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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

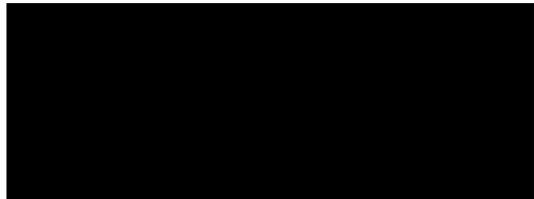


Date: **JUN 01 2012** Office: NEBRASKA SERVICE CENTER File: 

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:

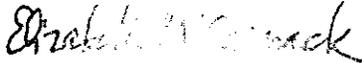


INSTRUCTIONS:

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 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 with the field office or service center that originally decided your case by filing a 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 software consulting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). In his August 16, 2007 decision, the director determined that the petitioner failed to establish that it had the ability to pay the proffered wage. The director denied the petition accordingly.

On December 4, 2008, the AAO dismissed the subsequent appeal, affirming the director's denial. 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 the petitioner's financial position. 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 March 18, 2002.¹ The proffered wage as stated on the Form ETA 750 is \$65,000 per year. The Form ETA 750 states that the position requires a Bachelor of Science in Computer Science or Engineering and two years of experience as a systems analyst or in the related occupation of software design and development.

The petitioner is a C corporation. On motion, the petitioner submits evidence concerning its shareholders' willingness to guarantee the beneficiary's wage and to forego officer's compensation to meet wage obligations. The petitioner also submitted information concerning other workers it sponsored and its bank statements.

In the AAO's December 4, 2008 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary (\$47,153.06 in 2006); the petitioner's income tax returns, considering both net income and net current assets; and the petitioner's totality of the circumstances including a Dunn & Bradstreet report, line of credit, and partial ownership by a parent company. The AAO noted that the petitioner sponsored 21 other workers and 72 non-immigrant visas, and that it must demonstrate its ability to pay all sponsored workers. In examining the petitioner's tax returns, the AAO determined that the petitioner had high gross receipts and high total wages paid, but that it had negative net income in three of four years for which its tax returns were provided and negative net current assets in two of the three years for which the Form 1120, Schedule L was provided and submitted insufficient evidence to demonstrate its ability to pay all of the sponsored workers.

With its motion to reopen, the petitioner submitted a letter from its accountant, a Guaranty Agreement executed by its majority shareholder and corresponding Forms W-2 and financial information for the shareholder, the petitioner's 2006 and 2007 Forms 1120, the petitioner's bank statements, Forms W-2 for the beneficiary and the worker originally sponsored by the Form ETA 750, and information concerning the other sponsored workers.

Counsel advised that in 2006 the beneficiary replaced the worker for whom the ETA 750 was filed. The evidence in the record names this worker, contains competent evidence of the wages paid and fulltime employment, verifies that the duties are those of the proffered position as set forth on the

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

Form ETA 750, and contains evidence that the petitioner has replaced him with the beneficiary. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The petitioner submitted additional evidence of wages paid to the beneficiary and to [REDACTED] the worker originally named on the ETA Form 750 whom the beneficiary replaced, with its motion to reopen including:

- In 2002, the Form W-2 states that the petitioner paid [REDACTED] \$86,760.63.
- In 2003, the Form W-2 states that the petitioner paid [REDACTED] \$72,366.56.
- In 2004, the Form W-2 states that the petitioner paid [REDACTED] \$66,568.77.
- In 2005, the Form W-2 states that the petitioner paid [REDACTED] \$54,636.57.
- In 2006, the Form W-2 states that the petitioner paid the beneficiary \$47,153.06
- In 2007, the Form W-2 states that the petitioner paid the beneficiary \$94,784.24.
- In 2008, pay stubs reflect that the petitioner paid the beneficiary \$94,550.64.

The amounts paid in 2002, 2003, 2004, 2007, and 2008 exceed the proffered wage and thus establish the petitioner's ability to pay the proffered wage in those years. As the wages paid in 2005 were less than the proffered wage, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which is \$10,363. As stated in the previous AAO decision, the 2006 Form W-2 also reflects wages paid to the beneficiary less than the proffered wage, so the petitioner must demonstrate its ability to pay \$17,846.94 in 2006.

As discussed in the previous AAO decision, the petitioner's Forms 1120 indicate negative net income and negative net current assets in 2005 and 2006. In addition, the petitioner sponsored a number of additional workers and must demonstrate its ability to pay the proffered wages to those additional workers as well as demonstrate the ability to pay the difference between the actual wage paid to the instant beneficiary and the proffered wage in 2005 and 2006. With its motion to reopen, the petitioner submitted a list of sponsored workers on the 2008 payroll. Of the 28 sponsored workers listed, 13 were on the petitioner's pay roll in 2005 and 16 were on the payroll in 2006 according to the information submitted by the petitioner including their date of hiring. The list provided by the petitioner does not indicate how many sponsored workers were on the payroll in 2005 or 2006 who resigned before 2008. The list of sponsored workers does not indicate the amount that the petitioner paid to each worker in either 2005 or 2006. As a result, the petitioner's net income or net current assets must be sufficient to cover the difference between the actual wage paid and the proffered wage to the instant beneficiary as well as the proffered wage to each of the other sponsored workers. Negative net income and negative net current assets are insufficient to demonstrate the ability to pay any of the sponsored workers.

