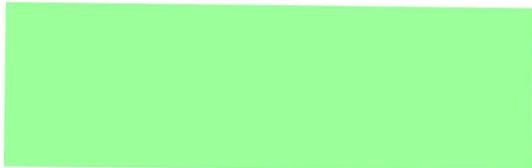
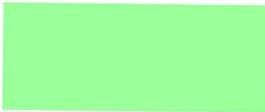


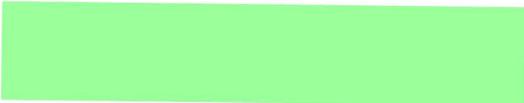
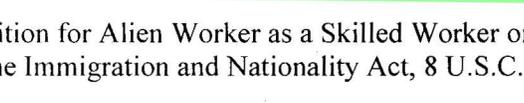
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

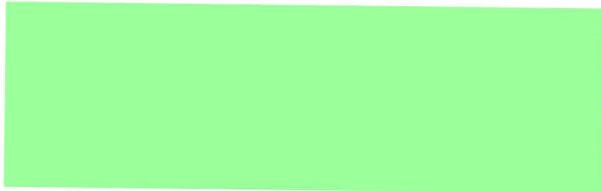


DATE: **MAY 08 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). The petitioner filed an appeal, which was dismissed by the Acting Chief, Administrative Appeals Office (AAO). The petitioner then filed a motion to reopen and a motion to reconsider. The AAO granted the motion to reconsider, but affirmed its previous decision. The case is now before the AAO on a second motion to reopen and motion to reconsider. The motion to reopen and reconsider will be granted. The AAO will affirm its dismissal of the appeal.

The petitioner describes itself as a commercial, corporate, and individual travel agency. It seeks to permanently employ the beneficiary in the United States as an assistant manager and to classify him as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The petition is accompanied by an Application for Alien Employment Certification, Form ETA 750 (labor certification), which was filed with the U.S. Department of Labor (DOL) on July 18, 2003, and certified by the DOL on August 28, 2006. The Form I-140, Immigrant Petition for Alien Worker, was filed with the Nebraska Service Center on April 11, 2007.

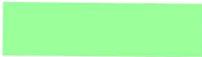
Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

On April 17, 2009, the Director denied the petition on the ground that the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date (July 18, 2003 – the date the labor certification application was filed with the DOL) up to the present. The AAO dismissed the appeal on the same ground in a decision dated June 27, 2013. In its subsequent decision dated November 26, 2013, the AAO once again determined that the record failed to establish the petitioner's continuing ability to pay the proffered wage from the priority date up to the present. The AAO also cited evidence in the record that called into question whether the beneficiary had the requisite experience to qualify for the offered position, though it did not make a specific finding on this issue.

The petitioner filed a second motion to reopen and motion to reconsider, along with supporting documentation, on December 30, 2013. The motion is properly filed and timely. The AAO determines that the current motion, like the previous one, meets the requirements of a motion to reconsider and will be granted as such. As always, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personal records, may be submitted by the petitioner or requested by the Service.

Thus, the petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date, which is the date the labor certification application was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). In this case, the labor certification application, Form ETA 750, was received by the DOL on July 18, 2003. Part A, boxes 10 and 12, of the form state that the job comprises 35 hours per week and that the “rate of pay” is \$16.90 per hour. Based on a work year of 52 weeks, or 1,820 hours, the annualized proffered wage amounts to \$30,758.

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 that document, 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, U.S. 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 a petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner employed and paid the beneficiary during the period in question. 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. In this case, the documentation of record shows that the beneficiary worked for the petitioner during the years 2008-2012. For each of those years the record contains a Form 1099-MISC and/or a Form W-2 issued by the petitioner to the beneficiary. There is no evidence that the beneficiary received any pay from the petitioner in the years 2003-2007.

