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U.S. Citizenship and Immigration Services
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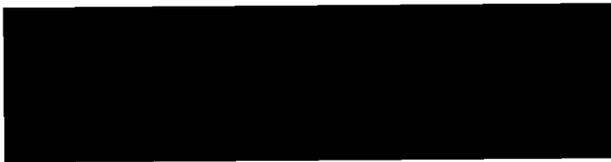
Petitioner:

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal.¹ The matter is now before the AAO on a motion to reconsider filed in accordance with 8 C.F.R. § 103.5. The motion will be granted; and, the previous decisions of the director and AAO will not be disturbed. The appeal will remain dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary² permanently in the United States as a stress analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL) along with an ETA 750, Part B for the substituted beneficiary. 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.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. 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.

Counsel has provided reasons for reconsideration supported by a pertinent precedent decision, *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).³ The record demonstrates that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The

¹ During the pendency of these proceedings, the AAO advised the petitioner of its intent to invalidate the underlying Alien Employment Certification and issue a formal finding of fraud. Based upon an investigation conducted in South Korea by the American Consulate in South Korea, a Notice of Derogatory Information (NDI) was issued to the petitioner providing details to the petitioner and counsel that the petitioner and beneficiary misrepresented the beneficiary's claimed prior employment experience in South Korea, and instructing the petitioner to respond in 30 days according to 8 C.F.R. § 103.2(b)(16)(i). Counsel has since responded with documentary evidence and has successfully rebutted the allegations found in the fraud report.

² The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

³ While counsel cites the USCIS Interoffice Memorandum (HQPRD 70/6.2.8-P) dated May 12, 2005, concerning the ability to pay, he acknowledges "that the Yates ATP Memo does not specifically endorse applying different tests for different years."

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.

Therefore, as set forth in the director's denial dated August 16, 2007, and the AAO's decision of September 17, 2009, dismissing the subsequent appeal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing by the DOL on May 22, 2002, and certified on November 17, 2006. The petitioner filed the Form I-140 petition on December 28, 2006. The proffered wage as stated on the Form ETA 750 is \$43,118.00 per year.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

⁴ The submission of additional evidence on appeal is allowed by the instructions to the U.S.

Relevant evidence in the record includes the original Form ETA 750, Application for Alien Employment Certification, certified by the DOL; an ETA Form 750, Part B for the substituted beneficiary; the petitioner's federal Form 1120-A tax return for 2002; the petitioner's federal Form 1120S tax returns for 2003, 2004, and 2005; Wage and Tax Statements (W-2) issued by the petitioner to an employee (not to the beneficiary) in 2003, 2004, 2005, and 2006; and explanatory letters from the petitioner dated December 20, 2006, and June 5, 2006. No other evidence such as an annual report or audited financial statement was submitted by the petitioner although the director requested such evidence in a request for additional evidence (RFE) dated March 8, 2007.⁵

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on December 19, 2006, the beneficiary did not claim to have worked for the petitioner.

In the prior appeal, counsel asserted that since the petitioner had been paying the salary of an employee who has since left its employ, this is proof of its ability to pay the proffered wage. In this present appeal, counsel states that because the petitioner has paid "an employee" less than the preferred wage, that is \$32,000 from 2003 to 2006, that this is proof of the petitioner's ability to pay the proffered wage of \$43,118.00 per year. Other than counsel's present assertion that a "hybrid" combination of ability to pay "tests" supports this assertion, no regulation or case decision was submitted to support this assertion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

As already stated in the AAO's decision dated September 17, 2009, according to the petitioner, these past wage payments to another employee may be added back to the petitioner's ability to pay the proffered wage. Since the former employee left the petitioner's company in 2006, the petitioner must prove its ability to pay both the former employee's wages and the beneficiary's wages from the priority date.

Moreover, there is no independent, objective evidence that the position of the former worker involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him.

Citizenship and Immigration Services (USCIS) Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵ The petitioner stated in its letter dated June 5, 2006, sent in response to the RFE that it would submit its 2006 federal income tax return, but to date, it was not received.

