



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 28 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Counsel to the petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner is a tourism and transportation business. The petitioner seeks to employ the beneficiary permanently in the United States as a sales manager-Latin America. 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.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also 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).

The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history and case precedent will be made only as necessary.

As set forth in the director's July 14, 2008 denial, and the AAO's May 18, 2012 decision, 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 is April 30, 2001. The director determined that notwithstanding any relationship between [REDACTED] and [REDACTED], they are two separate business entities and the petitioner could not use the income or assets of [REDACTED] as a means of establishing ability to pay the proffered wage.¹ The director also determined that except for 2004, the petitioner had failed to demonstrate its ability to pay the proffered wage, as of the priority date, through its net income or net current assets.

The AAO determined on appeal that the petitioner had failed to demonstrate that it was affiliated with [REDACTED] sufficient to consider [REDACTED] tax returns as evidence of the petitioner's income and assets. The AAO also determined that the petitioner had established its ability to pay the difference between the wages paid to the beneficiary and the proffered wage amount through its net income amount of \$70,234.00 in 2004 but, had failed to establish its ability to pay the proffered wage in 2001 through 2003 and 2005 through 2007.

¹ In response to the director's request for evidence, the petitioner submitted [REDACTED] income tax returns as evidence of the petitioner's ability to pay the proffered wage.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issue. Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage for 2001, 2002, 2003, 2005, 2006, and 2007.

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 Form ETA 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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$36,046.00. The Form ETA 750 states that the position requires four 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 that is properly submitted upon appeal and on motion.²

The evidence in the record of proceeding shows that the petitioner was structured as an S corporation. On the petition, the petitioner claimed to have been established on March 25, 1996 and that it currently employs five 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 April 26, 2001, the beneficiary does not claim to have been employed by the petitioner.

² 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).

A threshold issue is whether the petitioner has established the existence of an affiliate relationship with [REDACTED]. On motion, counsel asserts that the AAO should take into consideration the income and assets of [REDACTED] as a sister company or affiliate.³

Corporations are classified as members of a controlled group if they are connected through certain stock ownership. All corporate members of a controlled group are treated as one single entity for tax purposes (i.e., only one set of graduated income tax brackets and respective tax rates applies to the group's total taxable income). Each member of the group can file its own tax return rather than the group filing one consolidated return. However, members of a controlled group often consolidate their financial statements and file a consolidated tax return. The controlled group of corporations is subject to limitations on tax benefits to ensure the benefits of the group do not amount to more than those to which one single corporation would be entitled. Taxpayers indicate they are members of a controlled corporate group by marking a box on the tax computation schedule of the income tax return. If the corporate members elect to apportion the graduated tax brackets and/or additional tax amounts unequally, all members must consent to an apportionment plan and attach a signed copy of the plan to their corporate tax returns. In the instant matter, there is no evidence to show that the two business entities filed a consolidated federal tax return.

Counsel further asserts that it has been established through mutual ownership, shared financial obligations, and the same business purpose and function that [REDACTED] is an affiliate of [REDACTED]. [REDACTED] income tax returns show that the business entity is owned by [REDACTED] (50%) and [REDACTED] (50%). The petitioner submitted a copy of the Articles of Incorporation for [REDACTED] and [REDACTED]. There is no indication from the Articles of Incorporation that the business entities were formed as affiliate companies. [REDACTED] Federal Employer Identification Number (FEIN) is [REDACTED] and its business activity is listed on its tax return as transportation, with a business activity code of [REDACTED]. [REDACTED] FEIN is listed on its tax return as [REDACTED] and its purpose is listed as tour operations, with a business activity code of [REDACTED].