The subject forms show that the petitioner paid the beneficiary the following amounts from 2008 through 2012:

|      |             |      |             |
|------|-------------|------|-------------|
| 2008 | \$21,886.14 | 2011 | \$26,805.81 |
| 2009 | \$26,869.00 | 2012 | \$14,660.97 |
| 2010 | \$34,283.46 |      |             |

Thus, beneficiary's pay from the petitioner exceeded the annual proffered wage of \$30,758 in only one year – 2010. In all other years from 2003 onward the beneficiary either did not work for the petitioner or was paid less than the proffered wage. For the years 2003-2007, therefore, the petitioner has not established its ability to pay any portion of the proffered wage; for the years 2008, 2009, 2011, and 2012, the petitioner has not established its ability to pay the difference between the wages paid and the full proffered wage. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its actual compensation to the beneficiary over the years.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS examines the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010) *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *See 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).

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 [sic] 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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner’s net income.

As recorded on the federal income tax returns in the record – Form 1120S the each of the calendar years 2003 through 2011 – the petitioner’s net income over the years was as follows:<sup>1</sup>

|       |              |
|-------|--------------|
| 2003: | \$ - 261,258 |
| 2004: | \$ + 32,199  |
| 2005: | \$ - 172,733 |
| 2006: | \$ + 107,416 |
| 2007: | \$ - 97,319  |
| 2008: | \$ - 9,623   |
| 2009: | \$ - 4,194   |
| 2010: | \$ - 13,071  |
| 2011: | \$ - 6,251   |

As these figures show, net income exceeded the proffered wage of \$30,758 only in the years 2004 and 2006. In every other year the petitioner incurred a net loss. Thus, the petitioner cannot establish its ability to pay the proffered wage, or the difference between any wages paid and the full proffered wage, in the years 2003, 2005, 2007, 2008, 2009, and 2011. Accordingly, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its net income over the years.

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<sup>1</sup> For an S corporation like the petitioner, if its 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 IRS Form 1120S. However, if 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 18 (for the tax years at issue in this proceeding). 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 shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional income, deductions and/or other adjustments entered on its Schedule K for every year from 2003 through 2011, the petitioner’s net income is found on Schedule K of its tax returns.

As another alternate means of determining the petitioner’s ability to pay the proffered wage, the AAO reviews the petitioner’s net current assets as reflected on its federal income tax returns. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>2</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6, of the Form 1120S. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. If the total of a corporation’s end-of-year net current assets is 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.

As recorded on in its federal income tax returns for the years 2003-2011, the petitioner’s current assets were exceeded by its current liabilities every year. The petitioner’s net current liabilities year by year were as follows:

|       |              |
|-------|--------------|
| 2003: | \$ - 216,216 |
| 2004: | \$ - 153,055 |
| 2005: | \$ - 179,126 |
| 2006: | \$ - 332,724 |
| 2007: | \$ - 253,653 |
| 2008: | \$ - 461,571 |
| 2009: | \$ - 172,566 |
| 2010: | \$ - 349,752 |
| 2011: | \$ - 277,679 |

Since the petitioner had negative net current assets during any of the years 2003-2011, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date up to the present based on its net current assets year by year.

In summation, the foregoing analysis shows that, except for the years 2004, 2006, and 2010, the petitioner cannot establish its ability to pay the proffered wage of the job offered by any of the three methods discussed above – (a) compensation actually paid to the beneficiary, (b) the petitioner’s net income, or (c) the petitioner’s net current assets.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner’s ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.<sup>3</sup> USCIS may, at its discretion,

<sup>2</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>3</sup> 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,

consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the petitioner stated that it began operations in 1996 and had eight employees at the time the instant petition was filed in 2007. The federal income tax returns in the record show that the petitioner's gross annual income rose from approximately \$5.45 million in 2003 to \$7.4 million in 2005, increased sharply to \$16.34 million in 2006, then declined just as sharply to \$6.86 million in 2007. From that point gross receipts declined each of the next four years, settling at \$3.92 million in 2011. Thus, the petitioner's business volume steadily declined after 2006, and in 2011 gross receipts were less than one-quarter of the figure they reached in 2006. While these figures are not determinative in a *Sonegawa* analysis, they provide context for the proceeding discussion.

