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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

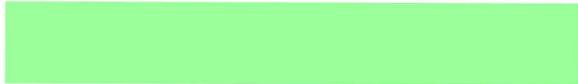


Date: **AUG 01 2013**

Office: NEBRASKA SERVICE CENTER

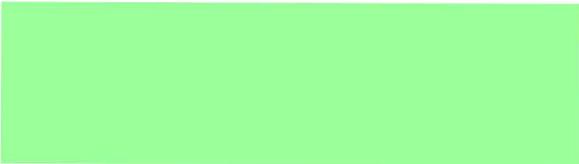
FILE: 

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

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 petitioner filed a motion to reopen and reconsider, which was dismissed by the AAO. The matter is now before the AAO on a second motion to reopen and reconsider. The motions to reopen and reconsider will be dismissed and the previous decision of the AAO will be affirmed.

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 a motion to reopen and reconsider the AAO decision. The AAO granted the motions and affirmed the previous decision denying the petition on April 17, 2013. The petitioner filed a second motion to reopen and reconsider the AAO decision.

The AAO finds that the petitioner has not filed a proper motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, 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." The request was not accompanied by any affidavits or other documentary evidence.

Nor has the petitioner filed a proper motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that "[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 [USCIS] policy. A motion to reconsider ... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision." The motion was not accompanied by arguments based on precedent decisions to establish that the decision was based on an incorrect application of law or policy.

A request for motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed; no provision exists for United States Citizenship and Immigration Services (USCIS) to grant an extension in order to await future correspondence that may or may not include evidence or arguments. On the Form I-290B Notice of Appeal or Motion, counsel indicated that his brief and/or additional evidence would be submitted within 45 days of filing. Counsel did specifically note on the Form I-290B that the income of the petitioner's husband should be considered in determining the petitioner's ability to pay the proffered wage, that the income of [REDACTED] a corporation jointly owned by the petitioner and her husband, should be considered, and that the financial contributions of the petitioner's daughter should be considered in determining the household expenses.

As such, the AAO will not consider the additional evidence submitted by the petitioner on June 28, 2013, 72 days after the AAO's April 17, 2013 decision. The regulations at 8 C.F.R. § 103.5(a)(1)(i) require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. The petitioner has not established that such an exception is warranted here. The fact that the petitioner modified the Form I-290B box F ("I am filing a motion to reopen and reconsider a decision. My brief and/or additional evidence is attached") to read "My brief and/or additional evidence will be submitted in 45 days," does not allow it to submit evidence beyond the 30 day period allowed for motions to reopen. The cover page of the AAO's April 17, 2013 decision clearly instructed the petitioner that it may file either a motion to reopen or a motion to reconsider the decision pursuant to the requirements found at 8 C.F.R. § 103.5, and that any motion must be filed with the office that originally decided the case within 30 days of the decision that the motion seeks to reconsider or reopen as required by 8 C.F.R. § 103.5(a)(1)(i).

Even had the petitioner timely submitted the additional evidence and argument with the motion, the motion does not overcome the reasons for dismissal expressed in the previous decision of the AAO. The AAO notes the following deficiencies in the record.

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 decisions on August 27, 2012 and April 17, 2013, 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 decisions, 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. In the April 17, 2013 decision, the AAO reviewed the petitioner's husband's 2002 tax return and 2003 and 2004 Forms W-2 as well as a statement of household expenses for 2001 through 2005. The AAO's two decisions 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.

The AAO's April 17, 2013 decision reviewed the household expense report submitted and noted that the petitioner claimed to have "shared expenses living with daughter." With the instant motions, the petitioner submitted an affidavit from [REDACTED] dated May 24, 2013 stating that she "lived on and off with [her] parents . . . and shared bills and mortgage as well, between the years 2001 and 2005." This evidence does not resolve the issue of the amount contributed by each party towards household bills and the mortgage. Counsel's claim that the petitioner and her daughter split the bills evenly is unsupported by the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, Ms. [REDACTED] indicates that she did not live with either of her parents for the entire duration, so we are unable to determine during which time periods she would have been contributing to household expenses.

