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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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OCT 27 2008

FILE:

EAC 05 081 52462

Office: VERMONT SERVICE CENTER

Date:

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:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a construction firm. The petitioner sought to employ the beneficiary permanently in the United States as a carpenter. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.

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 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 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, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d). The ETA 750 reflects that the priority date in this case is April 30, 2001. As set forth on the ETA 750, the certified wage is \$24.60 per hour, based on a 35-hour workweek, which amounts to \$44,772 per annum.

The Immigrant Petition for Alien Worker (I-140) was filed on January 26, 2005. The director determined that the petitioner failed to establish that it had the continuing financial ability to pay the proffered wage and on July 27, 2005, the director denied the petition. The evidence that the director examined included copies of the petitioner's 2001, 2002 and 2003 federal corporate tax returns provided with the petition and in response to the director's April 8, 2005 intent to deny the petition, along with copies of the beneficiary's Wage and Tax Statements (W-2s) for 2002, 2003 and 2004.

In his notice of intent to deny, the director advised the petitioner of the requirements of the regulation at 8 C.F.R. § 204.5(g)(2) and additionally requested copies of the petitioner's 2002, 2003, and 2004 corporate tax returns or copies of its annual reports for 2002, 2003, 2004 that are accompanied by audited or reviewed financial statements. Relevant to 2004, the petitioner submitted a copy of a Connecticut application for an

extension of time dated March 7, 2005 indicating that the petitioner had requested a six month extension of time to October 1, 2005, in which to file its state corporate tax return.

Following the director's denial, the appeal was filed on August 29, 2005. The petitioner submitted a brief dated June 21, 2006 and an addendum to the brief with additional evidence dated November 9, 2006.

As noted in its decision rendered on April 24, 2007, the AAO reviewed the evidence in the record, including: copies of earning statements issued by the petitioner to the beneficiary in 2005 and 2006, indicating that the petitioner paid the beneficiary \$38,007 from the pay period beginning 12/28/05 through the pay period ending 10/24/2006, and \$26,396.45 paid "year to date" in 2005; previously submitted copies of the beneficiary's W-2s for 2002, 2003 and 2004; previously submitted copies of the petitioner's 2001, 2002, and 2003 federal corporate tax returns, and a copy of its request for an extension of time to file its (state) corporate tax return for 2004.

The AAO dismissed the appeal on April 24, 2007. In finding that the petitioner had not demonstrated its continuing ability to pay the proffered wage of \$44,772, this office noted that providing the copies of earning statements issued to the beneficiary from the petitioner indicating that the petitioner had paid the beneficiary \$26,396.45 "year to date" in 2005 and paid a total of \$38,007 from the pay period beginning 12/28/05 through the pay period ending 10/24/06, does not demonstrate a continuing ability to pay the proffered wage beginning as of the April 30, 2001, priority date.

This office determined that in reviewing the petitioner's corporate tax return for 2001, neither the petitioner's net income of \$20,292 nor its net current assets of \$6,742 was sufficient to cover the proffered wage or establish the petitioner's ability to pay in that year.

For 2002, neither the petitioner's net income of -\$6,772 nor its net current assets of \$3,720 was sufficient to pay the difference of \$20,291.37 resulting from a comparison of the proposed wage offer of \$44,772 and the beneficiary's actual wages paid of \$24,480.63. The petitioner failed to demonstrate its ability to pay in 2002.

In 2003, the petitioner's corporate tax return reflects that neither its net income of \$4,902 nor its net current assets of -\$9,042 was sufficient to cover the shortfall of \$31,064.36 resulting from a comparison of the certified wage of \$44,772 and the beneficiary's actual 2003 wages of \$13,707.64. The petitioner failed to demonstrate its ability to pay the proffered salary for 2003.

In 2004 the beneficiary's actual compensation was \$26,665.50. This was \$18,106.50 less than the proffered wage. Other than the beneficiary's W-2 and the petitioner's application for an extension of time to file its state corporate income tax return dated March 7, 2005, no other financial information such as an audited financial statement or the federal tax return as requested was submitted pertinent to 2004.

