed. 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 on 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). USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). As such, the W-2 Forms are not deemed probative and do not establish the payment of wages by the petitioner to the beneficiary during the requisite period.³

² While Section 203 of the Act does not contain guidance for establishing an alien's true identity, a regulation for establishing identity is provided at 8 C.F.R. § 245a.2 dealing with applications for temporary residence. Under that section, an applicant's true identity is established pursuant to 8 C.F.R. § 245a.2(d)(1). The regulation provides that the assumed name must appear in the documentation provided by the applicant to establish eligibility. To meet the requirements of the regulation, documentation must be submitted to prove the common identity; i.e., that the assumed name was in fact used by the applicant. As noted in 8 C.F.R. § 245a.2(d)(2), the most persuasive evidence is a document issued in the assumed name which identifies the applicant by photograph, fingerprint or a detailed physical description. Other evidence which could be considered are detailed sworn affidavits which identify the affiant by name and address, state the affiant's relationship to the applicant and a detailed description of the basis of the affiant's knowledge of the use of the assumed name by the applicant. Affidavits accompanied by a photograph which has been identified by the affiant as the individual known to the affiant under the assumed name will carry greater weight.

³ The petitioner submitted the beneficiary's tax transcripts on appeal, which reflect amounts earned and reported under a taxpayer identification number. The amount reported as primary income does not match the W-2 Form submitted in 2006, which lists a different social security number. Doubt

The petitioner submitted a 2009 W-2 Form showing wages paid in the name of the present beneficiary in his true correct name in the amount of \$32,985. Thus, for 2009, the petitioner need only establish the ability to pay the difference between wages paid to the beneficiary and the full proffered wage. That sum is \$14,002. For 2006, 2007 and 2008, the petitioner must establish that it can pay the full proffered wage.

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). 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.⁴ 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

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁴ On appeal, the petitioner cites to its gross sales and asserts it can pay the proffered wage. As noted in *K.C.P. Food Co., Inc. v. Sava* and *Taco Especial v. Napolitano*, net income is the proper figure for consideration. *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084; *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881.

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).⁵

The record before the director closed on December 30, 2008 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available. The petitioner, however, subsequently provided copies of its 2008 and 2009 tax returns in response to a request for evidence from the AAO. The petitioner’s tax returns demonstrate its net income for years 2006 through 2009 as shown in the table below.

- In 2006, the Form 1120S stated net income⁶ of \$25,903.00.
- In 2007, the Form 1120S stated net income of (\$4,098).
- In 2008, the Form 1120S stated net income of \$27,801.
- In 2009, the Form 1120S stated net income of \$13,670.

⁵ Similarly, the AAO considered counsel’s assertion on appeal that the petitioner’s depreciation should be considered in 2007 but found it was not valid. *See River Street Donuts* at 118.

⁶ 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. In this instance, the income/loss reconciliation figures on Schedule K, line 18, of the petitioner’s 2006 and 2007 federal tax returns are the same as the figures listed for ordinary income on line 21 of page one of the petitioner’s IRS Form 1120S.

Therefore, for the years 2006 through 2008, the petitioner's tax returns do not state sufficient net income to pay the proffered wage (\$46,987), or the difference between the proffered wage and wages paid to the beneficiary in 2009 (\$14,002).

The AAO noted in its June 24, 2011 decision that USCIS records indicated that the petitioner has filed two additional Form I-140 petitions for other workers. The petitioner would need to demonstrate its ability to pay the proffered wage not only for the present beneficiary, but for each additional Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). The director raised this issue in his RFE. USCIS records reflect that both other filings have 2007 priority dates. Counsel stated the wages for the other two filings are \$17.00 per hour (\$35,360 per year) and \$18.50 per hour (\$38,480 per year). Thus, from 2007 onward, the petitioner would need to establish the ability to pay the sum of \$120,827 to cover the proffered wage of all sponsored workers since the proffered wage of the present beneficiary is \$46,987. In 2006, the petitioner must establish that it can pay \$46,987 for the instant beneficiary. The petitioner did not submit evidence of any pay to either worker. Counsel, however, asserted that the petitioner established its ability to pay the proffered wage in the one case as the petition was approved.⁷ Despite the director raising this in his RFE, and the AAO addressing this in its June 24, 2011 decision, counsel fails to address this on motion or send any evidence to demonstrate pay to the other beneficiaries.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

