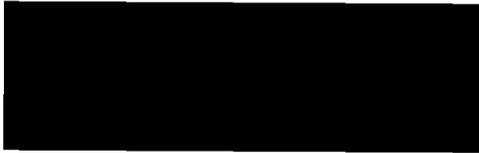


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
U.S. Citizenship
and Immigration
Services



PUBLIC COPY



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Date: **MAR 09 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 law was inappropriately applied by us in reaching our 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 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 reconsider. The motion to reconsider will be granted. The prior decision of the AAO will be affirmed. The petition remains denied.

The petitioner provides management services for the medical profession. It seeks to employ the beneficiary permanently in the United States as an accounts supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (priority date – January 21, 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.

The record shows that the 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.

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).

The petitioner states in its motion to reconsider that the AAO erred in application of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) and in denying its appeal on the grounds that "the wages paid by the petitioner during each year of the requisite period are those associated with a small business enterprise." The petitioner further states on motion that the matter should be remanded to the director "to permit the petitioner an opportunity to submit evidence regarding its historical growth for the period preceding the priority date."

While the AAO did state in its analysis related to the totality of the circumstances and decision denying the petitioner's appeal that "the wages paid by the petitioner during each year of the requisite period are those associated with a small business enterprise," this was not the basis for the denial. The appeal was denied by the AAO because the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date onward. The AAO specifically noted that the petitioner's tax returns showed insufficient net income and insufficient negative net current assets in all relevant years to pay the difference between wages paid to the beneficiary and the full proffered wage. The AAO further considered the totality of the circumstances in denying the petitioner's appeal. Factors considered included the petitioner's gross receipts, wages paid, officer compensation paid,¹ the historical growth of the petitioner based upon the evidence of record, the

¹ Counsel suggested, on appeal, that officer compensation could be used as an additional source of money to pay the proffered wage. The AAO noted in its decision denying the petitioner's original appeal that the record did not contain any statement that the petitioner's president was willing or able to forgo part of any officer compensation to pay the proffered wage. No mention is made of officer

modest net income and negative net current assets demonstrated by the petitioner's tax returns.

The petitioner states that it should be permitted to submit additional evidence concerning the petitioner's growth since its founding, or requests remand to the Director to submit such evidence. However, the petitioner submits only a short brief without any evidence in support of its motion concerning the petitioner's historical growth. Counsel asserts that the petitioner was "effectively faulted . . . for not submitting evidence which was never required . . . nor was such evidence subsequently requested by the Director of the Nebraska Service [Center]." The petitioner must establish its ability to pay the proffered wage from the priority date onward. See 8 C.F.R. § 204.5(g)(2). The petitioner is not required to submit evidence of historical growth from 1994 until 2006. Counsel misinterprets the AAO's decision. Rather, for purposes of *Sonegawa*, in consideration of evidence beyond wages paid, net income, and net current assets, such evidence of historical growth for even a few years before the priority date would be useful in consideration of the petitioner's totality of the circumstances. The petitioner tendered no additional evidence with its motion concerning its continuing ability to pay the proffered wage from the priority date onward. The petitioner did not seek to supplement its brief and later submit any evidence in support of its motion.

Therefore, 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.

Based on the foregoing, the petitioner has not established in its motion to reconsider its ability to pay the proffered wage from the priority date onward. The AAO's May 17, 2010 decision will not be disturbed.

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 is granted and the petition has been reconsidered. The previous decision of the AAO dated May 17, 2010 is affirmed. The petition remains denied.

compensation paid in the motion to reconsider. The petitioner did not submit any statement with its motion that the officer was willing or able to forgo any compensation to pay the proffered wage.