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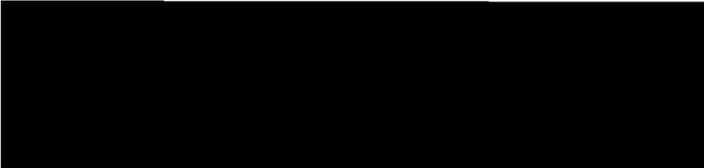
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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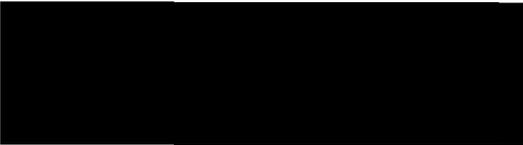
Date: JUN 14 2011 Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a waiter pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as an unskilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750) approved by the Department of Labor (DOL). The director denied the petition because the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

On July 16, 2010, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner filed a motion. The record shows that the motion is properly filed and timely and provides information concerning the petitioner's business and reputation. 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 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 United States Citizenship and Immigration Services (USCIS) 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, we will accept the motion to reopen the matter based on the new information submitted. The instant motion is granted.

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 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.

As noted in the AAO's prior decision, 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 the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on October 8, 2004. The proffered wage as stated on the Form ETA 750 is \$7.77 per hour (\$16,161.60 per year).¹ The petitioner sponsored a second worker as discussed in the AAO's July 16, 2010 decision. The proffered wage of the second sponsored worker is \$13,665.60 per year for a combined wage obligation of \$29,827 per year for both workers. The petitioner is an S corporation. The AAO's prior analysis of the S corporation's net income and net current assets is affirmed. On motion, the issue is whether the new information submitted concerning the petitioner's business and reputation overcomes the AAO's prior decision, which also considered *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), but the AAO found the information insufficient to establish the petitioner's ability to pay based on the totality of the circumstances.

In the AAO's July 16, 2010 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary (none), the petitioner's income tax returns and considered the petitioner's net income, net current assets, and the petitioner's totality of the circumstances. The AAO decision also considered a letter from the petitioner's CPA. The AAO noted that the petitioner sponsored a second worker with the same priority date as well as the beneficiary and must demonstrate its ability to pay both sponsored workers. In examining the petitioner's tax returns, the AAO determined that the petitioner demonstrated its ability to pay the proffered wage to the instant beneficiary and the second sponsored worker in 2005, but that neither the net income or net current assets were sufficient to demonstrate the ability to pay in 2004 or 2006, the only other years for which financial documents were submitted. The AAO considered the CPA's statement of the petitioner's financial position and found it insufficient because the statement was not audited pursuant to 8 C.F.R. § 204.5(g)(2) and the claims made in the letter, such as the claim that officer compensation was available, were not supported by outside evidence. No evidence was submitted with the motion to address this point. The CPA's letter additionally referred to the area's tourism, which was not supported by the record. A Wikipedia article submitted with the motion references the area's tourism as "seasonal" mainly summer and a "smaller peak season during Spring Break."

As counsel asserts on motion, 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

¹ The labor certification states that overtime will be remunerated at the rate of \$11.65 per hour but does not indicate that any overtime is required.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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.

In the instant case, the petitioner submitted no evidence that it has ever paid the beneficiary any wages since the priority date and it sponsored a second worker during the relevant time period. Nothing demonstrates that the petitioner paid the second sponsored worker any wages either. The petitioner did not assert or submit any evidence of pay with the initial filing, with its appeal, or with its motion. The petitioner did not address the issue of the second sponsored worker in its motion although clearly raised in the AAO's decision. The petitioner demonstrated the ability to pay the proffered wage, through an analysis of net income and net current assets, in only one out of three years (2005) for which the petitioner submitted its tax returns. As noted in the AAO's July 16, 2010 decision, in 2006, the petitioner had negative income (-\$678) and minimal net current assets (\$11,599) and in 2004, both the petitioner's net income (-\$5,940) and net current assets (-\$8,322) were negative. The record does not contain tax returns for any other year other than 2004, 2005, or 2006 to allow the AAO to determine any historical pattern of growth. The petitioner did not submit any additional financial information with its motion.

On motion, the petitioner submitted a copy of its menu and wine list; a restaurant review that appeared in [REDACTED] a newsletter for the regional chapter of the American Business Women's Association; reviews appearing on [REDACTED] reviews appearing on tripadvisor.com; and a Wikipedia.com article about Fort Walton Beach. The reviews on tripadvisor.com show that the restaurant ranks in the bottom half of those reviewed by the site (number 37 out of 60), 66% of reviewers recommend the restaurant and four of 11 reviewers thought the restaurant was "poor" or "terrible." Only three reviews appear on yelp.com and they all reviewed the restaurant highly. The general review in "Sand Pebbles" was also complimentary. Although the petitioner may have received some good reviews from individuals, they do not establish that the petitioner enjoys a reputation similar to the regional and national acclaim established by the petitioner in *Sonegawa*. In addition, unlike the petitioner in *Sonegawa*, the petitioner here did not experience one off year but instead demonstrated an ability to pay the proffered wage in only one year of three and provided no evidence demonstrating that any off years were a result of uncharacteristic

expenses or events. The petitioner claimed on the Form I-140 to have been established in 2003, but no financial records or tax returns were submitted for any year after 2006 to demonstrate that the 2004 and 2006 net income and net current assets were anomalous. On motion, counsel states that the petitioner was fairly new when the petition was filed, but it submitted no additional evidence to demonstrate that the business has grown or that it has become well known in the intervening time outside of the local reviews submitted. Even if we were to accept Wikipedia as a credible source, which we do not,² it does not establish that the petitioner can expect to see increased business as a result of the area being a tourist area or that the tourist season is continual and year round, as opposed to only “seasonal” or part of the year.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that two of three years for which tax returns were submitted were uncharacteristically unprofitable years for the petitioner.

Counsel’s assertions and evidence submitted on motion cannot overcome the grounds of denial in the director’s April 3, 2008 decision and the AAO’s July 16, 2010 decision. The petitioner failed to establish that the petitioner had the continuing ability to pay the proffered wage from the priority date through the present. Therefore, the petition cannot be approved.

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 to reopen is granted and the decision of the AAO dated July 16, 2010 is affirmed. The petition remains denied.

² Online content from *Wikipedia* is subject to the following general disclaimer:

Wikipedia is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information. . . . *Wikipedia* cannot guarantee the validity of the information found here. The content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.