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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

**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: **MAR 30 2011**

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)

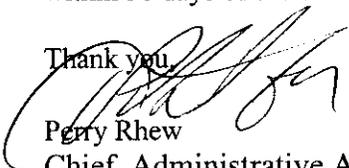
ON BEHALF OF PETITIONER:

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 your 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, Nebraska Service Center. The director rejected a subsequent motion to reopen as untimely. The matter is now before the AAO on appeal. The appeal will be dismissed.

The petitioner is a retail import/export firm of carpet and rugs. It seeks to employ the beneficiary permanently in the United States as an imports supervisor.<sup>1</sup> As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition.<sup>2</sup> DOL informed the U.S. Citizenship and Immigration Services (USCIS) that the petitioner had engaged in certain actions that made it subject to mandatory debarment provisions of section 212(n)(2)(c)(i) and (ii) of the Immigration and Nationality Act, as amended. The debarment period was set from June 1, 2008 to May 31, 2010. Accordingly, no immigrant visa petitions may be approved for this petitioner during the debarment period, regardless of when it was filed. Citing this provision, the director denied the petition on October 23, 2008.

It is noted that the director properly gave notice to the petitioner that it had 33 days to file the appeal.<sup>3</sup> As such, it was due on Tuesday, November 25, 2008. Accordingly, the motion to reopen submitted one year after the decision's denial was untimely filed on November 6, 2009. Counsel asserts the delay was caused by the fact that the petitioner contacted the former attorney to proceed with an appeal of the director's October 23, 2008, decision and was "unaware" that an appeal was not filed. Counsel cites the former attorney's ineffective assistance of counsel as prejudicing the beneficiary. He additionally suggests that if the director had been more prompt in his decision in adjudicating the case, then it would have been approved and the debarment period would not have applied.

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<sup>1</sup> 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>2</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the ETA Form 750 was filed prior to the enactment of the PERM regulations.

<sup>3</sup> If the last day of the designated period falls on a Saturday, Sunday or a legal holiday, the period will run until the end of the next day, which is not a Saturday, Sunday, or legal holiday. See 8 C.F.R. § 1.1(h). Here, the last day fell on November 25, 2008.

The director issued a decision on counsel's motion on February 23, 2010. He found that the motion was untimely and was rejected. Despite its untimeliness, the director determined that even if the motion had been timely filed, the petition was not approvable because it was subject to mandatory debarment.

The record shows that the appeal is properly filed, 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.

On appeal from the denial of the motion, counsel makes the same arguments as on motion. He states that the petitioner contacted his former attorney about pursuing an appeal but was told that it would not be successful, that "equitable tolling" should apply, and that the director's application of the debarment provision was in error.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

At the outset, it is noted that pursuant to an August 1, 2008, Memorandum from [REDACTED] Chief, Service Center Operations, petitions filed by the petitioner could not be approved for a period of two years, commencing on June 1, 2008, and ending on May 31, 2010.<sup>4</sup>

The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. See generally 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)."<sup>5</sup> Therefore, USCIS may not approve a nonimmigrant or immigrant petition during the

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<sup>4</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a *de novo* basis).

<sup>5</sup> We note that certain statutes that preclude USCIS from approving applications effectively require that USCIS deny the application. For instance, the language of Sections 204(c), (d), and (g) of the Act all similarly provide that "notwithstanding [the relevant applicable subsections] . . . no petition shall be approved if [the following facts are present]." Further, on October 21, 1998, President Clinton signed into law the Omnibus Consolidated and Emergency Supplemental Appropriations Act for Fiscal Year 1999, which incorporated several immigration-related provisions, including the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). ACWIA mandated new requirements for petitioners filing for H-1B beneficiaries. Pursuant to ACWIA, penalties were established for H-1B violations on a three tier system: (1) the first tier would encompass non-willful

debarment period, *regardless of when it was filed*. Accordingly, the director correctly denied the petition on October 23, 2008, as it became ready for adjudication during the period of debarment.

The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or USCIS policy. It must also demonstrate that the decision was *incorrect based on the evidence contained in the record at the time of the initial 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). In this case, counsel filed and requested a motion to reopen on Form I-1290B.<sup>6</sup> Counsel's motion alleges that the motion should not be treated as untimely and that the debarment decision should somehow not apply to the petitioner.

Counsel asserts that the petitioner's omission of filing a timely appeal and a resultant filing of an untimely motion to reopen was due to ineffective assistance of counsel. It is noted that any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

*Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988).

