

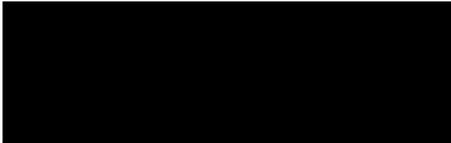
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

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U.S. Citizenship
and Immigration
Services



B6

Date: JUL 07 2011

Office: TEXAS SERVICE CENTER FILE:



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:

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the director's decision to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner has filed a motion to reopen. The motion will be granted, and the appeal will be reopened. The appeal will be dismissed.

The petitioner is a manufacturing company designing and producing metal and iron works. It seeks to employ the beneficiary permanently in the United States as a designer pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date, particularly in 2006 and 2007. The AAO agreed.

On motion, counsel for the petitioner urges the AAO to consider copies of various business checks issued by the petitioner in 2006 and 2007 payable to the order of "Cash" and endorsed by the beneficiary as evidence of the petitioner's ability to pay. The petitioner also submits the following documents to demonstrate that the petitioner has the ability to pay the proffered wage in 2006 and 2007:

- An affidavit dated September 17, 2010 from the owner of the petitioning company, [REDACTED], stating that the beneficiary has been employed by his company since 2006, that the beneficiary was paid by checks payable to the order of "Cash" for her services, that he, in addition to giving her checks, also paid approximately \$2,665 and \$3,980 for her car loan payments and credit card bills in 2006 and 2007;
- Copies of various checks issued by the petitioner in 2006 and 2007 (checks payable to the order of "Cash" are highlighted by the petitioner);²
- Copies of the beneficiary's credit card statements (Visa) dated September 8, 2006 and July 9, 2007;
- Copies of the front page of the beneficiary's credit cards (Discover and American Express) with expiration date of April 2012 (American Express) and August 2014 (Discover);
- Copies of the petitioner's general ledger for the years 2006 and 2007;
- Copies of the beneficiary's Forms W-2 for 2008 and 2009; and

¹ 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.

² On appeal, the petitioner submitted copies of checks made payable to "Cash" issued in 2006 and 2007. Some of the checks submitted on motion are the same checks the petitioner submitted earlier on appeal.

- Copies of the petitioner's payroll records for 2010.

Counsel further contends that the petitioner has the ability to pay the proffered wage of the beneficiary from the priority date based on the totality of the petitioner's circumstances. Counsel states that the petitioner's clients include famous New York City landmarks, celebrity event planners, including [REDACTED] – a widely acclaimed and award-winning designer of celebrity weddings and large-scale celebrations (copies of several published materials by [REDACTED] acknowledged the petitioner's works). Counsel also notes that the petitioner's work has been featured in events for [REDACTED], [REDACTED], and [REDACTED] and [REDACTED] wedding.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Here, counsel has provided additional facts and evidence. The motion is granted, and the appeal is reopened.

Counsel asserted earlier on appeal to the AAO that the beneficiary was in the United States illegally and had no work authorization or social security number, and for these reasons, the only way for the petitioner to compensate her for her services in 2006 and 2007 was by giving her checks made payable to cash. Counsel stated that the beneficiary endorsed and cashed most of these cancelled checks.³ In addition, counsel indicated that the petitioner claimed to have spent \$30,175 in 2006 and \$31,690 in 2007 for "outside services," and that the beneficiary was the recipient of some of this spending.⁴

In dismissing the appeal, the AAO gave the following reasons for why the checks and the claim that the petitioner had spent over \$30,000 for outside service in 2006 and 2007 could not be accepted as evidence of the petitioner's ability to pay:

- The record does not include payroll or accounting records to verify that the cancelled checks made payable to the order of cash were actually paid to the beneficiary for her services; and
- The record contains no evidence showing that some of the spending for outside services was actually paid to the beneficiary in 2006 and 2007⁵

In this proceeding, the petitioner again urges the AAO to consider the checks made payable to cash as evidence of the petitioner's ability to pay. In addition, the petitioner indicates that in exchange for beneficiary's services or work, the petitioner paid the beneficiary's credit card bills and car loans for a total of \$3,980 and \$2,665 in 2006 and 2007.

³ Upon review, the AAO noted in its previous decision that the beneficiary endorsed some of the checks for a total of \$5,560 in 2006 and \$2,600 in 2007.

⁴ The petitioner's tax return for 2006 is incomplete and does not show \$30,175 spent on outside services. The beneficiary's tax returns for 2006 and 2007 are not in the record.

⁵ The petitioner could not specifically state how much of the overall spending for outside services was actually paid to the beneficiary.

However, no evidence such as payroll or accounting records has been submitted to verify the veracity of the petitioner's claims. The contemporaneous evidence submitted on motion (the beneficiary's credit card statements, the front page of the beneficiary's credit cards, the beneficiary's car loan statement, the check images, and the petitioner's general ledger) does not reflect that the petitioner either paid the beneficiary's credit card bills or made the beneficiary's auto loans payments in exchange for the beneficiary's work for the petitioner.