The petitioner also submitted a letter from [REDACTED] dated December 22, 2008. The letter states that [REDACTED] reviewed the petitioner's business records, financial statements and tax

returns.” Reviews are governed by the American Institute of Certified Public Accountants’ Statement on Standards for Accounting and Review Services (SSARS) No.1, and accountants only express limited assurances in reviews. A review is conducted based on the representations of management and the accountant expresses no opinion pertinent to its accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. [REDACTED] states that the loans from shareholders amount appearing on line 19 of Schedule L should not be considered a current liability since the pay date of those loans exceeds one year. Counsel also argues that the loans from shareholders should not be counted in the calculation of the petitioner’s net current assets and states that such a practice would be in keeping with “standard accounting practice” and the Yates Memo.

USCIS does not count loans from shareholders on Line 19 of Schedule L as a short-term liability. Short-term liabilities on Schedule L include Lines 16, 17, and 18 (accounts payable, mortgages, notes, bonds payable in less than one year, other current liabilities). Despite [REDACTED] assertions, the AAO reiterates and incorporates its finding from the previous decision that the net current assets in 2005 amounted to -\$303,109. The petitioner did not submit its 2006 tax returns before the AAO previously. This figure does not count loans from shareholders as short-term liabilities.

[REDACTED] also states that [REDACTED] the petitioner’s president, has the authority to determine officer compensation and that [REDACTED] is able to forego all or part of the officer compensation in any year to meet the wage obligations.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation’s taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner’s figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that in 2006, [REDACTED] held 75 percent of the company’s stock. The 2004 and 2005 Forms 1120 indicate that the petitioner has a 75% shareholder, however, the identity of that shareholder was not identified in the tax returns. The petitioner has stated that this shareholder was [REDACTED] the 2002 and 2003 Forms 1120 indicates that [REDACTED] owned 75% of the petitioner’s stock in those years. The Form 1120 indicates that [REDACTED] held .3% of the petitioner’s stock in 2002 and 2003, which was increased to 3% of the petitioner’s stock in 2004, 2005, and 2006 and his holdings increased to 25% in 2007.

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.”

In the present case, however, counsel is not suggesting that USCIS examine the personal assets of the petitioner’s owners, but, rather, the financial flexibility that the employee-owners have in setting their salaries based on the profitability of their personal service corporation medical practice. Although counsel stated with its motion to reopen that [REDACTED] has outside revenue and is able and willing to forego officer compensation, no evidence appears in the record to that effect. The 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). The petitioner submitted a Guaranty Statement from [REDACTED] as well as [REDACTED] personal income tax returns and bank statements. The income tax returns did not include a Form W-2 or other evidence as to how much was paid to [REDACTED] in a particular year nor does the record establish that [REDACTED] has the financial ability to forego all or part of the prevailing wage. Finally, the petitioner submitted no evidence to demonstrate that the petitioner remunerated [REDACTED] at a rate above the proffered wage for the beneficiary or for the other sponsored workers to be able to demonstrate an ability to pay the proffered wage in 2006.

Similarly, the petitioner submitted income tax statements and a Guaranty Statement from [REDACTED] indicating that it would ensure that the beneficiary received the proffered wage. Again, neither [REDACTED] nor the petitioner indicated funds paid to [REDACTED] that could be redirected to the beneficiary’s proffered wage.

The guaranty of a third party, [REDACTED] cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. The guaranty lacks the amount of salary to be guaranteed and the period of the purported guaranty of the beneficiary’s wages. The guaranty is dated December 29, 2008, more than 6 years after the priority date. Even if enforceable as a guaranty of the future wages of the beneficiary, the affidavit of [REDACTED] and/or [REDACTED] could not help to establish the ability of the petitioner to pay the proffered wage prior to 2008. With the I-140 petition, evidence is required of a sponsoring employer’s ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971).

Also with the motion to reopen, the petitioner submitted its bank statements covering the months of December 2002, December 2003, December 2004, December 2005, December 2006, January 2007, December 2007, and November 2008. Counsel’s reliance on the balance in the petitioner’s bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner’s ability to pay a proffered wage. While this regulation allows additional material “in appropriate cases,” the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in

an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in the previous AAO decision and above in determining the petitioner's net current assets. As a result, this evidence does not demonstrate the petitioner's ability to pay the difference between the actual wage paid and the proffered wage to the instant beneficiary or the proffered wages to the other sponsored workers.

Finally, counsel in the motion to reopen states that the petitioner's ability to pay the proffered wage should be considered under a totality of the circumstances analysis. 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 (Reg'l Comm'r 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 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, as stated in the AAO's previous decision, the petitioner has high gross receipts and high total wage and salary amounts, however, it presented no evidence of any uncharacteristic business expenditures or losses or any evidence of the petitioner's reputation within its industry. With the motion to reopen, the petitioner submits the resumes of its two shareholders and counsel states that their experience demonstrates the petitioner's reputation. Without more, the experience and accolades of individuals in their personal capacities do not establish the reputation of a business. No evidence was submitted concerning the petitioner's reputation within the industry or the shareholders' reputation as opposed to establishing their work history. In addition, the current majority shareholder was not a shareholder in 2005, one of the two years for which the petitioner did not submit evidence of its ability to pay the proffered wage, so it is unclear how his reputation would reflect upon the company favorably prior to his assumption of majority shareholder status in 2006.

In addition, the AAO's previous decision noted multiple other petitions for other sponsored workers and the petitioner presented no evidence of any wages paid to those other sponsored workers or its ability to pay the other sponsored workers prior to 2007. 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.

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: Upon reconsideration, the appeal is dismissed.