identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

[redacted]

B6

Date: APR 2 7 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]
SRC 07 166 50996

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion to reopen will be granted. The petition is reopened. Upon review of the matter, the AAO's prior decision is withdrawn in part and affirmed in part. The petition remains denied.

The petitioner[1] is a garment business. It seeks to employ the beneficiary permanently in the United States as a shipping coordinator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (priority date – April 30, 2001), approved by the United States Department of Labor (the 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.

Beyond the decision of the director, the AAO further denied the petition on appeal on the ground that the petitioner failed to sufficiently establish that the beneficiary had one year of experience in the proffered position as of the priority date as required by the Form ETA 750.

The record shows that the motion to reopen is properly filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R § 103.5 provides in pertinent part that "a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner submitted with the motion to reopen a letter from [redacted] Human Resources Coordinator, Warnaco Swimwear Group, dated July 21, 2010[2] which stated, in pertinent part, that the beneficiary was employed by her organization from November 24, 1996 until March 8, 1999 as a shipping clerk, and that the beneficiary was then promoted to the position of shipping coordinator on March 8, 1999 where she worked until June 27, 2000. According to [redacted] the beneficiary was again promoted on June 27, 2000 to the position of Production Assistant where she worked until September 19, 2003. The beneficiary's duties as a shipping coordinator were set forth as follows:

---

[1]According to the California Secretary of State website, http://kepler.sos.ca.gov/cbs.aspx, accessed on June 1, 2010, the petitioner was incorporated as A & B Right Incorporated on October 4, 1993. Forms 941 submitted state the trade name as "Prime Cuts," the petitioning entity in this matter.

[2][redacted] had previously submitted an experience letter dated April 23, 2001 which provided the same position titles and employment dates as the July 21, 2010 letter. The AAO noted in its June 21, 2010 decision denying the petitioner's appeal that the April 23, 2001 experience letter was insufficient because the letter did not contain information concerning the beneficiary's training or duties. The July 21, 2010 experience letter detailed the duties performed by the beneficiary which meets the experience required for the position's duties noted on the Form ETA 750.

> Coordinates the production schedules of all fabric and garment products for shipment purposes. Coordinates and tracks the shipment of fabric and garments to outside vendors (for embroidery, fusing, screen printing and other special effects) with the internal production schedules of the fabric, cutting, sewing and trimming departments. Supervises the activities of the shipping clerks in relationship to the coordinating function described above.

The motion to reopen stated new facts to be provided in the reopened proceeding in the form of an additional letter addressing the job duties of the position supported by documentary evidence. The motion to reopen shall, therefore, be granted and the evidence submitted therewith considered. The facts submitted with the motion to reopen were supported by other documentary evidence, the July 21, 2010 experience letter provided by [redacted] The letter complies with 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A) in that it includes the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. The documentation provided establishes that the beneficiary had the 12 months experience in the proffered position required by the Form ETA 750 by the time of the priority date. This portion of the AAO's prior decision will be withdrawn.

The AAO, in adjudicating the petitioner's appeal of the director's May 19, 2008 decision denying the Form I-140 petition, also found that the petitioner had failed to establish its continuing ability to pay the proffered wage of $21,777.60 in accordance with 8 C.F.R. § 204.5(g)(2) from the priority date through an examination of wages paid to the beneficiary, the petitioner's net income or net current assets. As stated previously by the AAO in its June 21, 2010 decision, for the years 2001, 2003 and 2006, as well as the period from the April 30, 2001 priority date to September 30, 2001, the petitioner did not establish that it could pay the proffered wage through an examination of wages paid to the beneficiary, its net income or net current assets. As noted in the AAO's decision, the petitioner failed to submit its 2000 tax return in order to establish its ability to pay from the April 30, 2001 priority date (the 2000 tax return covers October 2000 to September 2001). The petitioner's tax returns show negative net current assets in tax years 2001, and 2003, with net current assets being $16,691 in 2006. Thus, for fiscal years 2001, 2003 and 2006, as well as the period from the priority date to September 30, 2001, the petitioner could not demonstrate its ability to pay the proffered wage through an examination of wages paid to the beneficiary, or its net current assets or its net income. The AAO decision further noted that the record contains no evidence to establish that the petitioner's reputation in the industry is such that it is more likely than not that it maintained the continuing ability to pay the proffered wage from the priority date onward based on a consideration of the petitioner's totality of the circumstances.

With its Motion to Reopen, the petitioner submitted a July 17, 2008 letter signed by [redacted] CEO of the petitioner which stated, in pertinent part, that its Form 941 quarterly reports establish that it had many employees despite company losses in some years. [redacted] stated that despite these losses, it maintained the ability to pay its employees. The petitioner's motion to reopen states that the attestation of the petitioner's president should be sufficient to overcome the losses demonstrated by the petitioner's tax returns in some years and that the AAO failed to address this

statement. Nothing in the CEO's letter addresses the missing tax return for fiscal year 2000,[3] or establishes a basis to overcome the deficiencies noted in years 2001, 2003 and 2006 as set forth in the AAO's prior decision. The statements of the petitioner's CEO are not sufficient to overcome the financial information demonstrated by the petitioner's tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The statement does not address any specific reason for the "losses in some years," or address any factors related to the petitioner's reputation or totality to demonstrate that *Sonegawa* might be applicable. The motion to reopen does not contain sufficient documentation to establish the petitioner's ability to pay the proffered wage from the priority date onward. The AAO's prior decision in this regard is affirmed.

Assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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. The previous decision of the AAO dated June 21, 2010 is withdrawn in part, affirmed in part. The petition remains denied.

[3] [redacted] states, "contrary to the assertion that we did not make the 2001 Income Tax Return available, along with 2002 through 2006, we submitted this documentation to [the petitioner's attorney] . . . who submitted it to you." Despite this assertion, the record does not contain the petitioner's 2000 Form 1120, which covers part of the time period from the priority date onward.