At an earlier stage in the proceeding, in conjunction with counsel's legal brief in support of the original appeal in 2009, the petitioner's owner and vice president, [REDACTED],<sup>4</sup> submitted a letter to USCIS stating that she and her husband, the petitioner's president, would be willing to forego some of their discretionary income – recorded as "compensation of officers" on the Form 1120S at page 1, line 7 – to pay the proffered wage. In that letter, dated June 1, 2009, Ms. [REDACTED] wrote as follows:

I am the sole shareholder and my husband [REDACTED] and I are the only officers of the company. If for any reason, it was required, we could adjust our salary and shareholder dividends to pay the offered salary. . . . We could just as easily have taken \$30,758 less per year if it was required to pay the offered salary.

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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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

<sup>4</sup> On July 25, 2012, [REDACTED] signed a Stock Purchase Agreement whereby she sold all 1,000 shares of her common stock (100% ownership of the petitioner) to [REDACTED]. Publicly available documents on the petitioner's website identify [REDACTED] as the president as well.

The compensation of officers on the petitioner's Forms 1120S for the years 2003-2011 was recorded as follows:

|       |           |
|-------|-----------|
| 2003: | \$103,554 |
| 2004: | \$ 71,415 |
| 2005: | \$ 26,524 |
| 2006: | \$ 4,917  |
| 2007: | \$ 38,936 |
| 2008: | \$ 42,728 |
| 2009: | \$ 71,620 |
| 2010: | \$ 61,422 |
| 2011: | \$ 44,893 |

As far as the record shows, these dollar figures represent the only income the petitioner's two officers earned or received in the years 2003-2011. With the possible exception of 2003, therefore, the petitioner has not established that its president and vice president could have foregone as much as \$30,758 in any other year to pay the proffered wage. The full amount may not have been needed every year, since the petitioner's net income appears to have been sufficient to pay the proffered wage in 2004 and 2006, and the petitioner paid the beneficiary more than the proffered wage in 2010, as well as part of the proffered wage in 2008, 2009, 2011, and 2012. In 2005, however, the compensation of officers amounted to just \$26,524, which was less than the proffered wage. Since no net income or net current assets were available in 2005, the record indicates that the petitioner could not have paid the proffered wage that year from the compensation paid to officers. Likewise, the compensation of officers in 2007 – \$38,936 – was approximately \$8,000 above the proffered wage. The petitioner has not established that [REDACTED] and her husband could have spent \$30,758 (approximately 80% of their officer compensation) to cover the proffered wage in 2007. As for subsequent years, the difference between the proffered wage and the amounts actually paid to the beneficiary were \$8,872 in 2008, \$3,889 in 2009, \$3,952 in 2011, and \$16,097 in 2012. While the shortfalls of 2009 and 2011 may have been coverable out of officer compensation in those years, the shortfall of 2008 (\$8,872), representing more than 20% of the officer compensation that year (\$42,728), would have presented a greater challenge. As for 2012, the shortfall was substantial (\$16,097) and there is no evidence in the record as to what amount was allocated to the compensation of officers that year. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

Furthermore, 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, 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.” Without additional documentary evidence of the ability of the petitioner’s officers – [REDACTED] and her husband – to forgo the substantial amount of income they claim to have been willing to give up, the AAO cannot determine whether this assertion overcomes the previously discussed information in the tax returns. See *Matter of Soffici*, 22 I&N at 165.