The AAO additionally noted in its April 24, 2007, decision that the beneficiary's employment verification letter dated July 16, 2004, failed to offer a specific description of his duties as a carpenter during his employment in Guatemala from March 1988 to March 1990 for [REDACTED] of the Engineering Architecture and Construction, S.A. Pursuant to its *de novo* reviewing authority and ability to

deny a petition even though the director does not specify all of the grounds of denial, the AAO also dismissed the appeal on the grounds that the petitioner failed to demonstrate that the beneficiary possessed two years of experience in the certified job of carpenter as required by 8 C.F.R. § 204.5(l)(3)(ii)(A).¹

Through counsel, the petitioner submits a motion to reopen the AAO's decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Upon motion, counsel summarizes the proceedings and lists the petitioner's gross income for 2001, 2002, and 2003, as well as the amounts paid to the beneficiary as wages for 2002, 2003, and 2004 as indicated by the beneficiary's W-2s. Counsel also lists weekly gross earnings as indicated by checks issued by the petitioner to the beneficiary from October 2005 to March 2006, asserting that this indicates a substantial increase in weekly gross wages. Counsel reiterates his assertion that the petitioner's gross income in conjunction with actual wages paid to the beneficiary establishes the petitioner's ability to pay the proffered wage. Counsel relies on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for support of this contention. Counsel further states that a more detailed description of the beneficiary's duties during his previous employment as a carpenter in Guatemala has been obtained and is submitted with the motion. Finally, counsel requests an additional 30 days in which to obtain the petitioner's 2004 tax return since the AAO had noted its absence in its dismissal of the appeal. Counsel states that the attempts to contact the petitioner about this documentation have not been successful thus far.

With the motion, counsel submits another letter, dated May 14, 2007, from _____ of the Engineering Architecture and Construction S.A., as well as certified English translation describing the beneficiary's duties as a carpenter during his two year employment with this firm. As it sufficiently establishes that the beneficiary possessed the requisite employment experience as a carpenter pursuant to the terms of the ETA 750, the AAO withdraws that portion of its decision dismissing the appeal on the grounds that the petitioner had not established that the beneficiary was qualified for the certified position.

The AAO denies counsel's request for an additional 30 days in order to attempt to obtain a copy of the petitioner's 2004 corporate tax return. The petitioner has been on notice of this omission since the director's notice of intent to deny the petition was issued on April 8, 2005. The mere submission of an application for an extension of time to file a state tax return does not excuse the petitioner from its obligation to establish its continuing ability to pay the proffered wage pursuant to the regulatory requirements of 8 C.F.R. § 204.5(g)(2). As noted in the AAO's prior decision, the beneficiary's W-2 indicating that \$26,665.60 was paid in wages in 2004 does not establish the petitioner's ability to pay the full proffered salary of \$44,772 in that year.

As set forth in his brief to the AAO asserting the same argument on appeal, counsel is correct that *Matter of Sonegawa* is sometimes applicable where the expectations of increasing business and profits overcome

¹ See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D.Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n.9 (2d. Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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. Here, while it is noted that the petitioner's gross sales increased from 2001 to 2003,² it is also noted that the petitioner has reported modest net income and net current assets during that same period, none of which was sufficient to cover full payment of the proffered wage. Moreover as noted in the AAO's previous decision, the petitioner failed to provide a tax return or audited financial statement for 2004. As such, it cannot be concluded that an ability to pay the certified salary has been established for the relevant years of 2001, 2002, 2003, or 2004. No evidence of uncharacteristic losses, factors of outstanding reputation or other circumstances similar to *Sonegawa* have been submitted. The fact that the petitioner may have increased the beneficiary's wages in recent months after the director's denial and the filing of the appeal does not nullify, absent other persuasive circumstances, the petitioner's obligation to demonstrate its continuing financial ability to pay the proffered wage as of the priority date. 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)). Based on the tax returns provided to the record, it cannot be concluded that they represent a framework of success such as that discussed in *Sonegawa* or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after eligibility is sought under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). This ability must be existent at the time the priority date was established. See 8 C.F.R. § 204.5(g)(2). The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date.

²As noted in the AAO's decision of April 24, 2007, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985) the court held that the Immigration and Naturalization Service, now CIS, 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 as is asserted here on appeal and on motion by counsel. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reopen is granted. The prior decision of the AAO, dated April 24, 2007, is affirmed. The petition remains denied.