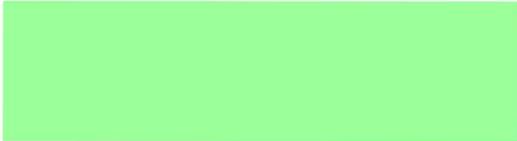


(b)(6)

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



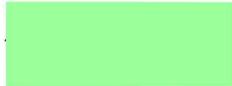
U.S. Citizenship
and Immigration
Services



DATE:

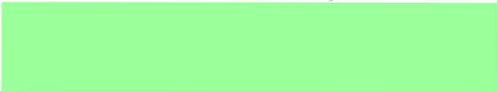
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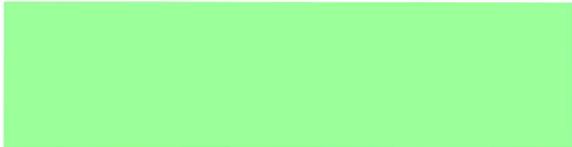
IN RE:

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition¹ was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) rejected the appeal. The matter is now before the AAO on a motion to reconsider and motion to reopen. The AAO will accept the motion as a motion to reopen. The appeal will remain rejected. The petition will remain denied.

The petitioner is a foam fabrication firm. It seeks to employ the beneficiary permanently in the United States as a foam specialist. A labor certification (Form ETA 750, Application for Alien Employment Certification) accompanied the Immigrant Petition for Alien Worker (Form I-140) as required by statute. The director denied the petition finding that the petitioner failed to establish its continuing ability to pay, that the beneficiary met the work experience requirement and that the petition was not supported by a labor certification for a skilled worker as it did not require at least two years training or experience as required by the skilled worker visa classification.

The beneficiary filed the appeal. The AAO rejected the appeal on February 23, 2012, as the regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The petitioner, through counsel, has filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5, although erroneously designated as an appeal on the Form I-290B, Notice of Appeal or Motion. The AAO will grant the motion as a motion to reopen, as the brief submitted with the filing shows the petitioner sought a motion to reopen. The AAO affirms the previous decision of the director and the AAO's rejection of the appeal. The petition will remain denied.

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

¹The petitioner sought the beneficiary's visa classification as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

incorrect application of law or U.S. 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).

Counsel's motion is accompanied by the beneficiary's affidavit and materials related to the beneficiary's experience and Wage and Tax Statements (W-2s). Counsel asserts that the petitioner and beneficiary mistakenly relied upon an incompetent preparer who is responsible for the errors upon which the director's denial was addressed.

The AAO accepts the motion as a motion to reopen, but points to the fact that the regulation at 8 C.F.R. § 103.2(a) provides in pertinent part:

- (2) By signing the application or petition, the applicant or petitioner, or parent or guardian certifies under penalty of perjury that the application or petition, and all evidence submitted with it, either at the time of filing or thereafter is true and correct.

The regulations apply to everyone that files an employment-based petition.² The appeal filed by the beneficiary remains rejected. The following issues are addressed as set forth below.

Visa Classification

The regulation at 8 C.F.R. § 204.5(l) states 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.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on November 13, 2007, indicates that the petitioner was established on June 3, 1992, reports a gross annual income of \$3,512,965.49, a net annual income of \$284,338.31 and currently employs 30 workers. The petitioner sought visa classification (Part 2, paragraph e of I-140) of the beneficiary as a professional or skilled worker

² A petitioner's failure to apprise himself of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve him of responsibility for the content of his petition or the materials submitted in support. See *Hanna v. Gonzales*, 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. See *Bautista v. Star Cruises*, 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993).

(requiring at least two years of training or experience) under section 203(b)(3)(A)(i) of the Act. Part(s) 14 and 15 of the Form ETA 750 do not require the applicant to have any formal education or training and require one year of work experience in the job offered.³

Relying on 8 C.F.R. § 204.5(l)(2) and (4), and as mentioned above, the director observed that the minimum requirements of the certified position described on the Form ETA 750 required less than two years training or experience. As the visa classification sought on the Form I-140 petition designated the skilled worker (or professional) category (paragraph e), the Form I-140 petition was not approvable because it was not supported by the appropriate Form ETA 750. It is noted that in order to be classified as a skilled worker, the Form ETA 750 must require a minimum of two years of training or experience as set forth in Section 203(b)(3)(A)(i) of the Act. The director denied the petition on this basis because the petitioner did not demonstrate that the position required at least two years of training or experience, therefore the labor certification does not support the visa classification sought. The director also denied the petition because the petitioner submitted no evidence of its ability to pay the proffered wage and failed to submit evidence that the beneficiary possessed the requisite work experience.