⁷ Each petition filed is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In determining eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. §103.2(b)(16)(ii). If previous immigrant visa petitions have been erroneously approved, then this does not mandate future approvals. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). As the record does not contain evidence of pay to the other beneficiary, it is unclear on what basis the director determined that the petitioner had the ability to pay the beneficiary of that petition.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ 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 returns demonstrate its end-of-year net current assets for 2006 through 2009, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of (\$3,372,911).
- In 2007, the Form 1120S stated net current assets of (\$1,857,797).
- In 2008, the Form 1120S stated net current assets of \$1,113,610.
- In 2009, the Form 1120S stated net current assets of \$887,315.

Therefore, for the years 2006 and 2007, the petitioner's tax returns do not show sufficient net current assets to pay the proffered wage. The petitioner's 2008 tax return would show its ability to pay the full proffered wage. The petitioner's 2009 tax return would show its ability to pay the difference between wages paid to the beneficiary and the proffered wage. As noted above, the petitioner must also demonstrate its ability to pay the proffered wage of two other sponsored workers. Based on the stated proffered wages that counsel submitted, the petitioner's 2008 and 2009 tax returns would demonstrate sufficient net current assets to pay the wages of those workers in addition to the wages of the present beneficiary. The petition is still not approvable, however, for the reasons set forth herein, as the petitioner must establish its continued ability to pay from the priority date onward. Here, the petitioner cannot establish its ability to pay the beneficiary and all sponsored workers for 2006 and 2007.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the proffered wage, as of respective priority dates, for all sponsored workers through an examination of wages paid, or its net income or net current assets.

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 (BIA 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

⁸According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

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.

As noted in the AAO's June 24, 2011 decision, the petitioner's tax returns demonstrate insufficient net income to pay the proffered wage of the beneficiary, or other sponsored workers, from 2006 through 2009. The tax returns show substantial negative net current assets in 2006 and 2007, which are insufficient to pay the proffered wage of the beneficiary or other sponsored workers. The tax returns reflect substantial variation in net current assets from year to year. The record does not contain any explanation for this substantial variance. The petitioner's tax returns show minimal wages paid to employees during any relevant period, with the most wages paid being \$68,581 in 2007.⁹ The proffered wage of the beneficiary alone would represent 68 per cent of that sum. The

⁹ As noted in the AAO's prior decision, the petitioner states that it employs twenty workers. It is incumbent on 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). While the petitioner's tax returns do show additional amounts paid in cost of labor, this raises the issue of whether the petitioner employs its workforce directly. In determining the actual employer, the regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

The petitioner failed to address this issue on motion.

petitioner has not established that its gross receipts have historically increased throughout its business history. They actually decreased from 2007 to 2008. Nor has the petitioner established that its reputation in the industry is such that it can be concluded that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage of all sponsored workers from their respective priority dates onward. The petitioner asserts that its cost of labor figures listed on its tax returns establish its ability to pay the proffered wage in that the beneficiary would have performed labor paid for in those calculations. The petitioner did not submit any Form W-2 or Form 1099 issued directly to the beneficiary in 2006, 2007 or 2008. The wage evidence submitted for these years, as discussed above, is not credible. Generally, wages paid to others will not establish the petitioner's ability to pay the proffered wage. The record does not, however, establish that the beneficiary would have performed the same labor included in the cost of labor figures contained on the petitioner's tax returns. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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 of the present beneficiary from the priority date onward, or the wages of other sponsored workers from their respective priority dates. Despite the AAO's noting all of the foregoing in its June 24, 2011 decision, counsel does not address any of these aspects on motion, but merely asserts that the W-2 Forms issued in a name other than the beneficiary's and unsupported by evidence, as addressed above, should be accepted. The W-2 Forms are insufficient for all of the reasons set forth above. The petitioner additionally failed to address its other sponsored workers, as well as failed to address the issue of who could be the beneficiary's actual employer as set forth at length in the AAO's June 24, 2011 decision.

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 motion to reconsider is denied. The AAO's decision of June 24, 2011 is affirmed. The petition remains denied.