Further, while W-2 statements submitted for a former employee for years 2003, 2004, 2005 and 2006 show a consistent history of payroll payments in equal amounts of \$32,000.00, the information does not establish the petitioner's ability to pay the proffered wage of \$43,118.00. Wages paid to others generally will not demonstrate the petitioner's ability to pay for the instant beneficiary. *See K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985).

In his appeal statement dated October 12, 2009, counsel states "that the net income test or the current assets test alone is insufficient to show the petitioner's ability to pay the proffered wage." Counsel proposes a "hybrid test" but provides no details or method to ascertain the ability.

To summarize, the petitioner's net incomes as stated in the petitioner's federal tax returns are: 2002 - <\$53.00>⁶; 2003-\$13,540.00; 2004-\$15,671.00; and 2005- \$31,368.00. The petitioner's net current assets for 2003 and 2004 were \$14,487.00 and \$6,105.00 respectively.⁷ Since the petitioner did not pay the beneficiary the proffered wage, and both its net incomes and net current assets are less than the proffered wage, by all the evidence submitted to date, the petitioner did not have the ability to pay the proffered wage beginning on the priority date. According to the director's RFE of March 8, 2007, the petitioner was instructed as follows: "the petitioner must submit copies of federal tax returns [including its 2006 federal tax return], annual reports or audited financial statements." However, even at this late date, the petitioner has not followed the director's instructions. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In counsel's brief to support the current appeal, counsel states that because of a downturn of the housing market, the case of *Matter of Sonogawa* is applicable. As already stated, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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, 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a

⁶ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss. Net income, here a loss, was stated on Form 1120-A, Line 24.

⁷ While the petitioner has submitted evidence for 2003 and 2004, the petitioner has not provided information concerning the petitioner's current assets and current liabilities for 2002 and 2005.

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

In the instant case, the petitioner was established in 2002, and the petitioner has provided its tax returns from 2002 to 2005. The documentation presented here indicates that there are two owners of the company's stock. Other than that, there is a paucity of data in the record relating to the petitioner's finances. On appeal, despite the AAO's prior decision dated September 17, 2009, in which this lack of financial information was mentioned, the petitioner still has not submitted further information according to the regulation at 8 C.F.R. § 204.5(g)(2). There is insufficient information in the record concerning the petitioner's business profits expectations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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. at 506.

For the first two years of operation, the petitioner's gross profits were nominal, 2002-\$24,209.00 and 2003-\$30,811.00, but in 2004 and 2005 gross profits climbed to \$106,989.00 and \$176,371.00 respectively. However, the petitioner's net incomes for 2002, 2003, 2004 and 2005 were below the proffered wage despite no officers' compensation declared for 2002 and 2003, and only \$7,800.00 and \$14,300.00 officers' compensation stated for 2004 and 2005.

In the subject appeal, counsel asserts without additional evidence that the beneficiary will replace "sub contractors" and will save more than \$45,000.00 each year. This is the first instance the petitioner has asserted this contention, since up to the present date, it has stated that the beneficiary would replace a former worker who presumably was employed along with the "subcontractors" now mentioned. Counsel has not provided information how he calculates that "savings." Further, counsel has not stated where these expenses are found on the tax returns (no figures are given for Cost of Labor found on Line 3, of Form 1120S, Schedule A). Counsel's statements are assertions made without submitting documentary evidence in corroboration.

Counsel contends for the first time in his motion for reconsideration that the S corporation may allocate income to pay the proffered wage. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Neither counsel, nor has the petitioner, offered compensation of officers as additional financial resources of the petitioner, in addition to its figures for ordinary income.⁸ Since net income was insufficient to pay the proffered wage for all years for which tax returns were submitted, counsel's assertion is misplaced.

⁸ The source of these "additional" funds to be allocated is not specified by counsel.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.

ORDER: The motion is granted; and, the appeal is denied.