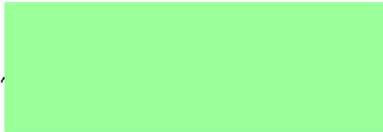
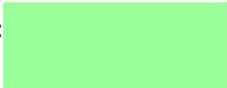


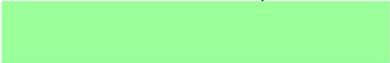


**U.S. Citizenship
and Immigration
Services**

(b)(6)



Date: **MAR 12 2013** Office: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Nebraska Service Center, revoked the approval of the preference visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and on July 8, 2010, the AAO dismissed the appeal. The petitioner filed a motion to reopen and a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reopen is granted, however, the previous decision of the AAO will be affirmed. The petition will remain revoked.

The petitioner provides rehabilitation and therapy services. It seeks to employ the beneficiary permanently in the United States as an accounts clerk.¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director approved the petition but later revoked the petition's approval, finding that the petitioner did not have sufficient net income or net current assets to pay the beneficiary's \$31,200 proffered wage beginning on the priority date until the beneficiary obtains lawful permanent resident status. Specifically, the petitioner's 2005 tax return did not show sufficient net income or net current assets to pay the beneficiary's proffered wage, and the petitioner failed to submit any documentation related to its ability to pay the proffered wage in 2006.

The record shows that the motion to reopen and 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.

A motion to reopen must: (1) state the new facts to be provided in the reopened proceedings; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 AAO finds that the petitioner has met the requirements for a motion to reopen by stating new facts and providing evidence in support of the petitioner's motion.

The petitioner states in its motion that the AAO "correctly found that the facts and the 2006 [i]ncome [t]ax [r]eturn of [p]etitioner's was [sic] inadequate to support its ability to pay the wage offered to [the] [b]eneficiary." The petitioner further asserts that despite this, entries on the petitioner's 2006 tax return including gross receipts cost of goods sold and wages, labor costs, and loan payments made in 2006, establish that the petitioner did have the ability to pay the

¹ 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.

proffered wage in 2006. The petitioner further states that its 2007 and 2008 tax returns demonstrate that its ability to pay the proffered wage for 2007 and 2008. And finally, the petitioner asserts that it has established the ability to pay the proffered wage based on the "totality of the circumstances."

The AAO takes note of the petitioner's gross receipts, net profits, cost of goods sold, officer compensation, salaries and wages, cost of labor and other financial information contained in the record of proceeding. As discussed in detail below, those costs and figures, however, do not establish the petitioner's continuous ability to pay the proffered wage of the beneficiary from the priority date onward. 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 establish that its job offer to the beneficiary is a realistic one. 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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period.

The petitioner did not submit any evidence of pay to the beneficiary with its motion to reopen or previously. Evidence of wages paid to other workers generally cannot be used to establish the petitioner's ability to pay the beneficiary's proffered wage.

The director revoked the approval on March 10, 2008 due to the petitioner's failure to establish the ability to pay the proffered wage in 2005 and 2006. The AAO previously concluded that neither the net income (\$5,994.00) nor net current assets (-\$28,440.00) for 2006 established that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date on May 22, 2006.² Although counsel suggests that the petitioner's gross receipts should be

² The AAO additionally reviewed the petitioner's 2005 net income which was insufficient to pay

considered, as noted in the AAO's prior decision, the proper figure to rely on is net income, not the petitioner's gross receipts. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The AAO's prior decision discussed the petitioner's net income and net current assets for 2005 and 2006, neither of which demonstrated the petitioner's ability to pay the proffered wage. With the motion to reopen, the petitioner resubmitted its 2006 federal income tax return but did not submit any new evidence of its ability to pay the beneficiary's proffered wage in 2006. Thus, nothing submitted with the motion to reopen would overcome the director's basis of revocation, that the petitioner failed to establish its ability to pay the beneficiary's proffered wage in 2006.

With the motion to reopen, the petitioner submitted its 2007, 2008 and 2009 federal income tax returns. 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), *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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient.³ Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income, as shown in the table below.

the proffered wage. As this tax return was for the time period before the priority date, the return will be considered generally in the petitioner's totality of the circumstances.

³ *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). *See also 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).

- In 2006, the Form 1120 stated net income of \$5,994.
- In 2007, the Form 1120 stated net income of \$25,085.
- In 2008, the Form 1120 stated net income of \$52,174.
- In 2009, the Form 1120 stated net income of \$38,679.

