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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

DATE: **APR 18** 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the preference visa petition. The director granted the petitioner's motion to reopen and affirmed the petition's denial. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner owns and operates Chinese-Japanese restaurants. It seeks to employ the beneficiary permanently in the United States as a cook, specializing in Chinese food, at an annual offered wage of \$28,017.60.¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).² The priority date of the petition is August 8, 2003, the date the DOL accepted the petitioner's request for certification. *See* 8 C.F.R. § 204.5(d).³

The director determined that the petitioner failed to demonstrate its continuing ability to pay the proffered wage from the petition's priority date onward. Specifically, the director found that the petitioner did not establish its ability to pay the proffered wage in 2004 and 2005. The director denied the petition accordingly.

On appeal, the AAO determined that the petitioner demonstrated its ability to pay the proffered wage in 2003, 2005, 2006, 2007 and 2008. But, after considering evidence of the wages that the petitioner paid the beneficiary, its net income, its net current assets, and the overall magnitude of its business activities, the AAO affirmed the director's determination that the petitioner failed to establish its ability to pay the offered wage in 2004. The AAO dismissed the appeal accordingly.

The record shows that the motion is properly filed, timely and meets the applicable requirements for a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2). 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.

¹ The labor certification states a proffered wage of \$13.47 per hour for a 40-hour work week, which computes to \$28,017.60 annually.

² The DOL certified the job opportunity at the petitioner's former restaurant, [REDACTED], at [REDACTED] in San Francisco, California. On December 19, 2012, the AAO sent a notice of intent to dismiss/notice of derogatory information to the petitioner based on evidence that its restaurant at [REDACTED] no longer existed. In response to the notice, the petitioner submitted evidence that it sold the restaurant at [REDACTED] in 2012, but that it continues to offer the same job opportunity to the beneficiary at one of its other restaurants, [REDACTED] in San Francisco. As both worksites appear to be in the same Metropolitan Statistical Area (MSA), the petitioner's labor certification remains valid. *See* 20 C.F.R. §§ 656.3, 656.30(c)(2) (explaining that a labor certification remains valid only for the stated "area of intended employment" and defining that term as including worksites within the same MSA).

³ Although the labor certification indicates that the DOL received it on August 8, 2003, the certified ETA Forms 750 that the petitioner and the beneficiary signed are dated March 8, 2007. There is no explanation in the record as to why the certified forms are dated after the priority date.

The AAO conducts review on a *de novo* basis. The AAO's *de novo* authority is well recognized by federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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.

In its motion, the petitioner submits evidence that it opened a new restaurant at [REDACTED] in San Francisco in August 2010 after spending about \$400,000 to remodel and equip the premises. The petitioner submits a copy of a business plan, which projected gross annual sales of more than \$3 million for the new restaurant. The petitioner also submits copies of August 24, 2009 cashier's checks in the amounts of \$400,000 and \$30,000. Counsel asserts that the petitioner issued the \$400,000 check to an escrow account to fund construction work on the property and the \$30,000 check to the lessor of the new restaurant site as a security deposit.

In determining the petitioner's continuing ability to pay the offered wage, counsel urges U.S. Citizenship and Immigration Services (USCIS) to reconsider the totality of the circumstances in light of its establishment of the new restaurant. Counsel first asserts that the petitioner's operation of three restaurants merits favorable consideration.

The record, however, shows that the petitioner no longer operates three restaurants. In a December 28, 2012 affidavit, the petitioner's president/sole shareholder states that the petitioner sold its restaurant at [REDACTED] in May or June of 2012. Besides its newest restaurant at [REDACTED] in San Francisco and its older restaurant, [REDACTED], in Redwood City, California, the petitioner has not submitted evidence of any other restaurants that it owns or operates. Thus, the record shows that the petitioner may have operated three restaurants only from August 2010 to May or June of 2012.

