



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: Office: NEBRASKA SERVICE CENTER FILE:

APR 25 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:

SELF-REPRESENTED

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 appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits.

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a paralegal. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the 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.

As set forth in the director's decision dated April 17, 2009 and the AAO's decision dated July 22, 2011, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The priority date in this matter is April 6, 2006. The petitioner asserts that it has established its ability to pay the proffered wage.

Therefore, on motion the issue is whether the petitioner has established its ability to pay the proffered wage since 2006.

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.

The regulation 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on April 6, 2006. The proffered wage as stated on the Form ETA 750 is \$17.95 per hour based upon a 40 hour work week (\$37,336.00 per year). The

ETA Form 9089 states that the position requires an associate's degree in paralegal studies and two years work experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1999 and to currently employ two workers. On the ETA Form 9089, signed by the beneficiary on August 7, 2007, the beneficiary claims to have been employed by the petitioner from December 1, 1999 through April 1, 2001.

On motion, the petitioner asserts that the decision of the AAO was in error and that the petitioner has demonstrated its ability to pay the proffered wage in the relevant years. The petitioner states that it employed two paralegals who the firm intended to replace with the beneficiary. The petitioner indicated that both paralegals worked as independent contractors, were both issued Forms 1099, and further states that one of the paralegals left the petitioner's employ in 2010, and that the other paralegal resigned as of August 2011.

Counsel states that the combined income of the independent contractor paralegals should be considered in determining the petitioner's ability to pay the proffered wage. The petitioner submitted copies of Forms 1099 issued to both paralegals demonstrating that combined, the amount paid to the paralegals for 2006 was \$35,714.51, for 2007 it was \$44,991.92, for 2008 it was \$45,495.11, for 2009 it was \$81,427.66,<sup>2</sup> and for 2010 it was \$36,168.33. Counsel concludes that the combined amounts paid to the two paralegals for 2007, 2008, and 2009 were sufficient to cover the proffered wage of the beneficiary – who is to replace the two paralegals. The petitioner states that the remaining amount from the Adjusted Gross Income (AGI) for 2006, \$3,010.00, combined with the amounts received by the paralegals in that year, \$35,714.51, is in excess of the proffered wage, and that the combined amounts for 2010 are slightly below the proffered wage amount because one of the independent contractor paralegals left the law firm in that year.

The petitioner asserts that in assessing the totality of the circumstances USCIS should take into consideration whether the beneficiary is replacing a former employee, or outsourced service. Counsel states that the petitioner has indicated that the position offered to the beneficiary is not a new position, but that the beneficiary will be replacing two paralegals who were filling the position until 2010 and 2011, respectively. The petitioner claims that the beneficiary will replace the independent contractors, thus saving the petitioner the money that it would have paid to them, and that the income paid to those workers are sufficient to establish the proffered wage amount in the relevant years.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

<sup>2</sup> The Forms W-2 for 2009 are illegible. This number was provided by the petitioner in his brief.

The record does not, however, provide sufficient evidence that the petitioner has replaced or will replace the two workers who left the law firm in 2010 and 2011 with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the two workers involves the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

The petitioner submitted a letter of resignation from one of the independent contractors who indicated that she was employed as a paralegal and was resigning as of August 4, 2011. However, the amounts reported on both Forms 1099 are not reflected on the petitioner's Forms 1040 in 2006 and 2008. The petitioner's Forms 1040 indicate contract paralegal expenses for 2007 of \$45,563.00; for 2009, in the amount of \$42,278.00; and for 2010 in the amount of \$29,066.00. However, the amounts listed are inconsistent with the income amounts on the Forms 1099 as they are noted above.

Moreover, there is no evidence in the record or proceeding to demonstrate that the position of the independent contractors involve the same duties as those set forth in the ETA Form 9089. The petitioner has not documented the duties of the workers who it states performed the duties of the proffered position. If the worker performed other kinds of work, then the beneficiary could not have replaced them. Further, the petitioner has not established the retirement of the second paralegal in 2011. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The proffered wage in this matter is \$37,336.00. The petitioner must establish that it could pay this wage from the priority date in 1998. 8 C.F.R. § 204.5(g)(2). USCIS may not ignore a term of a labor certification. See *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 406 (Comm. 1986). As noted in the previous decision, the evidence in the record demonstrates the following:

- In 2006, the IRS Form 1040 of the petitioner stated AGI of \$89,794.00.
- In 2006, the Household Expense (HHE) was \$86,784.00 per year.
- In 2006, the remaining amount minus the HHE is \$3,010.00.
  
- In 2007, the IRS Form 1040 stated AGI of \$91,767.00.
- In 2007, the household expense was \$86,784.00 per year.
- In 2007, the remaining amount minus the HHE is \$4,983.00.

On motion the petitioner submitted tax returns for 2008, 2009, and 2010, which reflect the following:

- In 2008, the IRS Form 1040 stated AGI of \$79,152.00.
- In 2008, the household expense was \$86,784.00 per year.
- In 2008, the remaining amount minus the HHE is -\$7,632.00.
  
- In 2009, the IRS Form 1040 stated AGI of \$77,894.00.
- In 2009, the household expense was \$86,784.00 per year.
- In 2009, the remaining amount minus the HHE is -\$8,890.00.
  
- In 2010, the IRS Form 1040 stated AGI of -\$94,004.00.
- In 2010, the household expense was \$86,784.00 per year.
- In 2010, the remaining amount minus the HHE is \$180,788.00.

This evidence fails to demonstrate the petitioner's ability to pay the proffered wage since 2006. In addition, even if the AAO were to consider the income amounts paid to the two independent contractors as evidence of the petitioner's ability to pay the proffered wage, USCIS records indicate that the petitioner has filed two other Forms I-140 petitions. Therefore, the petitioner must establish that he had sufficient funds to pay the wages of all three beneficiaries from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of his ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that he has the ability to pay the proffered wages to each of the beneficiaries of his pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750 job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). Accordingly, even if the instant record established the petitioner's ability to pay the proffered wage for the instant beneficiary, which it does not, the fact that there are multiple petitions would further call into question the petitioner's eligibility for the benefit sought.

The assertions of counsel and the evidence presented on motion cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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. 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.

In this matter, and as noted by the AAO in its July 22, 2011 decision, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonegawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not demonstrated the occurrence of any uncharacteristic business expenditures or losses in the relevant years. Overall, the record is not persuasive in establishing that the job offer was realistic.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

**ORDER:** The AAO's prior decision, dated July 22, 2011, is affirmed. The petition remains denied.