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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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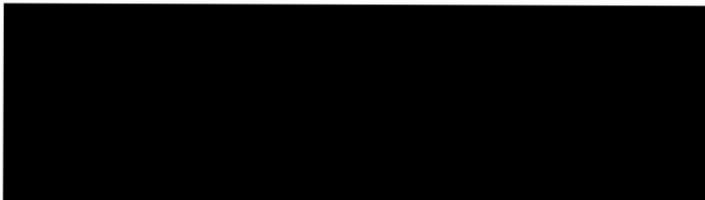
FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN 04 121 50008

Date: SEP 17 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO affirmed the Acting Director's decision and dismissed the appeal. Counsel for the petitioner filed a Motion to Reopen and Reconsider the decision of the AAO, seeking to have the petition approved. The AAO will grant the Motion to Reopen and Reconsider and affirm its previous decision to deny the petition.

The petitioner is a donut and ice cream shop. It seeks to employ the beneficiary permanently in the United States as a manager, retail store. As required by statute, the petition is accompanied by a Form ETA 750, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The record shows that the motion to reopen and reconsider is properly filed and timely and makes a specific allegation of error in law or fact. 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.

In a decision dated April 27, 2005 the acting director determined that the petitioner failed to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence. On March 29, 2007 the AAO affirmed the acting director's decision and dismissed the appeal. The AAO found that that while the petitioner had demonstrated the ability to pay the proffered wage for calendar years 2002, 2003, and 2004 for one beneficiary, the petitioner did not show its ability to pay the proffered wage for calendar year 2001 as it had not submitted its 2000 federal tax return for examination. Furthermore, the AAO stated that the petitioner had filed immigrant petitions for three additional beneficiaries and would not be able to demonstrate its ability to pay the proffered wage for four beneficiaries for calendar years 2002, 2003, and 2004. With respect to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), the AAO found that counsel had not provided any evidence to show any large one-time incident impacting the business' finances, or other factor, which previously impacted its ability to pay the proffered wage. The AAO noted several positive factors for the petitioner, including the length of time in business, high gross receipts, and wages paid, but also noted the negative factors of negative net current assets and low net income. Additionally, the AAO found that the beneficiary did not meet the experience requirements of the certified ETA 750 as the employment letter to document the beneficiary's qualifications was deficient in that it failed to list the company's street address, and only listed "Chicago, IL."

In the Motion to Reopen and Reconsider, counsel submits the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2000 which covers the 2001 calendar year. Counsel asserts that two of the additional beneficiaries have been working for the petitioner for the past five or six years and have been receiving the proffered wage, and the fourth beneficiary is awaiting overseas consular processing and already has an approved Form I-140 petition. Regarding the beneficiary's qualifications, counsel states the street address of the beneficiary's previous place of employment.

With respect to whether the petitioner has demonstrated its ability to pay the proffered wage, 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 2000 federal tax return submitted with the

Motion to Reopen and Reconsider demonstrate its net income for calendar year 2001, as shown in the table below.

In 2001, the Form 1120 stated net income of \$72,559.00

Therefore, for the calendar year 2001, the petitioner did have sufficient net income to pay the proffered wage of \$42,452.80 per year for the beneficiary of this petition, but not for the additional three beneficiaries.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ 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 calendar year 2001, as shown in the table below.

In 2001, the Form 1120 stated net current assets of -\$94,785.00

Therefore, for the calendar year 2001, the petitioner did not have sufficient net current assets to pay the proffered wage.

With respect to counsel's assertions regarding the three additional beneficiaries, the AAO notes that the record fails to include documentation, such as earnings statements, W-2 forms, and the approved Form I-140 to demonstrate that the petitioner has the ability to pay all of the beneficiaries the proffered wage. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With respect to the beneficiary's qualifications, the AAO acknowledges counsel's statement of the street address of Marine Subway, the beneficiary's place of prior employment, yet again notes that the record fails to include documentation, such as a statement from Marine Subway, to support counsel's assertion. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See 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)).

¹According 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.

The AAO notes that in his Motion to Reopen and Reconsider, counsel makes no additional claim regarding the totality of the circumstances of the petitioner's ability to pay the proffered wage. As the AAO addressed this issue in its initial decision, it will not again be reviewed.

As counsel has not provided the necessary documentation to support his assertions, the AAO affirms its previous finding that the petitioner has not demonstrated its ability to pay the proffered wage, nor has the beneficiary met the experience requirements of the certified ETA 750.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the previous decision of the AAO shall be affirmed.

ORDER: The previous decision is affirmed.