Counsel also asserts that the petitioner's investment in its new restaurant is a favorable factor when considering its ability to pay the proffered wage. The AAO acknowledges that the petitioner has provided evidence of the investment in its new restaurant. But the petitioner has not submitted evidence of the source of the investment funds. The petitioner's tax returns from 2003 to 2008 do not show that it accumulated sufficient profits or maintained cash reserves sufficient to invest \$400,000 in its new restaurant. Rather, the tax returns show that it lost money three of those six years and reported only \$6,218 in cash on hand at the end of 2008.

The petitioner may have raised about half of its investment for the new restaurant from the sale of its former restaurant at [REDACTED] as the petitioner previously submitted a February 2009

appraisal that valued that property between \$200,000 and \$225,000. But the petitioner's president/sole shareholder states that the petitioner did not sell its former restaurant until 2012, after its purported initial investment in the new restaurant.

Even with the proceeds from the sale of its former [REDACTED] restaurant, it would appear that the petitioner would have still needed additional funding for the \$400,000 escrow account. If the petitioner's president/sole shareholder, for example, used his personal funds to establish the new restaurant, then the investment would provide little evidence of the petitioner's financial ability, as opposed to the personal financial resources of its president. Or if the petitioner borrowed money to establish the new restaurant, the resulting debt would have to be considered in determining its financial abilities. The petitioner has not explained or documented the source of the investment funds for the new restaurant.

Moreover, of the more than 40 invoices and receipts from 2009 and 2010 that the petitioner submitted regarding the remodeling and equipping of its new restaurant, the AAO counted only four in the name of the petitioner, [REDACTED]. Many more were in the names of the petitioner's president, another employee, and/or "[REDACTED]". The invoices and receipts therefore do not establish that the corporate petitioner paid for most of the remodeling and equipping of the new restaurant.

In addition, the business plan and the lease for the new restaurant identify the lessees/tenant not as the corporate petitioner, but as the petitioner's president and the beneficiary's wife, whom the record shows is also an employee of the petitioner. The president and the beneficiary's wife did not sign the lease on behalf of the petitioner, indicate the capacity in which they were signing, or affix a corporate seal as the lease's instructions on the bottom of the signature page require for corporate tenants. For the foregoing reasons, the AAO finds that the petitioner has not demonstrated that it, rather than its president, other individuals and/or entities, funded the establishment of its new restaurant. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (the petitioner must resolve any inconsistencies by independent, objective evidence). Further, the petitioner has not shown how opening a new location in 2010 establishes its ability to pay the proffered wage in prior years.

Counsel argues that the petitioner's number of employees also tends to show its continuing ability to pay the proffered wage. Counsel asserts that the petitioner employs more than 50 people in its three restaurants. Because the record shows that the petitioner sold one of its restaurants after counsel submitted his brief, however, the AAO finds it unlikely that the petitioner now employs more than 50 people. Moreover, on its Form I-140, Petition for Alien Worker, which was filed on July 23, 2007, the petitioner stated that it employed only 14 people. Its most recent federal tax return in the record shows that the petitioner paid total wages and salaries in 2008 of only \$99,625.

Counsel also argues that the petitioner's ability to sustain its business in a recessionary economy and in a competitive restaurant market in San Francisco also merits favorable consideration. The record of proceeding, however, contains no evidence of those market conditions and no evidence specifically linking the petitioner's business decline to those conditions. A mere broad statement by counsel that economic conditions hurt the petitioner's business cannot, by itself, demonstrate the

petitioner's continuing ability to pay the proffered wage. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for those conditions. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel do not constitute evidence).

Counsel further asserts that the petitioner's employment of the beneficiary since 2003 tends to establish its ability to pay the proffered wage. But, besides Internal Revenue Service (IRS) Forms W-2 for 2007 and 2008 and isolated payroll records from 2009 and 2012, the petitioner has not provided evidence to support counsel's assertion that it has employed the beneficiary since 2003. *See Obaigbena*, 19 I&N Dec. at 534; *Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence).