On appeal, with regard to the designation of the wrong visa category, counsel asserts that it was a scrivener's error and the fault of the preparer. It is noted that the regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It further noted that neither the law nor the regulations compel the director to consider other classifications if the petition is not approvable under the classification requested or require the director to issue a request for evidence where evidence of ineligibility is present. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker. As evidence of ineligibility was present, we cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner.

Additionally, as cited by director, it is noted that a petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage as of the priority date.⁴ It must also

³ 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.

⁴ The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating

demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the Form ETA 750 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on May 6, 2002, which establishes the priority date. The proffered wage as set forth on the Form ETA 750 is \$14.44 per hour, which amounts to \$30,035.20 per year. On the Form ETA 750, which was signed by the beneficiary on April 8, 2002, it is not claimed that he worked for the petitioner.⁵

Ability to Pay

With respect to the petitioner's ability to pay the proffered wage, 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In support of its ability to pay the proffered wage, the petitioner has submitted copies of W-2s for 2002 through 2010 giving the beneficiary's name as the employee and a copy of the petitioner's corporate income tax return for 2007.

It is noted that if a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that

whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

⁵The petitioner's copies of W-2s submitted to the record suggest the beneficiary's employment from 2002 onward. 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).

the petitioner may have paid the beneficiary less than the proffered wage during a given period, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the LLC petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If the end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

However, as the record currently stands, the petitioner's continuing ability to pay the proffered wage cannot be determined and has not been established. As noted above, neither the petitioner nor the beneficiary listed the petitioner as the beneficiary's employer on Part B of the Form ETA 750. *See Matter of Leung*, 16 I&N 12 (BIA) (Decided on other grounds, but court deemed applicant's testimony concerning employment omitted from the labor certification to be not credible.) Further, the petitioner's federal employment identification number (FEIN) as set forth on Part 1 of the Form I-140 and Part 15 of the Form ETA 750 is 94-xxxxxxx. On the W-2s and on the 2007 copy of the tax return submitted to the record, the FEIN is 95-xxxxxxx. A FEIN is required by DOL in order to identify the U.S. employer seeking to sponsor a foreign worker. 20 C.F.R. § 656.3. Finally, the beneficiary's name appears with a social security number on every W-2, yet on the Form I-140 no social security number is stated on Part 3. These inconsistencies have not been addressed or resolved by the petitioner. As the record currently stands, the AAO does not find that the petitioner had the ability to pay the proffered wage in the years.⁷ Doubt cast on any aspect of the petitioner's

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁷ *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion

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).

Experience

The director also denied the petition because the petitioner had failed to submit evidence that the beneficiary possessed the requisite one year of employment experience in the job offered required by the terms of the Form ETA 750. The regulation at 8 C.F.R. § 204.5(1)(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 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.

On motion, counsel submits an employment verification letter from [REDACTED] dated March 9, 2012. It is signed by [REDACTED] and states that the beneficiary worked as a molding machine operator from September 9, 1992 until May 1994. It is also noted that the beneficiary claimed that this job was that of a foam specialist on Part B of the Form ETA 750. As the duties are not described in the letter, it is not clear that this was the same job. Further, it is not clear what title or position was held by [REDACTED] as it is not stated on the letter. The letter does not comply with 8 C.F.R. § 204.5(1)(3) and is not probative of the beneficiary's claimed work experience in the job offered.

Based on a review of the underlying record and the evidence submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for a skilled worker visa classification (or professional) initially sought by the petitioner. Additionally, the petitioner has not established its ability to pay the proffered wage. Further, there was insufficient evidence to establish that the petitioner has demonstrated that the beneficiary has the requisite qualifying employment experience as set forth on the Form ETA 750. Finally, the appeal's rejection remains as set forth above.

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, historical growth and outstanding reputation as a couturiere.

No reputational factors or evidence of a framework of successful or profitable years was presented in this case analogous to the factors in *Sonegawa* that was sufficient to justify an approval based on *Sonegawa* factors.

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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 reopen is granted. The prior decisions of the director and the AAO are affirmed. The petition remains rejected.