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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: **JAN 04 2012** OFFICE: NEBRASKA 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 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 employment based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is a tree service. It seeks to employ the beneficiary permanently in the United States as a tree pruner. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish that it had the ability to pay the beneficiary the proffered wage, and denied the petition accordingly.

The petitioner filed an appeal. The AAO dismissed the appeal on August 20, 2010, and also concluded that the petitioner had not established its continuing financial ability to pay the proffered wage of \$21,840 as of the priority date of January 21, 2004. The AAO additionally determined that the petitioner had failed to submit evidence establishing that the beneficiary had six months of experience in the job offered as required by the labor certification. 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.

Through counsel, the petitioner submits a motion to reopen and a motion to reconsider the AAO's decision. 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 United States Citizenship and Immigration Services (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).

On motion, counsel submits additional material relevant to the beneficiary's experience in the job offered and the petitioner's ability to pay the proffered wage. The AAO accepts counsel's submission as a motion to reopen and reconsider and finds that the petitioner has established that the beneficiary gained six months of employment experience in the job offered but has not established that it has had the continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

Experience

The regulation at 8 C.F.R. § 204.5(l)(3), which provides in pertinent part:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification. The petitioner must establish that the beneficiary has all the education, training, and experience specified on the labor certification as of the petition's priority date.

The Form ETA 750 states that the certified job of tree pruner requires no education or training, but does require six months of work experience in the job offered or six months of experience in an unspecified related occupation. As noted in the AAO's August 20, 2010 decision, the record contained no evidence of the beneficiary's experience gained as of the priority date of January 21, 2004.

On motion, counsel submits a letter, dated September 6, 2010, from [REDACTED] signed by [REDACTED] [REDACTED] confirms that the beneficiary worked for the company from January 1997 to July 2000, "working on cutting and pruning trees." This letter matches the experience and employer stated by the beneficiary on Form ETA 750B. The AAO accepts this confirmation that the beneficiary gained the requisite six months of experience as required by the terms of the labor certification and withdraws that part of its previous decision on this issue.

Ability to Pay

With respect to the ability to pay the proffered wage of \$21,840 per year (\$10.50 hr.), it is noted that 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

As stated in the AAO's prior decision, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing ability to pay the proffered wage as of the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

In reviewing the petitioner's ability to pay the proffered wage, the AAO noted in its decision of August 20, 2010, that the petitioner appeared to be structured as a sole proprietorship¹ for the years of 2004, 2005 and 2006 as indicated by copies of Schedule C, Profit or Loss from Business submitted for each of those years. It was also noted, however, that the petitioner failed to submit complete copies of the sole proprietor's individual federal income tax returns or audited financial statements from which its ability to pay could be calculated. Further, the AAO noted that the sole proprietor failed to submit a summary of his recurring monthly household expenses for all pertinent years, which are also factored into the evaluation of the petitioner's ability to pay the proffered wage of \$21,840 per year where the petitioner is a sole proprietorship.² Additionally, the AAO observed that the report of wages paid to the beneficiary submitted in the form of W-2s for 2004, 2005, and

¹ [REDACTED] is identified as the sole proprietor.

² A sole proprietorship, an entity in which one person operates in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage. In *Ubeda*, 539 F. Supp at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself and family on a gross income of slightly more than \$20,000 where the beneficiary's salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

2006³ did not match any amounts shown for wages paid on any of the corresponding Schedule Cs that were submitted, thus raising a question as to the accuracy of the amounts reported on Schedule C as well as on the W-2s.⁴ No clarification and no additional evidence addressing this issue have been submitted. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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)).

On motion, the petitioner submits copies of page(s) 1 and 2 of the sole proprietor's 2004 individual federal income tax return (Form 1040) showing three dependents and \$37,954 in adjusted gross income; a copy of page 1 of the sole proprietor's 2005 individual Form 1040 showing two dependents and \$43,447 in adjusted gross income; and a copy of page(s) 1 and 2 of the sole proprietor's individual Form 1040 showing two dependents and \$45,748 in adjusted gross income. On motion, the petitioner additionally provides copies of page(s) 1 and 2 of [REDACTED] individual Form 1040s for 2007, 2008, and 2009.⁵ However, no other portions of these tax returns in 2007, 2008, or 2009 have been submitted such as Schedule C, so it is unknown if the petitioning business remained a sole proprietorship for these years. We are unable to determine the petitioner's ability to pay the proffered wage where the record does not indicate the petitioner's business structure for all relevant years.⁶

On motion, counsel asserts that factors of outstanding reputation should be evaluated in determining a petitioner ability to pay pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). Provided on motion are copies of documents consisting of: 1) a March 25, 2009, online article mentioning the petitioner's involvement in tree removal at a playground; 2) a list of businesses, which include the petitioner, that are compliant in a longhorned beetle eradication program as of July 2010; 3) a September 16, 2010 online document indicating that the petitioner is insured; and 4) a June 15, 2004, document containing minutes of a Board of Selectmen meeting relating to a change of site use, which includes the petitioner's name as one of four businesses operating at the site where the petitioner is located.

³The petitioner also submitted a W-2 for 2007 indicating \$16,800 wages paid to the beneficiary. The complete tax return for 2007 has never been submitted.

⁴ See page 5 of the AAO's August 20, 2010 decision.

⁵The adjusted gross income shown for these years was \$65,782 for 2007; \$62,636 for 2008; and \$39,657 for 2009 (Two dependents reported for 2007 and 2008; no dependents for 2009).

⁶As noted above, the AAO noted in its prior decision that the petitioner must submit its full tax returns in order to determine the petitioner's ability to pay the proffered wage.

Matter of Sonegawa related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In this matter, there are few facts and little evidence upon which to evaluate the petitioner's circumstances. As set forth above, the evidence submitted on motion is more relevant to the petitioner's operational existence rather than to the kind of outstanding reputational factors referenced in *Sonogawa*. As noted above, some of the evidence requires clarification, such the lack of explanation of the beneficiary's W-2 wages as reported on the sole proprietor's tax returns, the lack of submission of the sole proprietor's monthly recurring household expenses,⁷ and the lack of complete tax returns for the years 2007 through 2009.⁸ There is no indication that any unusual or unique business circumstances or reputational factors have been shown to be applicable in this case that parallel those described in *Sonogawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year within a framework of profitable years for the petitioner.

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date. It is further noted that no new evidence or argument has been submitted on motion that would reverse the AAO's previous finding in its August 20, 2010 decision that the petitioner has failed to establish its ability to pay the proffered wage and therefore the petition cannot be approved.

⁷The AAO does not recognize the poverty guidelines, issued by the Department of Health and Human Services, as an appropriate guideline to determine a sole proprietor's personal living expenses. The poverty guidelines are used for administrative purposes - for instance, for determining whether a person or family is financially eligible for assistance or services under a particular Federal program. The poverty guidelines are not adjusted for regional differences in the cost of living and, therefore, comparisons across regions of the country may be misleading. Thus, the poverty guidelines will not be considered when determining the petitioner's ability to pay the proffered wage.

⁸The petitioner failed to state on Form I-140 how many employees that it employs. Schedule Cs submitted in 2004, 2005, and 2006 do not list any wages paid to any employees.

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, August 20, 2010 is affirmed. The petition remains denied.