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conduct, or less substantial violations such as failure to meet strike, lockout or layoff attestations; failure to meet notice or recruitment attestations; or misrepresentation of a material fact on a labor condition application, and would result in fines of not more than \$1,000 per violation and result in the mandatory debarment of at least one year. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(i) of the Act; (2) willful violations, such as willful failure to meet any attestation condition; willful misrepresentation; or actions taken in retaliation against whistleblowers, which would result in a fine of not more than \$5,000 per violation, and mandatory debarment of two years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(ii) of the Act; and (3) willful violations that result in layoffs, such as a violation of the attestation, or misrepresentation of a material fact in the course where an employer displaces a U.S. worker, which would result in a fine not to exceed \$35,000 per violation, and mandatory debarment of at least three years. *See* ACWIA § 413(a) incorporated at 212(n)(2)(C)(iii) of the Act.

<sup>6</sup> Counsel's brief describes the filing as a "motion to reopen and reconsider."

In this case, there is no evidence that any of the three requirements have been fulfilled. Further, it is noted that two different statements have been made with regard to the filing of an appeal. In the motion, counsel stated that the petitioner believed that his prior counsel had filed an appeal. On appeal, counsel stated that the petitioner contacted his former attorney to proceed with an appeal but was informed that any appeal would be denied. The undocumented assertions of counsel 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).

With respect to equitable tolling, in *Lopez v. INS*, 184 F.3d 1097 (9<sup>th</sup> Cir. 1999), as cited by counsel, the court found that the statute of limitations for reopening an order of deportation was equitably tolled where an alien's late petition was the result of deceptive actions by a notary posing as an attorney. The instant case does not involve such egregious actions. Moreover, as noted above, there is no showing that the requirements have been completed. The motion to reopen was not filed for over one year. For equitable tolling to apply, it is required that "despite all due diligence, the party invoking equitable tolling is unable to obtain vital information bearing on the existence of the claim." *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1181 (9<sup>th</sup> Cir. 2001)(en banc). The information must have been unavailable for reasons beyond the party's control. *Id.* at 1193. The AAO does not believe that this has been demonstrated in this case such that equitable tolling of filing a motion to reopen should not be rejected by the director as untimely. See *Valeriano v. Gonzales*, 474 F.3d 669 (9<sup>th</sup> Cir. 2007). As noted above, there is no demonstration that the *Lozada* requirements were completed and the arrangement between the petitioner and former counsel has not been clearly established whether an appeal was to be filed.

Additionally, as noted by the director, even if considered timely, the debarment provisions precluded the approval of the petition. As noted by the director, there is nothing compelling USCIS to hold all petitions until a debarment period has run. For this reason, we concur with the director's denial of the petition and the rejection of the motion to reopen.

Beyond the decision of the director, we also find that the petitioner has not clearly established that it has had the continuing ability to pay the annual proffered wage of \$28,371.20 beginning at the priority date of March 24, 2005 and continuing onward.<sup>7</sup>

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<sup>7</sup>The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has submitted a copy of the beneficiary's W-2 for 2005 indicating that the petitioner paid her \$22,729 or \$5,642 less than the proffered wage. In 2006, her W-2 was for \$25,758.75, or \$2,612.45 less than the proffered wage. It is noted that as of June 2, 2007, the petitioner paid her \$15.00 per hour, which was more than the \$13.64 per hour proffered wage, but her bi-weekly hours were not consistently 80 hours per week.

It is noted that the petitioner submitted a copy of its 2005 corporate tax return, which shows substantial net income of \$1,916,311, however, it is also noted that the petitioner has filed at least thirteen other non-immigrant and immigrant petitions since 2001. A petitioner is obliged to demonstrate its ability to pay each respective proffered wage to each sponsored beneficiary as of each priority date. Without additional information concerning these beneficiaries, as well as either tax returns or audited financial statements for 2006 and 2007, we are unable to determine the petitioner's ability to pay the proffered wage in this case.<sup>8</sup>

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<sup>8</sup> If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. USCIS will consider net current assets<sup>9</sup> as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and may be shown on Schedule L of the corporate income tax return or on an audited financial statement.

In some cases, USCIS may also 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 (BIA 1967).<sup>10</sup> 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, or the petitioner's reputation within its industry. In this case, there is very little evidence to determine the overall magnitude of the petitioner's business because it has not submitted all of the relevant federal income tax returns or audited financial statements upon which a meaningful review may be based. The AAO does not find that this petition would be approvable based on the record as it currently stands, as there is insufficient information relevant to 2006 and 2007. While we note that the petitioner's 2005 tax return exhibits some favorable factors, in the absence of tax returns or audited financial statements related to 2006 and 2007, as well as information related to any other sponsored workers, we are unable to conclusively determine that the petitioner has established its continuing ability to pay the proffered wage.

The AAO concurs with the director's decision rejecting the petitioner's motion to reopen and the director's determination that the petition was not eligible for approval even if the motion was regarded as timely. Further, as the record currently stands, the petitioner has not established its

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<sup>9</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>10</sup> 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.

continuing ability to pay the proffered wage. Each reason is considered as an independent and alternative basis for denial.

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.