In addition to the evidentiary shortcomings discussed above – especially for 2005 and 2007, but also for 2008 and 2012 – the letter of June 1, 2009 casts further doubt on the availability of officer compensation over the years to pay the proffered wage because it is only signed by one of the petitioner’s two officers, [REDACTED]. While Ms. [REDACTED] was the petitioner’s vice president, the petitioner’s husband, [REDACTED] was its president. Since he did not sign the letter, he would not appear to have been bound by his wife’s pledge. Moreover, there is no way to determine on the tax returns how the officer compensation was allocated each year between [REDACTED] and her husband, as the record does not contain any evidence of the officers’ individual compensation. In view of these evidentiary gaps the AAO cannot determine how much officer compensation would have been available year by year to cover shortfalls in the proffered wage.

In examining a petitioner’s ability to pay the proffered wage, the fundamental focus of the determination by USCIS is 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, 145 (Acting Reg’l Comm’r 1977). It is unclear from the record whether the petitioner would be making a realistic job offer if the petitioner’s officers must forgo all, or substantial portions, of their compensation for multiple years.

Based on the foregoing analysis, the AAO concludes that the record fails to support [REDACTED]’s claim that the proffered wage could have been covered every year by utilizing some or all of the officer compensation paid out to her and her husband.

In the current motion, counsel asserts that the AAO “completely overlooked” case precedent (*Matter of Sonogawa*, 12 I&N Dec. 612) and USCIS policy statements in determining that the petitioner’s bank statements did not establish its ability to pay the proffered wage in 2005. The AAO specifically addressed the petitioner’s 2005 bank statements in its most recent decision on November 26, 2013, however, and concluded that the subject funds, when viewed in the context of the petitioner’s total financial situation, did not establish the petitioner’s ability to pay the proffered wage that year.

Counsel reiterates the claim that the bank account balances at the end of 2005 (two accounts totaling \$80,552.29 as listed on the petitioner’s [REDACTED] statement dated December 31, 2005)<sup>5</sup> demonstrate the petitioner’s ability to pay the proffered wage that year. Counsel’s reliance on the balances in the petitioner’s bank accounts is misplaced. Bank statements are not among the three

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<sup>5</sup> Exhibit A of the petitioner’s initial Motion to Reopen and/or Reconsider, dated July 25, 2013.

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 in 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Counsel has not shown that the bank account balances represented additional funds that were not included in the petitioner's list of current assets on Schedule L of its federal income tax return, Form 1120S, for that year. As the AAO has already considered the petitioner's net current assets earlier in this decision, it would be duplicative to consider the bank account balances separately. Schedule L of the petitioner's 2005 Form 1120S listed "cash" at the end of the calendar year in the amount of \$300,194 (among total current assets of \$323,611). The petitioner's cash assets (and other current assets), however, were far exceeded by its current liabilities in 2005, recorded on Schedule L as \$502,737. In view of this substantial overhang of current liabilities at the end of 2005, the AAO is not persuaded that \$30,758 in cash was available out of the petitioner's bank account balances to pay the proffered wage that year.

The current liabilities overhang was even more pronounced in 2007. As recorded on the petitioner's Form 1120S, Schedule L, for that year, "cash" assets at the end of 2007 stood at \$146,057 (among total current assets of \$233,671), while current liabilities stood at \$487,324. As in the case for 2005, counsel has not shown that the petitioner had bank account balances at the end of 2007 that represented additional funds not included in the list of current assets on Schedule L of its 2007 Form 1120S. Therefore, the AAO is not persuaded that \$30,758 in cash was available out of the petitioner's bank account balances to pay the proffered wage in 2007 either.