³ Counsel states that the entities' owners are the petitioner and his spouse and that because together they own the two closely held corporations, the net current assets and net income of [REDACTED] may be considered when determining whether the petitioner, [REDACTED] has the ability to pay the proffered wage. However, there is no evidence in the record to demonstrate the existence of an affiliate relationship between [REDACTED] and [REDACTED] or that the couple is a holding company or parent company of [REDACTED] and [REDACTED]. It is further noted that neither [REDACTED] nor [REDACTED] submitted consolidated tax returns demonstrating any type of tax affiliation between the two business entities, or parent subsidiary relationship with their stockholders. The stockholders right of control of the closely held companies does not make them personally liable for the debts of the corporation, and does not extend the obligation of [REDACTED] to pay its own employees through an unrelated company. Both business entities have separate and distinct Federal Employer Identification Numbers and are not reported on any consolidated return.

The petitioner also submitted a copy of a liability coverage insurance policy issued by [REDACTED] [REDACTED] which indicated that the policy was issued to [REDACTED] and [REDACTED] in December 2007. The policy's duration is from December 10, 2007 to December 10, 2008, thus not demonstrating any affiliation between the two business entities in 2001 through December 2007. Furthermore, the insurance policy is insufficient to demonstrate that the petitioner is affiliated with [REDACTED] with ongoing common interests and common financial obligations. In addition, the petitioner did not indicate on its IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, at Schedule B, for 2001 through 2007, that it was a member of a controlled group. And, [REDACTED] checked "NO" on its IRS Forms 1120, U.S. Corporate Income Tax Return for 2001 through 2007, at Schedule K Part 3; when asked if the corporation was a subsidiary in an affiliated group or a parent-subsidary controlled group.

Although [REDACTED] and [REDACTED] may be owned by the same stockholders and shared a liability insurance policy for one year, there is insufficient evidence in the record to establish an affiliate or parent-subsidary relationship requiring [REDACTED] to pay the beneficiary's proffered wage on behalf of the petitioner.

USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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. 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."

In the instant matter, the petitioner has not established an affiliate relationship. Despite any alleged affiliation or shared ownership between the two entities, the petitioner must establish its own ability to pay the proffered wage without any reliance on shareholders' assets belonging to the shareholders. 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. Accordingly, any wages paid by [REDACTED] to the beneficiary, or [REDACTED] tax returns, cannot be considered.⁴

⁴ On appeal, counsel refers to a decision issued by the AAO concerning the consideration of a parent company's financial strength in evaluating a subsidiary's ability to pay a proffered wage, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Accordingly, the AAO is not bound by the unpublished, non-precedent decision. Furthermore, it is noted that the facts of the current appeal

Based upon the above noted analysis, the AAO will consider only the petitioner's ability to pay the proffered wage. 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 the Form ETA 750 the proffered wage amount is \$36,046.00.

On motion, counsel asserts that during the years between 2001 and 2004 the petitioner was not put on notice by the DOL that it was required to pay a salary higher than the amount submitted in 2001 (\$17,949.88), and that as such, the government should be estopped from requiring a higher prevailing wage during those time periods. Counsel further asserts that USCIS erred in assessing the petitioner's ability to pay the proffered wage of \$36,046.00 in 2001 through 2004, whereas that amount was not considered the proffered wage, and was not reflected as the prevailing wage, until the correction was certified by the DOL on June 18, 2004. The record of proceeding shows that the handwritten corrections changing the proffered wage amount from \$17,949.88 to \$36,046.00 were initialed and approved by a DOL representative on June 18, 2004.

concern two companies owned by the same stockholders, not one company owned by another (subsidiary). See *cf.* 8 C.F.R. § 214.2(l)(1)(ii)(K)-(L).

Also, counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the DOL's Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. Once again, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Moreover, *Ranchito Coletero* deals with a sole proprietorship, where the assets of the owner may be considered, and is not directly applicable to the instant petition, which deals with a corporation separate and distinct from its owners.

Counsel asserts an equitable estoppel claim with respect to the initial versus the corrected proffered wage amount that was certified by the DOL on June 18, 2004. However, the AAO has no authority to address an equitable estoppel claim. The AAO, like the Board of Immigration Appeals, has no authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). AAO's jurisdiction is also limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

The priority date in the instant case is April 30, 2001. The prevailing wage amount in 2001, for level I wage for a Sales Manager (SOC Code 11-2022.00) was \$36,046.00, exactly the amount the DOL corrected the salary to be.⁵ Therefore, it does not appear from the record that \$17,949.88 was a realistic wage offer for a sales manager in 2001. Foreign Labor Certification Data Center, online wage library website, indicates that the prevailing wage as of 2001 for level I wage was \$36,046.00. Therefore, both the proffered wage and the prevailing wage on the priority date was \$36,046.00. This figure is also the only certified wage and thus will be used in determining the petitioner's ability to pay the proffered wage since the priority date.

