



U.S. Citizenship
and Immigration
Services

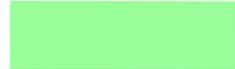
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Date:

Office: NEBRASKA SERVICE CENTER

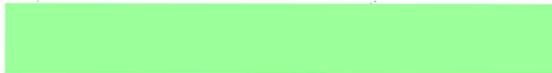
FILE:



APR 17 2013

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 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 motions to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a bookkeeping, real estate, and income tax company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant / manager. 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). 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.

On August 27, 2012, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner then filed motions to reopen and reconsider the AAO decision. The record shows that the motions are properly filed, timely and include new evidence. The regulations at 8 C.F.R. § 103.5(a)(2) state, 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." 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 motions to reopen and reconsider the matter based on the new information submitted. Thus, the instant motions are 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)(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 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.

With regards to the petitioner's ability to pay the proffered wage, 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.

As noted in the AAO's prior decision on August 27, 2012, 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$31.32 per hour (\$65,145.60 per year).

In its decision, the AAO specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of its 2007 Internal Revenue Service (IRS) Form W-2 demonstrating that it paid the beneficiary \$42,595.20 in that year and paystubs indicating that it paid the beneficiary \$21,297.60 from January 1 to May 4, 2008. The AAO also reviewed the sole proprietor's tax returns and household expenses. The AAO decision stated that the petitioner established its ability to pay the proffered wage in 2005, 2006, and 2007 and that the petitioner did not establish its ability to pay the proffered wage from 2001 through 2004. As the petitioner's ability to pay the proffered wage in 2005, 2006, and 2007 has already been established, it will not be discussed further.

With its motion, the petitioner submitted her husband's 2002 tax return and 2003 and 2004 Forms W-2 as well as a statement of household expenses for 2001 through 2005.

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>
AGI	\$21,362	\$55,345	\$71,154	\$82,487
Est. House Exp.	\$9,912	\$10,080	\$17,252	\$17,852

The household expenses submitted by the petitioner indicate that she "shared expenses living with daughter" and had a house payment of \$400 in each year 2001 through 2005. The Form 1040 for 2001 indicated mortgage interest of \$3,692 for the year; in 2002, the Form 1040 indicated mortgage interest paid of \$3,827; the 2003 Form 1040 indicated mortgage interest paid of \$8,930; the 2004 Form 1040 did not include a Schedule A with mortgage interest paid; the 2005 Form 1040 indicates mortgage interest paid in the amount of \$16,287. We note that the monthly amount of the mortgage interest paid in 2001 was \$307.67; in 2002, the amount of monthly mortgage interest was \$318.91; in 2003, the amount of monthly mortgage interest was \$744.16, and the monthly mortgage interest in 2005 was \$1,357.25. It is also noted that the sole proprietor's husband reported that he paid mortgage interest separate from the sole proprietor in 2001 and 2002 (the only years for which the sole proprietor provided her husband's separate tax returns).¹ The home address provided on both the sole proprietor and her husband's tax returns were the same in 2001 and 2002. In addition, the September 16, 2012 affidavit from the petitioner's husband indicated that the parties resided together from 2001 to 2004. As a result, it is unclear how the petitioner would have been sharing living expenses with her daughter or how she made a \$400 house payment when the mortgage interest

¹ The mortgage interest amount reported on the husband's Form 1040, Schedule A in 2001 was \$8,787 and \$7,046 in 2002. No other household expenses for the husband were reported.

alone per month exceeded that amount in 2003 and 2005. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Even if we were to accept the sole proprietor's household expenses statements, when considering the AGI less the household expenses, the sole proprietor has not established the ability to pay the proffered wage. In 2001, the amount remaining was \$11,450; in 2002, the amount remaining was \$45,265; in 2003, the amount remaining was \$53,902; and in 2004, the amount remaining was \$64,635. Because the sole proprietor indicated that she resided with her daughter and shared expenses with her daughter in these years, the evidence is incomplete as to her husband's living expenses as compared to his income, so his finances may not be considered in the analysis of whether the sole proprietor could pay the proffered wage in those years.²

With the motion, counsel asserts that even though a property may not be a readily liquifiable asset, the equity in a property may be available and should be considered in the analysis of whether the sole proprietor has the ability to pay the proffered wage. Counsel also states that the current property in which the sole proprietor resides was not acquired prior to 2006. As a result, the equity in the current residence would have been unavailable to pay the proffered wage prior to 2006.

The petitioner submitted a statement from the [REDACTED] concerning the value of the previous residence of the petitioner. The 2012 appraisal states that the appraised value of that property is \$78,185. The petitioner submits no evidence to demonstrate how much principle is owed on the property nor did she submit evidence that an equity line of credit would be available to her. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

As the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, 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). In addition, the appraisal is submitted from 2012 and is, therefore, incapable of demonstrating the amount that the property was worth in 2001, 2002, 2003, or 2004, some 11 years earlier.

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

² Even if the sole proprietor's husband's income were considered with no regard for his household expenses, as noted in the previous decision, the combined AGI would be \$54,335 in 2001, which would be insufficient to cover both the claimed household expenses for the sole proprietor and the proffered wage.

(Reg 1 Comm r 1967). 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.

In the instant case, the petitioner submitted no new reliable evidence concerning its ability to pay the proffered wage from the priority date onwards. As stated in the prior AAO decision, the petitioner's AGI from 2001 to 2004 was less than the sum of the household expenses and the proffered wage. In addition, the AGI in 2001 was lower than the proffered wage without considering the household expenses. As noted in the AAO's previous decision, the total amount of wages paid as reflected on Schedule C of the sole proprietor's Form 1040 were less than the proffered wage in every year except 2007. The petitioner submitted no evidence that it had one off year, incurred uncharacteristic expenses, or experienced some other situation that would liken it to *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.

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 motions to reopen and reconsider are granted and the decision of the AAO dated August 27, 2012 is affirmed. The petition remains denied.