Moreover, the record contains conflicting evidence of the beneficiary's start date of employment with the petitioner. On ETA Form 750B and Form G-325A, Biographic Information, which the beneficiary submitted with his application for adjustment of status, the beneficiary stated that he has worked for the petitioner in the offered position since April 1991. Records of the California Secretary of State's office, however, show that the petitioner was not incorporated until July 14, 1999. *See* <http://kepler.sos.ca.gov> (accessed March 21, 2013). Because of the discrepancies and lack of evidence regarding the beneficiary's start date with the petitioner, the AAO finds that the petitioner has failed to demonstrate its employment of the beneficiary since 2003 as counsel asserts. *See Matter of Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve any inconsistencies by independent, objective evidence).

Finally, counsel argues that the beneficiary will generate future income for the petitioner. The petitioner, however, must demonstrate its ability to pay the proffered wage since the petition's priority date. Any future income that the beneficiary will generate is irrelevant to the petitioner's ability to pay the proffered wage as of the priority date. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977) (a petitioner cannot establish a priority date for visa issuance for a beneficiary without establishing that it could pay the proffered wage at the time it made the job offer).

Moreover, the petitioner has not submitted evidence, or even an explanation, of how the beneficiary will generate future income for the petitioner. *See Obaigbena*, 19 I&N Dec. at 534; *Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence). The record, therefore, does not support counsel's assertion, as it is unclear how the beneficiary, whom the petitioner already employs, will generate future income when the record does not document his ability to generate current income.

Further, according to USCIS records, the petitioner in the instant case has filed multiple immigrant visa petitions for workers. The petitioner must demonstrate its ability to simultaneously pay the proffered wage for each I-140 beneficiary from the priority date of each petition until the corresponding beneficiary obtains permanent residence or the petition is denied. *See Matter of Great Wall*, 16 I&N Dec. at 144-145; 8 C.F.R. § 204.5(g)(2).

USCIS records show that the petitioner filed I-140 petitions for two other workers, including the beneficiary's wife. The records show that USCIS approved one petition, which the petitioner filed in the name of its Redwood City restaurant, [REDACTED] and denied the petition for the beneficiary's wife, which, like the instant petition, was filed in the name of its former restaurant, All [REDACTED]. The evidence in the record does not provide information regarding: the priority dates or proffered wages of the other petitions; the amounts of wages paid to the other beneficiaries; whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

As the AAO explained in its previous decision, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of its ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioner 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, however, 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 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 its business; its overall number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; and whether the beneficiary is replacing a former employee or an outsourced service.

Like the petitioner in *Sonogawa*, the petitioner in the instant case has been doing business for more than 10 years, as the record shows it was incorporated on July 14, 1999. The petitioner's federal tax returns, however, do not reflect a history of business growth. Rather, they show that the petitioner generated less sales and had a smaller payroll in 2008 than in 2003. Counsel points to the petitioner's business plan for the new restaurant as evidence that the petitioner generates substantially more revenue since opening the new restaurant in 2010. But the business plan contains only a projection of annual revenues for the new restaurant. The petitioner has not submitted evidence of the new restaurant's actual revenues since its opening. The evidentiary value of the business plan projection, more than two years after the new restaurant began operating, is therefore limited. See *Matter of*

Soffici, 22 I&N Dec. 158, 165 (Comm'r 1998), citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972) (going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings).

Moreover, unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not submitted evidence of an outstanding reputation or of uncharacteristic business expenditures or losses. In addition, as previously noted, the petitioner has not demonstrated its ability to pay the proffered wages of all the beneficiaries from the priority date onward. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO concludes that the petitioner has not established its continuing ability to pay the proffered wage since the petition's priority date of August 8, 2003.

In summary, after granting the petitioner's motion to reopen and carefully reconsidering its decision based on the record and in light of the new evidence, the AAO finds that the petitioner has failed to demonstrate its continuing ability to pay the offered wage rate since the priority date.

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: The motion to reopen is granted and the decision of the AAO dated July 19, 2010 is affirmed. The petition remains denied.