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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**



B6

Date: **JUL 31 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other 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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 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 steel fabrication and construction company. It seeks to employ the beneficiary permanently in the United States as a maintenance and repair worker (“mechanical technician”) 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 Permanent Alien Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the labor certification did not support the visa category that the petitioner requested. The director denied the petition accordingly.

On December 17, 2010, the AAO dismissed the subsequent appeal, affirming the director’s denial and noting further that the petitioner failed to demonstrate that the beneficiary had the skills required by the terms of the labor certification and failed to demonstrate its ability to pay the proffered wage. The petitioner filed a motion to reopen and reconsider the AAO decision. The record shows that the motion is properly filed and timely and provides information concerning wages paid by the petitioner to the beneficiary and education received by the beneficiary. 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.

Regarding the director’s and AAO’s holding that the petitioner filed the Form I-140 under an incorrect category, the regulation at 8 C.F.R. § 204.5(i) provides in pertinent part:

- (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of

training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification requires that the worker in the proffered position have three years of college in the field of mechanics (electronics), four years of training, and eight years of experience as a mechanical technician with adequate knowledge in mechanical and electrical works. However, the petitioner requested the other worker classification on Part G of the Form I-140, which requires less than two years of experience (any other worker).

On motion, counsel states that “20 CFR sec 656.2(b)(2)(ii) fits in this category because his job designation is not a teacher in college or University [sic].” 20 C.F.R. § 656.2(b) states:

Burden of proof under the Act. Section 291 of the Act (8 U.S.C. 1361) provides, in pertinent part, that:

Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act * * *.

It is unclear how this regulation relates to the petitioner’s burden to demonstrate that it filed its petition for a sponsored worker in the correct category. The terms of the labor certification require more than two years of experience. Therefore, the petition should have been filed under the skilled worker classification on Part E of the Form I-140, which requires at least two years of specialized training or experience. The petition was filed under the wrong category as the labor certification required more than two years of training or experience. As such, the petition for an unskilled worker must be denied.

Concerning the petitioner’s ability to pay the proffered wage, 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 April 30, 2001. The proffered wage as stated on the ETA Form 750 is \$19.60 per hour (\$40,768 per year).

On motion, the petitioner submits Internal Revenue Service (IRS) Forms W-2 issued to the beneficiary from 2001 through 2010. These Forms W-2 show that the petitioner paid the beneficiary the following amounts:

- The 2001 Form W-2 states that the petitioner paid the beneficiary \$30,995.01.¹
- The 2002 Form W-2 states that the petitioner paid the beneficiary \$31,029.82.
- The 2003 Form W-2 states that the petitioner paid the beneficiary \$36,831.07.
- The 2004 Form W-2 states that the petitioner paid the beneficiary \$35,144.78.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$36,424.44.
- The 2006 Form W-2 states that the petitioner paid the beneficiary \$47,429.72.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$46,494.42.
- The 2008 Form W-2 states that the petitioner paid the beneficiary \$60,129.00.
- The 2009 Form W-2 states that the petitioner paid the beneficiary \$51,278.04.
- The 2010 Form W-2 states that the petitioner paid the beneficiary \$34,657.56.

The amounts paid by the petitioner in 2006, 2007, 2008, and 2009 exceed the proffered wage, so the petitioner established its ability to pay the proffered wage in those years. The petitioner, however, must establish its ability to pay the proffered wage in every year from the priority date onwards. The amounts paid to the beneficiary in 2001, 2002, 2003, 2004, 2005, and 2010 are less than the proffered wage and would thus be insufficient to establish the petitioner's ability to pay the proffered wage in those years. The petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage in those years.

In the AAO's December 17, 2010 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary (\$47,429.72 in 2006). Despite notification in the AAO decision of the types of evidence that the petitioner needed to submit under the regulation at 8 C.F.R. § 204.5(g)(2) (annual reports, federal tax returns, or audited financial statements) as evidence of its ability to pay the proffered wage, the petitioner submitted no such evidence with its motion.

On motion, the petitioner submitted a letter from its [REDACTED] stating that the petitioner "has averaged over \$31 million in annual sales over the last 10 years, as

¹ The petitioner also submitted a Form W-2 stating that [REDACTED] paid the beneficiary in this year. As no relation has been demonstrated between the petitioner and [REDACTED] the wages paid by this other company may not be considered. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

well as achieving profit marginalization on an average of 8% over that period of time.” 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’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The letter also states that the petitioner has employed in excess of 100 workers from 2002 onward. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. The regulation further provides: “In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.” (Emphasis added.) The record does not contain any corporate information about the petitioner, its operations, and the number of its employees. Given the lack of corroborating information about the petitioner, we find that USCIS need not exercise its discretion to accept the letter from [REDACTED]. In addition, the letter does not establish that the petitioner employed in excess of 100 employees in 2001, so the petitioner would still need to provide evidence of its ability to pay the difference between the actual wage and the proffered wage in that year. As a result, the petitioner failed to submit evidence of its ability to pay the difference between the actual wage paid and the proffered wage in 2001, 2002, 2003, 2004, 2005, and 2010 and thus did not establish its ability to pay in those years.

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 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 new evidence concerning wages actually paid to the beneficiary from 2001 through 2010, however, the amount of the wages paid were less than the

proffered wage in 2001, 2002, 2003, 2004, 2005, and 2010. The petitioner submitted no evidence of its ability to pay the difference between the proffered wage and actual wage paid in 2001. The record does not contain evidence concerning the petitioner's financial history to determine any historical pattern of growth or that any particular year represented an unusual year. Additionally, the petitioner submitted no evidence of its reputation to liken its situation to that of *Sonegawa*. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onwards.

In its December 17, 2010 decision, the AAO found that the petitioner did not submit evidence that the beneficiary has the training and experience required by the terms of the labor certification. As stated in that decision, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies that:

(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.

The Form ETA 750 requires that the beneficiary have eight years of experience as a mechanical technician with "adequate knowledge in Mechanical & Electrical works" in addition to three years of college with a major in mechanics (electronics) and four years of training.

With the motion, the petitioner explained that labor certification stated "3 years Electronic & 4 years training show[s] he [the beneficiary] learned it from the technical & mechanical school. The 8 years in job offer shows that item 15 on labor certification was not learned in the present employer." On motion, the petitioner submitted the beneficiary's elementary, middle, and high school education records. These records establish that the beneficiary has the required middle and high school education specified by the terms of the Form ETA 750. The petitioner did not, however, submit evidence of any college level education, training, or experience as required by the terms of the labor certification despite being specifically notified of this deficiency in the AAO's previous decision.

The petitioner's assertions and the evidence submitted on motion do not overcome the grounds of denial in the director's December 1, 2008 decision and the AAO's December 17, 2010 decision. The petitioner failed to establish that the petition was filed under the correct category, that it had the continuing ability to pay the proffered wage from the priority date through the present, or that the beneficiary possesses the specific skills, training, and education required by the terms of the labor certification. Therefore, the petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is granted and the decision of the AAO dated December 17, 2010 is affirmed. The petition remains denied.