



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **APR 25 2013**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

50389

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

Petition: Immigrant Petition for Alien Worker as Skilled Worker or Professional pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

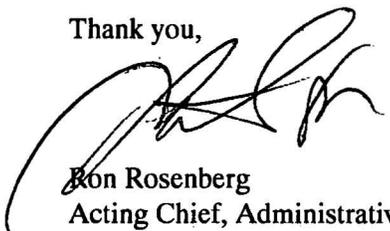
ON BEHALF OF PETITIONER:

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 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 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 the petition will be granted and the matter reconsidered. Upon review of the matter, the AAO's prior decision (May 24, 2012) is affirmed. The petition remains denied.

The petitioner is an electronics company. It seeks to employ the beneficiary permanently in the United States as a mechanic. 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 of \$50,856 beginning on the priority date of April 26, 2001 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 grounds that the petitioner failed to sufficiently establish that the beneficiary met the education and experience requirements of the certified labor certification. Nothing showed that the beneficiary had completed three years of grade school and the translated employer letter did not comply with the relevant regulatory requirements to establish that the beneficiary had the required two years of experience in the job offered.

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 has stated reasons for reconsideration and cited a precedent decision in support of its request for reconsideration. The motion to reconsider will be granted and the matter, therefore, will be reconsidered.

Counsel's motion asserts 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 Sonogawa*, 12 I&N Dec. 612 (BIA 1967) in support of that proposition. The AAO does not agree and considered *Sonogawa* in its previous decision dismissing the petitioner's appeal. As previously noted by the AAO in its November 22, 2010 decision, the petitioning entity 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 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.

On motion, counsel asserts that the labor certification was filed on April 26, 2001; only 37 weeks were left in the year; the petitioner was obligated to pay the beneficiary \$36,186 for 2001; the petitioner paid \$13,800 leaving a deficit of \$22,386; and the deficit was well below the 2001 annual net income of \$34,961. The AAO notes that the petitioner must demonstrate the ability to pay the proffered wage for the full year of the priority date. The AAO does not pro-rate wages or else it would have to prorate the petitioner's 2001 net income. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Therefore, this contention does not establish ability to pay the proffered wage in 2001.

Counsel also states that the petitioner is a general partnership; it is unincorporated and all assets of the business owners must be considered when evaluating the overall financial ability of the whole enterprise; and it does not require a vast capital base or extensive liquid cash reserves to be successful as it is a labor-intensive service business. Counsel asserts that the petitioner's owners have a high net worth maintained almost exclusively in real estate investments; the real estate provides a collateral basis upon which the petitioner's owners can draw funds to supplement any cash shortages; and the accumulated wealth does not need to be liquefied to supplement the business cash flow but simply serve as a security for real estate equity based line of credit. Counsel states that the petitioner's owners have a life insurance policy with a \$85,000 cash value, and the policy holders may freely access the cash value during the life of the policy and it serves as a savings account. Lastly, counsel cites to *Matter of Sonegawa* in asserting that

evidence outside of the petitioner's net income and net current assets can be considered for ability to pay.

In its initial decision, the AAO addressed counsel's claims related to real estate and life insurance as bases for ability to pay the proffered wage. The AAO stated:

As noted by counsel, real estate is not a readily liquefiable asset. It is unlikely that a sole proprietor would sell his real estate assets or use his life insurance cash to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). No statement from the petitioner demonstrating his [and her] willingness or ability to liquidate his assets to pay the beneficiary's salary was submitted. Other than the December 10, 2008 financial statement, the record of proceedings contains no information regarding the petitioner's owner's personal expenses for all years considered...Further, even if property was sold now, any funds from the sale would only be available after the date of sale. A petitioner must establish its ability to pay from the time of the priority date which in this matter is 2001...Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The AAO previously considered the petitioner's wages paid to the beneficiary (only a 2001 W-2 was submitted); the petitioner's net income: this was insufficient in each year from the priority date onward to pay the proffered wage in any year; and the petitioner's net current assets, which were also insufficient to demonstrate the petitioner's ability to pay the beneficiary's proffered wage from the priority date onward as the petitioner's Schedule Ls submitted were not complete. In consideration of *Matter of Sonogawa*, the petitioner's tax returns exhibit declining gross receipts, and no salaries or wages paid with minimal costs of labor.

As the petitioner has not established the ability to pay the proffered wage from the priority date onward, the petition will remain denied. The AAO notes that counsel did not address the issue of the petitioner's failure to demonstrate that the beneficiary met the education and experience requirements of the position offered as discussed in the initial AAO decision. The petition, therefore, remains denied on this basis as well.

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 reconsider is granted and the petition is reconsidered. The previous decision of the AAO dated May 24, 2012 is affirmed. The petition remains denied.