The same analysis applies to the certificates of deposit (CDs) that the petitioner may have owned "for the years in question."<sup>6</sup> Counsel asserts that the CDs represented immediately available funds with which the petitioner could have paid the proffered wage in 2005 and subsequent years. The aforementioned [REDACTED] statement dated December 31, 2005 listed four fixed term CDs held by the petitioner in the total amount of \$115,499.75. Counsel has not shown that the CD

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<sup>6</sup> Among other evidence, the petitioner has provided "screen shots" of two CD accounts, "printed on" March 10, 2009, as well as a copy of a letter from [REDACTED] dated April 29, 2008, purportedly discussing two additional CDs. However, the letter indicates that at least one "prior CD" may have been closed as of the letter's writing. Further, these documents indicate that some or all of the petitioner's CDs have terms of 15 months, indicating that there may have been several additional CDs opened or closed during the relevant years. The AAO is unable to analyze the sufficiency of an account, or funds, that span multiple years and accounts without an objective tracing of those funds, and relevant documentation such as the accounts term, and opening and closing dates and balances. Counsel's assertion that said funds were available in 2005, and continued to be available in subsequent years, is insufficient. The assertions of counsel do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Soffici*, 22 I&N Dec. at 165.

balances represented additional funds that were not included in the petitioner's list of current assets on Schedule L of its federal income tax return for that year. As previously stated, Schedule L of the petitioner's 2005 Form 1120S listed "cash" at the end of the calendar year in the amount of \$300,194 (among total current assets of \$323,611). Even when the bank account balances of \$80,552.29 are added in, the petitioner's [REDACTED] assets at the end of 2005 amounted to only \$196,052.04. Thus, they do not appear to represent additional funds beyond those recorded on Schedule L. In view of this substantial overhang of current liabilities at the end of 2005, the AAO is not persuaded that \$30,758 in cash was available out of the petitioner's CDs to pay the proffered wage in 2005.

The record is unclear as to the dollar value of the petitioner's CDs in 2007, though a [REDACTED] statement dated January 31, 2008 listed three CDs totaling \$121,229.83 (in addition to a checking account with a balance of 8,022.93).<sup>7</sup> These funds represented a little over half of the petitioner's total current assets at the end of 2007 – \$233,671, as listed on Schedule L of the 2007 Form 1120S – and were far below the petitioner's current liabilities at the end of 2007, recorded on Schedule L as \$487,324. As in the case of 2005, therefore, the AAO is not persuaded that \$30,758 in cash was available out of the petitioner's CDs to pay the proffered wage in 2007.

For the first time on motion, counsel discusses the fact that southern Florida was hit by multiple hurricanes in 2005 – in particular, hurricanes Wilma and Rita – and cites an internal USCIS memorandum advising adjudicators to "take a generous approach to addressing issues brought about by the hurricanes." USCIS Memorandum from Acting Associate Director of Domestic Operations, Michael Aytes, dated October 5, 2005. Counsel states, "the petitioner's travel agency business was directly and adversely impacted by the 'triple-punch' of these three storms." While cognizant of this USCIS memorandum, the AAO notes that neither counsel nor the petitioner has submitted any evidence demonstrating to what extent, if at all, the hurricanes of 2005 affected the petitioner's business that year. The assertions of counsel do not constitute evidence. *See Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. at 165. Moreover, even if evidence had been submitted regarding the financial effects of the hurricanes on the petitioner's business in 2005, that is not the only year for which the evidence in this case, as discussed above, fails to establish the petitioner's ability to pay the proffered wage.

For all of the reasons discussed in this decision, the AAO concludes that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its continuing ability to pay the proffered wage of the job offered from the priority date up to the present. Accordingly, the petition cannot be approved, and the appeal will be dismissed.

As for the other issue raised by the AAO in its previous decision, the evidence submitted in support of the current motion has persuaded the AAO that the beneficiary has the requisite experience to

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<sup>7</sup> Exhibit G of the petitioner's Response to Notice of Intent to Dismiss and Request for Evidence.

qualify for the proffered position. Accordingly, the beneficiary's qualifications do not represent an additional basis for denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden with respect to its continuing ability to pay the proffered wage.

**ORDER:** The motion to reconsider is granted. In accord with the AAO's previous decisions in this case, the petition remains denied.