Moreover, even if the AAO were to assume that the checks made payable to cash were payments for the beneficiary's services in 2006 and 2007, and that the assertions of the petitioner that it paid the beneficiary's credit card bills and auto loan were true, the petitioner would still fail to establish the ability to pay the proffered wage in 2006 and 2007. As noted earlier, the rate of pay or the proffered wage stated on the ETA Form 9089 is \$16.27 per hour or \$33,841.60 per year.

In 2006, the beneficiary only endorsed \$5,560 of the checks made payable to cash.⁶ In 2007, the beneficiary endorsed \$2,600 of the checks made payable to cash.⁷ She also was issued a W-2 by the petitioner. The beneficiary's 2007 W-2 shows that she was paid \$6,710. [REDACTED] claims in his affidavit he paid the beneficiary \$3,980 for her credit card bills in 2006 and 2007. He also claims he paid \$2,665 for the beneficiary's car loan in 2006 and 2007. Even if we were to add \$2,665 and \$3,980 to the checks made payable to the order of cash in 2006 or 2007, or add the amount on the beneficiary's W-2 for 2007 to the amounts paid for the credit cards and car note in lieu of the cash payments for that year, the petitioner would have paid substantially less than the proffered wage of \$33,841.60 per year.

As noted in the previous decision, the petitioner had net income in 2006 of \$1,309 and \$8,961 in 2007. These amounts, when added to the figures the petitioner states it paid the beneficiary in 2006 and 2007, still do not equal or exceed the proffered wage. The petitioner's net current assets were negative for both years. Thus, on motion, the petitioner has not established that it had the ability to pay in 2006 or 2007.

In her appellate brief, counsel maintains that the petitioner has the ability to pay the proffered wage from the priority date. Specifically, counsel states that the petitioner has paid at or above the proffered wage in 2008 and 2009,⁸ and for that reason, counsel urges the AAO to take the overage in the beneficiary's pay in those years and apply it retroactively.

⁶ This amount is based on the checks made payable to cash that the petitioner submitted on appeal. Counsel states in his brief that the total amount of the checks made payable to cash in 2006 is \$4,750. The petitioner does not appear to know how much it paid the beneficiary in 2006 and 2007.

⁷ Similar to 2006, this amount is based on the checks that the petitioner submitted on appeal.

⁸ According to the Forms W-2 submitted, the beneficiary was paid \$48,825 in 2008 (\$14,983.40 more than the proffered wage) and \$37,755 in 2009 (3,913.40 more than the proffered wage).

Counsel's argument is not persuasive. Consistent with 8 C.F.R. § 204.5(g)(2), the petitioner must show the ability to pay the proffered wage every year from the priority date.

Counsel also urges the AAO to consider the petitioner's totality of circumstances. Specifically, counsel states that the petitioner has famous clients such as [REDACTED], and that the petitioner's works have been featured in events for [REDACTED], [REDACTED], and [REDACTED] and [REDACTED] wedding.

USCIS may, in its discretion, 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 (Reg. Comm. 1967). 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 [REDACTED] 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 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.

Based on the evidence submitted in this proceeding, the AAO acknowledges that the petitioner has established the ability to pay the proffered wage in 2008 and 2009. In 2008 and 2009, the beneficiary received \$48,825 and \$37,755, respectively. In 2010, the beneficiary received \$22,510 as of August 31. The AAO also acknowledges that the petitioner has a viable business and has been in a competitive field since its inception in 1997.

However, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonogawa*. Nor does it include any evidence or detailed explanation of its milestone achievements. The published materials by [REDACTED] alone do not demonstrate that the petitioner's works are exceptional.

Counsel's claim that the petitioner's works have been featured in the [REDACTED] show, [REDACTED] and the wedding of [REDACTED] and [REDACTED] is not supported by any evidence. The record does not contain any newspapers or magazine articles, awards, or certifications indicating

the business' accomplishments or well known reputation. The assertions of counsel alone do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, 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)).

Further, no evidence or information has been submitted to show that the petitioning corporation has significant potential to grow beyond its current profitability, or that it will generate sufficient income for the petitioner to be able to pay the proffered wage from the priority date. Based on the evidence of record, the most profitable year for the petitioner was in 2004, when the company reported \$35,518 net income. For the next three successive years (2005, 2006, and 2007), the petitioner reported low net income of \$3,792; \$1,309; and \$8,961, respectively. Moreover, no unusual circumstances have been shown to exist to parallel those in *Sonegawa*, nor has it been established that the petitioner, especially in 2006 and 2007, had uncharacteristically substantial expenditures.

Assessing the totality of the circumstances in this individual case, the AAO upon consideration concludes that the petitioner does not have the ability to pay the proffered wage from the priority date and continuing until the beneficiary receives permanent residence. Although the motion is granted and the appeal is reopened, the appeal will be dismissed for the reasons stated above. 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 appeal is dismissed.