Therefore, for the years 2006 and 2007, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner would appear to have had sufficient net income to pay the proffered wage in 2008 and 2009. However, USCIS records show that the petitioner filed at least two other Immigrant Petitions for Alien Worker (Form I-140) for workers between 2006 and 2009. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and 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'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). From the record, the other petitions' priority dates and proffered wages are unknown. As the petitioner's net income is insufficient to pay the instant beneficiary's proffered wage from the priority date onward, the petitioner's net income also would not establish the petitioner's ability to pay the other sponsored workers' proffered wages in addition to the beneficiary's proffered wage without the additional evidence discussed above.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 to 2009 as shown in the table below.

- In 2006, the Form 1120 stated net current assets (liabilities) of -\$28,440.
- In 2007, the Form 1120 stated net current assets of \$33,844.
- In 2008, the Form 1120 stated net current assets of \$49,184.
- In 2009, the Form 1120 stated net current assets of \$127,499.

⁴According 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.

Nothing establishes that the petitioner can pay in 2006, the year of the priority date, and the basis for the director's revocation. Whether the petitioner can pay in 2007, 2008 and 2009 is unclear as the petitioner has sponsored other workers. The petitioner, however, cannot establish its ability to pay in the year of the priority date, 2006.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, here none, or its net income or net current assets.

The petitioner further asserts that it has established the ability to pay the proffered wage in 2009 by discretionary evidence submitted with the motion to reopen and reconsider including a Promissory Note, Continuing Unlimited Guaranty, and an Amendment to Line of Credit all executed in 2009, three years after the priority date.

In the motion to reopen, counsel states that the petitioner's 2006 ending bank balance⁵ and line of credit establish that the petitioner had the ability to pay the proffered wage in 2006. The petitioner's reliance on the balance in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay,

⁵ The petitioner did not submit any bank statements, but instead cites to the petitioner's 2006 tax return, Schedule L, line 1, cash. The full amount of cash cited has already been considered above in the net current asset analysis.

the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

The petitioner cites to *Construction & Design Co. v. United States Citizenship and Immigration Services*, 563 F.3d 593 (7th Cir.2009) for the proposition that net income alone does not reflect its ability to pay the proffered wage. *Construction & Design* is a precedent decision only in certain cases arising in the 7th circuit (Illinois, Indiana, and Wisconsin). Of note, however, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method involves: (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner also states that despite the fact that it cannot establish its ability to pay in the year of the priority date, 2006, the petitioner has established the ability to pay the proffered wage based on a "totality of the circumstances" review. The petitioner cites to unpublished decisions in *Matter of X*, [REDACTED] (AAO Jan. 31, 2003) (Vermont Service Center) and *Matter of X*, [REDACTED] (AAO Dec. 30, 2004) (California Service Center) concerning the totality of the circumstances review on the issue of the ability to pay.⁶ The AAO considered the totality of the circumstances in its July 8, 2010 decision and noted that:

The [petitioner's] tax returns do not reflect a pattern of historic growth or the occurrence of an[y] uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage as of the filing date and continuing through to the present.

The petitioner argues that it paid "\$99,239 against liabilities" in 2006, when it was only obligated to pay "\$35,131." The petitioner asserts that it would have "over \$60,000 available to

⁶ 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).

pay the beneficiary's salary" based on this purported voluntary payment toward liabilities. However, the petitioner did not submit evidence of these payments and did not submit evidence that these payments were discretionary and not required by contract or other obligation. Unsupported assertions are not evidence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The AAO addressed the totality of the circumstances and applicability of *Sonegawa* in its July 8, 2010 decision, noting that the petitioner did not submit information on (1) the company's reputation or historical growth since its inception in 2002, (2) the corporation's milestone achievements or, (3) the company's accomplishments. In the motion to reopen, the petitioner did not submit information addressing any of these factors. Further, the 2007, 2008 and 2009 tax returns submitted with the motion show that the petitioner's gross receipts and net income both decreased from 2008 to 2009, and that officer compensation decreased each year from 2007 to 2009. The petitioner indicated on Form I-140 that it employs forty workers, but failed to state its net annual income as required by the form. Considering this number of employees, the costs of labor as reported on the tax returns were not substantial. The petitioner's quarterly tax returns document that its number of employees decreased from 31 employees in 2006 to 17 employees in 2007. This casts doubts on the information provided by the petitioner and casts significant doubt that the business is a growing entity. Doubt cast on any aspect of the petitioner's evidence may 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, 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).

Nothing shows that the petitioner can overcome the director's basis for the revocation, that the petitioner has failed to establish its ability to pay in 2006. The petitioner has additionally sponsored other workers. Considering all of the foregoing, nothing demonstrates that *Sonegawa* should be positively applied. The evidence submitted with the motion to reopen and reconsider does not outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted and the petition is reopened for reconsideration. The previous decision of the AAO, dated July 8, 2010, is affirmed. The petition remains denied.