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 of proceeding contains copies of IRS Forms 1099-MISC (Form 1099) representing wages purportedly paid to the beneficiary by [REDACTED] and [REDACTED] as shown below:

- In 2001, the [REDACTED] Form 1099 stated total wages of \$17,298.00.
- In 2002, the [REDACTED] Form 1099 stated total wages of \$10,209.00.
- In 2003, the [REDACTED] Form 1099 stated total wages of \$1,240.00.⁶
- In 2005, the [REDACTED] Form 1099 stated total wages of \$2,180.00.
- In 2005, the [REDACTED] Form 1099 stated total wages of \$4,040.00.
- In 2006, the [REDACTED] Form 1099 stated total wages of \$10,325.00.

⁵ See <http://www.fledatacenter.com>, the website for the Foreign Labor Certification Data Center, online wage library.

⁶ As noted above, the wages paid by [REDACTED] to the beneficiary are not persuasive in establishing that the petitioner paid wages to the beneficiary during those years. Regardless, even assuming that the Forms 1099-MISC from [REDACTED] could be considered in subtracting the total claimed wage amounts from the proffered wage, it is determined that the petitioner has failed to demonstrate its ability to pay the proffered wage since the priority date.

- In 2007, the [REDACTED] Form 1099 stated total wages of \$10,400.00.

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner submitted its tax returns through 2006. The proffered wage is \$36,046.00.⁷ The petitioner’s 1120S⁸ tax returns demonstrate its net income as shown in the table below:

- In 2001, the Form 1120S stated net income of -\$23,936.00.
- In 2002, the Form 1120S stated net income of -\$113,965.00.
- In 2003, the Form 1120S stated net income of -\$71,482.00.
- In 2005, the Form 1120S stated net income of -\$5,389.00.
- In 2006, the Form 1120S stated net income of -\$41,778.00.

Therefore, for the years 2001, 2002, 2003, 2005, and 2006, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net income. The petitioner did not provide any tax returns for 2007.

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.⁹ 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:

⁷ The petitioner submitted a copy of corporate tax returns for [REDACTED] for 2001 through 2007. However, as noted above [REDACTED] tax returns will not be considered in determining the petitioner’s ability to pay the proffered wage.

⁸ 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 23 (2001-2003), line 17e (2004-2005), and line 18 (2006-2008) 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.).

⁹ According 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.

- In 2001, the Form 1120S stated net current assets of -\$65,190.00.
- In 2002, the Form 1120S stated net current assets of -\$6,600.00.
- In 2003, the Form 1120S stated net current assets of -\$52,025.00.
- In 2005, the Form 1120S stated net current assets of -\$53,061.00.
- In 2006, the Form 1120S stated net current assets of -\$74,362.00.

Therefore, for the years 2001, 2002, 2003, 2005, and 2006, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary through its net current assets.

Therefore, from the date the Form ETA 750 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.

The evidence and argument presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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 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 weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the

priority date. 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 submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the Form ETA 750.

Although noted in the AAO's decision dated May 18, 2012, counsel has not addressed on motion the issue of the multiple immigrant petitions filed by the petitioner. USCIS records indicate that the petitioner has filed another immigrant petition since the petitioner was established in 1996. Therefore, the petitioner must establish that it had sufficient funds to pay the wages to both beneficiaries from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer. *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there is another immigrant visa petition would further call into question the petitioner's eligibility for the benefit sought.

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

As noted previously, a motion to reconsider must 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). The petitioner has not done so in the instant matter.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

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 dismissed, and the AAO's prior decision, dated June 14, 2012, is affirmed. The petition remains denied.