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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**

PUBLIC COPY

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Date: **JUN 21 2012** Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 Director, Nebraska Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and motion to reconsider. The motion to reopen will be denied. The motion to reconsider the petition will be granted and the matter reconsidered. Upon review of the matter, the AAO's prior decision (November 22, 2010) is affirmed. The petition remains denied.

The petitioner is an elderly care home. It seeks to employ the beneficiary permanently in the United States as a care giver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (priority date – March 14, 2003), approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

Beyond the decision of the director, the AAO further denied the petition on appeal on the ground that the petitioner failed to sufficiently establish that the beneficiary had three months of apprenticeship training in the proffered position as of the priority date as required by the Form ETA 750.

The record shows that the motion to reopen and motion to reconsider is properly filed. 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.

The regulation at 8 C.F.R. § 103.5 provides in pertinent part that “a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

A motion to reconsider must: (1) 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 [USCIS] policy; and (2) 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).

As noted above, a motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.” “New” facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. The petitioner did not state new facts to be considered in the reopened proceeding that were not available and could not reasonably have been discovered or presented in the previous proceeding. Counsel, in fact, admits that the new facts and documents submitted on motion “are not new in their occurrence.” As such the motion to reopen is denied. The petitioner did state, however, reasons for reconsideration and cited precedent decisions in support of its request for reconsideration. The motion to reconsider will be granted and the matter, therefore, will be reconsidered.

Counsel's motion states that under a totality of the circumstances, the petitioner has established its continuing ability to pay the proffered wage from the priority date onward and relies on *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967) in support of that proposition. The AAO does not agree and considered *Sonegawa* in its previous decision denying the petitioner's appeal. As previously noted by the AAO in its November 22, 2010 decision, the petitioning entity in *Sonegawa* 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 *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.

The facts of the instant case are distinguishable from those in *Sonegawa*. As noted above, the petitioner in *Sonegawa* had unique business occurrences which adversely affected its regular business performance. For example, that petitioner had moved its business during the course of the year and was forced, for a temporary period of time, to cease operations. The move caused substantial nonrecurring increased business expenses that were uncharacteristic for that petitioner's business operations. The present petitioner presented no evidence of any uncharacteristic business expenses affecting its business operations during any relevant year. Although the petitioner claims it opened a second location in 2003, the petitioner submitted no documentation to establish any short term loss; the petitioner's tax returns in later years similarly reflect low net income, low net current assets, low wages paid and fairly low gross receipts. In *Sonegawa*, the Regional Commissioner's decision was based, in part, on the petitioner's sound business reputation and outstanding reputation in its particular industry as a factor weighing favorably on the likelihood of that petitioner being able to pay the proffered wage. The instant petitioner has produced no evidence to establish that its reputation in the industry is such that it is more likely than not that it has maintained the continuing ability to pay the proffered wage from the priority date onward. Although claimed that the petitioner is in a competitive industry, the petitioner was only operational for a year prior to filing the labor certification, and the record reflects employment of only three workers.¹ As stated by the AAO in its November 22, 2010 decision denying the petitioner's appeal, the petitioner's net current assets were

¹ Based on the total salaries paid, it is unclear that these workers are all employed on a full-time basis.

minimal and insufficient to pay the proffered wage in 2003, 2004 and 2005. The petitioner had minimal or negative net current assets in all relevant tax years considered. Wages paid to all employees, as reported on the petitioner's tax returns, were minimal, never exceeding \$31,600. The tax returns showed no wages paid in 2003, the year of the priority date, only \$6,600 in wages for 2004, and \$15,000 in 2006. The total wages paid to all employees for 2003 and 2004 were substantially below the proffered wage. The highest gross receipts reported by the petitioner in any year were in 2009 (the petitioner submitted its 2009 tax return with its motion to reopen/reconsider) with reported gross receipts being \$186,797. Although the petitioner states on motion that the beneficiary has been employed by it since 2003, it presented no proof of wages paid to the beneficiary in 2003, 2004 or 2005 in the form of W-2 statements or records of pay. The beneficiary's 2004 tax return states that the beneficiary was self-employed during that year.² The tax returns submitted by the beneficiary for 2005 through 2009 do not include copies of W-2 Forms or any other documentation showing the beneficiary was employed by the petitioner. 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 AAO also stated in its November 22, 2010 decision that the petitioner had not established the beneficiary had three months of apprenticeship training as of the priority date and denied the petition for that reason also. The AAO specifically noted that 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(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

² The beneficiary's tax returns reflect that he lives on the petitioner's premises. The record contains conflicting evidence regarding the beneficiary's employment. Form ETA 750B signed on May 8, 2006 does not state that the beneficiary was employed with the petitioner at all. Form G-325, filed with the beneficiary's application to adjust status, claims employment with the petitioner since September 2002. On motion to reopen, the petitioner states that it has employed the beneficiary since 2003. The petitioner's tax returns reflect no wages paid or costs of labor paid in that year. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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.

The petition is for an unskilled/other worker and the job requires three months apprenticeship training, yet the record of proceeding does not contain evidence reflecting that the beneficiary has the three months apprenticeship training conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) and is another reason why the petition may not be approved.

In its motion to reopen/reconsider, the petitioner states that the above cited regulation does not apply to the present case as the petition did not require any form of experience or training, just “the willingness of the successful candidate to undergo 3 months of training by the petitioner.” In support of that assertion the petitioner submitted a copy of its “NOTICE OF APPLICATION FOR ALIEN EMPLOYMENT CERTIFICATION” which states that the proffered position requires four years of high school “and we will train candidate for 3 month[s].” The petitioner also submitted copies of newspaper advertisements for the position which stated that the position required four years of high school and three months of training in Valencio, California. To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The labor certification as certified by DOL clearly requires three months training, “apprenticeship” in box 14 of Form ETA 750A. Therefore, the petitioner still has not established that the beneficiary has the required training as of the priority date.

In visa petition proceedings, the burden of proving eligibility remains entirely 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 denied. The motion to reconsider is granted and the petition was reconsidered. The previous decision of the AAO dated November 22, 2010 is affirmed. The petition remains denied.