The April 17, 2013 AAO decision also indicated that the amount claimed by the petitioner in house payments in each year from 2001 through 2005 was contradicted by the amount of interest paid shown on the Schedule A of her IRS Form 1040. Specifically, the decision noted that the petitioner claimed to have paid \$400 per month (\$4,800 per year) for her mortgage, but her Forms 1040 indicated mortgage interest paid of \$3,692 in 2001, \$3,827 in 2002, \$8,930 in 2003, and \$16,287 in 2005 (no Schedule A was submitted for 2004 in any filings). We also noted that the tax returns provided for the petitioner's husband indicated that he paid mortgage interest as well in the amount of \$8,787 in 2001 and \$7,046 in 2002 with the home address provided being the same as the petitioner's address and a September 16, 2012 affidavit from the petitioner's husband indicating that he resided in the same residence with the petitioner from 2001 to 2004. Even if evidence had been submitted to demonstrate that Ms. [REDACTED] paid \$400 per month towards the mortgage in 2001 and 2002, the total amount of expenses claimed of \$9,600 is less than the total mortgage interest claimed by the petitioner and her husband in 2001 and 2002 (\$12,479 and \$10,873, respectively). The AAO's previous decision cited these discrepancies and stated that 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). The petitioner submitted no such evidence with the instant motions.

As stated in the April 17, 2013 AAO decision, 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. Additionally, the petitioner submitted with the instant motions a 2001 statement of mortgage interest made on two retail loans jointly held by the petitioner and her husband. The statement of household expenses contains no mention of retail loan payments, so is further lacking in stating the full financial obligation of the petitioner each month.¹ With the instant motions, counsel states that although the remaining amount in some years may be less than the proffered wage, he urges us to consider the value of certain real property held by the petitioner during this time.

In response to the same argument made by counsel with the previous motions to reopen and reconsider, the AAO reviewed a 2012 Appraisal District statement concerning the petitioner's previous residence. With the instant motions, the petitioner submits two October 18, 2000 statements from the County Tax Assessor-Collector stating the assessed value of two properties as \$41,870 and \$41,800. As stated in the prior AAO decision, the petitioner submitted no evidence to demonstrate how much principal is owed on the property nor did she submit evidence that an equity line of credit would be available to her on any of the properties.² In addition, real property is not a readily liquifiable asset so is generally unavailable to demonstrate the petitioner's ability to pay the proffered wage. In addition, even if the two properties for which information was submitted were immediately liquifiable, the sale proceeds would be insufficient to cover the wage obligations. Specifically, the proffered wage of \$65,145.60 less the amount remaining after household expenses³ are deducted from the petitioner's AGI in 2001 of \$11,450 leaves \$53,695.40 owing. That amount would then be paid by all of one property and \$11,825 of the second property. For 2002 then, the remainder between the petitioner's AGI and household expenses of \$45,265 would leave \$19,880.60 to be paid from the property proceeds. In 2003, the remainder between the household expenses and AGI is \$53,902 leaving a remainder of \$11,243.60 owing and a remainder from the property sale of only \$10,095. The petitioner would still not then be able to meet its wage obligations in either 2003 or 2004 from the sale of the two properties.

With these motions, the petitioner submitted the 2002, 2003, and 2004 corporate tax returns for a business indicated on the 2002 and 2003 Schedules E to be owned jointly by the petitioner and her husband. Counsel states that the evidence of income and assets included on these corporate tax returns should be considered in determining the petitioner's ability to pay the proffered wage. As stated in the AAO's August 27, 2012 decision, because a

¹ The petitioner's business loan would be a part of her "household expenses" as she operates as a sole proprietor and any income, assets, and liabilities are reported on her personal IRS Form 1040.

