



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

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF F-&F-, PLLC

DATE: MAY 25, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a law firm, seeks to employ the Beneficiary as an immigration law clerk. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition concluding that the Petitioner had not established its ability to pay the proffered wage. The matter came before us on appeal, and we dismissed the appeal, affirming the Director's conclusion that the Petitioner had not established its ability to pay the proffered wage. We denied the Petitioner's subsequent motion to reconsider, once more concluding that the Petitioner had not established its ability to pay the proffered wage.

The matter is again before us on a motion to reconsider. On motion, the Petitioner asserts that it had established its ability to pay the proffered wage through an examination of the totality of the circumstances and submits new evidence in support of the assertion. Upon review, we will deny the motion.

I. LAW

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 Service 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).

II. ANALYSIS

On motion, the Petitioner submits its 2015 tax return and new evidence regarding the company's reputation within its industry, regarding the replacement of one of its employees, and regarding money transfers between the Petitioner and its New York office. However, assertions regarding new facts to be proved and the submission of new evidence are not elements that support a motion to reconsider. While the assertion of new facts and the submission of new evidence are elements that

support a motion to reopen under 8 C.F.R. § 103.5(a)(2), the Petitioner clearly indicated on Form I-290B that it was filing a motion to reconsider and not a motion to reopen.¹ Specifically, the Petitioner makes the following seven primary assertions on motion, each discussed below:

A. Discussion of Tax Returns from Prior to Priority Date

The Petitioner asserts that we erred by discussing the Petitioner's levels of net profit in years before the priority date. The Petitioner contends that *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) requires us to not be "overly focused on specific numbers," but, instead, to consider a business' "overall financial health." However, a review of the record shows that our prior decision does not list specific numbers for the Petitioner's net profits in years before the priority date. Rather, our previous decision discusses those net profit levels only within the context of assessing the business' "overall financial health." Prior income tax returns were considered to assess any pattern of growth, and considered in the absence of the Petitioner's 2014 income tax return, which was requested on several occasions, but not submitted. Since the Petitioner's assertion does not establish that our decision was incorrect based on the evidence of record at the time of the initial decision, the assertion does not satisfy the requirement for a motion to reconsider.

B. Most Recent Tax Returns are Positive

The Petitioner submits a copy of its 2015 federal income tax return and states that its most recent tax returns are positive. Specifically, the Petitioner states that "[s]ince this case has been pending now for three years we have the advantage of looking at . . . the business over a long period of time." The Petitioner describes its business strategy since 2011 and identifies the 2015 tax return as evidence "of the overall plan that is coming to fruition." However, even the 2015 tax return reflects that the Petitioner had insufficient net income or net current assets to pay the Beneficiary the proffered wage that year and, since this assertion is based on new evidence submitted on motion to reconsider, it cannot establish that our decision was incorrect based on the evidence of record at the time of our prior decision and does not satisfy the requirement for a motion to reconsider.

¹ It is noted that even if the matter was accepted as a motion to reopen, the motion would still be denied, since the Petitioner has not established that it had the continuing ability to pay the Beneficiary the proffered wage from the priority date onward through an examination of wages paid to the Beneficiary, or its net income or net current assets. The Petitioner asserts that it has established its ability to pay the proffered wage through an examination of the totality of circumstances consistent with *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). However, while the Petitioner cites factors in support of this assertion, we note that despite numerous requests, the Petitioner has still not provided copies of its annual report, federal tax return, or audited financial statement for 2014 as is expressly required by the regulation at 8 C.F.R. § 204.5(g)(2). The Petitioner does not explain how we would be able to assess its overall totality of the circumstances without this regulatory-required evidence.

C. The Petitioner's Reputation in its Industry

The Petitioner also asserts on motion that we erred by not properly recognizing the Petitioner's reputation within its industry. The Petitioner submits new evidence relating to the reputation of the business and awards received by two of the business' partners. Since the Petitioner's assertion relies on new evidence submitted on motion, it cannot establish that our decision was incorrect based on the evidence of record at the time of our decision and the assertion does not satisfy the requirement for a motion to reconsider. However, in reviewing prior evidence submitted, that evidence does not overcome the issues raised in our prior decisions or outweigh the fact that the record does not contain the Petitioner's 2014 income tax return, which is required to assess the totality of the Petitioner's circumstances.

D. Relationship with New York Office

The Petitioner asserts that the wages paid to the Beneficiary by [REDACTED] should be counted toward the Petitioner's ability to pay the proffered wage and states that is "has argued to exhaustion the numerous ways in which the two offices are one in the same."

Our previous decision discussed the differences between the petitioning entity, with FEIN [REDACTED] and the company that paid the Beneficiary's wages, [REDACTED] with FEIN [REDACTED]²

However, despite the Petitioner's claim, the Petitioner has not pointed to an error in our previous discussion of precedent decisions and the assertion is not supported by any precedent decision or other authority that would allow us to consider wages that were paid to the Beneficiary by an entity that is legally distinct from the Petitioner in the determination of the Petitioner's ability to pay the proffered wage as of the priority date. The court in *Sitar v. Asheroft*, 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." Since the assertion is not supported by precedent decision, the assertion does not satisfy the requirement for a motion to reconsider.

E. Petitioner has been Transferring Money to Beneficiary's New York Employer

Similar to the assertion above, the Petitioner states that its bank records reflected "numerous transactions" from the Petitioner to the New York office to pay for the Beneficiary's salary. However, as noted above, the pay statements were issued by a separate and distinct entity. *Id.*

² The Petitioner now appears to identify itself online as [REDACTED]. In any further filings, the Appellant would need to establish its connection with the petitioning entity, that it is a valid successor-in-interest to the entity that filed the labor certification, or that the name is an official d/b/a of the entity that filed the labor certification. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

Additionally, as the amounts transferred differ, it is unclear whether the transfers would reflect payments for other matters.

F. Beneficiary is Now Paid by the Petitioner

The Petitioner states on motion that it is now paying the Beneficiary's wages and submits new evidence to support the statement. However, current payments of the Beneficiary's wages cannot establish the Petitioner's ability to pay the proffered wage to the Beneficiary as of the September 26, 2013, priority date.

G. Replacing Former Employee

The Petitioner states on motion that one of its employees left their employment in September 2015 and would not be replaced, thus freeing up those wages to pay the proffered wage to the Beneficiary. The Petitioner submits on motion a copy of that employee's 2015 IRS Form W-2 showing wages in the amount of \$129,957.33. However, 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). The fact that additional monies were available after this employee left in September 2015 cannot establish the Petitioner's ability to pay the proffered wage to the Beneficiary as of the September 2013 priority date. Additionally, given the large discrepancy in pay between the Beneficiary's proffered wage and the wages paid to the individual who left, it is not clear that the two will perform the same job duties and whether the individual will need to be replaced.

III. CONCLUSION

Our previous decision noted that the record contained no evidence of wages paid to the Beneficiary by the actual Petitioner, and noted that the Petitioner's net income and net current assets did not establish its ability to pay the proffered wage. Our decision examined additional evidence submitted by the Petitioner and, considering the totality of the circumstances, concluded that the Petitioner had not demonstrated that it had the continuing ability to pay the proffered wage to the Beneficiary beginning on the priority date.

The motion to reconsider before us is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy and that the decision was incorrect based on the evidence of record at the time of the initial decision. 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)). With the current motion, the movant has not met that burden.

ORDER: The motion to reconsider is denied.

Cite as *Matter of F-&F-, PLLC*, ID# 11828 (AAO May 25, 2017)