² 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).

³ For the purposes of this discussion only, we will accept the petitioner's statement of household expenses as accurate. The AAO, however, does not agree that the statement of household expenses is accurate due to the uncertainty of Ms. contribution and the above noted inconsistencies in mortgage interest paid and the unaccounted retail loan payment.

corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioner's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

It is additionally noted that the 2002 and 2003 corporate tax returns indicate that the petitioner devotes 100% of her time to the [REDACTED] business, a restaurant and food services establishment. The Form I-140 states that the petitioner works as a bookkeeping, income tax, and real estate company with only one employee. It is unclear how the petitioner could devote herself 100% to running [REDACTED] while also operating her sole proprietorship doing bookkeeping, income tax, and real estate. In any further filings, the petitioner should resolve these inconsistencies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Counsel states in the instant filing that a 2004 \$12,000 Certificate of Deposit (CD) should be considered in determining the petitioner's ability to pay the proffered wage in that year.⁴ As stated above, the petitioner's statement of household expenses appears to be incomplete and contains discrepancies concerning actual obligations incurred. As a result, this CD is insufficient to demonstrate the petitioner's ability to pay the proffered wage in 2004.

Counsel also indicates that the petitioner's husband's income should be considered in determining the petitioner's ability to pay the proffered wage. As discussed in the AAO's previous decisions, the petitioner's husband's tax returns for 2001 and 2002 as well as his Forms W-2 for 2002, 2003 and 2004 were previously submitted. The petitioner and her husband filed separate tax returns and only the tax returns for the owner of the sole proprietorship, in this case, the wife, may be considered. In any event, as stated above, the petitioner's husband included a deduction for mortgage interest on his tax returns separate from the interest claimed by the petitioner. No household expenses statement has ever been submitted for the petitioner's husband and the amount claimed to have been paid by the petitioner for mortgage expenses is lower than the amount of interest claimed on the Schedule E of the petitioner's husband. As a result, the statement of household expenses appears to be incomplete or is otherwise in conflict with other evidence in the record. Because of this conflict, the petitioner's husband's tax returns may not be considered.⁵

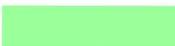
⁴ The CD was considered in the AAO's August 27, 2012 decision, which used an estimated household expense amount in determining that the amount of the CD in addition to the petitioner's AGI is less than the proffered wage after the petitioner's household expenses are deducted. As a result, the AAO decision found it insufficient to demonstrate the ability to pay the proffered wage in 2004.

⁵ It is also noted, as stated in the AAO's August 27, 2012 decision, even if we were to consider the sole proprietor's husband's income also in 2001 and 2002, the combined AGI would be \$54,335 and \$87,154, respectively. Consideration of the combined income of the sole proprietor and her husband in 2001 and 2002 would not affect the outcome of the appeal.

Also with the instant motions, counsel states that any excess income from years in which the petitioner demonstrated the ability to pay the proffered wage should be applied to 2001, 2002, 2003, and 2004 to demonstrate the ability to pay in these additional years. Money earned in later years would not have been available in previous years to meet financial obligations whether it be the proffered wage or household expenses, as a result, we are unable to retroactively apply money earned from years in which in excess of the proffered wage was earned to those years where the ability to pay the proffered wage was not demonstrated.

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 (Reg'l Comm'r 1967). 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 and 2002 was lower than the proffered wage without considering the household expenses. Evidence of additional assets, the CD and real property, do not provide sufficient additional assets to demonstrate the petitioner's ability to pay the proffered wage. Additionally, the statement of household expenses submitted by the petitioner appears to be incomplete so that we are unable to fully calculate the petitioner's income available to pay the proffered wage after deducting household expenses. As noted in the AAO's previous decisions, 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 *Sonogawa*. 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.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions to reopen and reconsider are dismissed and the decisions of the AAO dated August 27, 2012 and April 17, 2013 are affirmed. The petition remains denied.