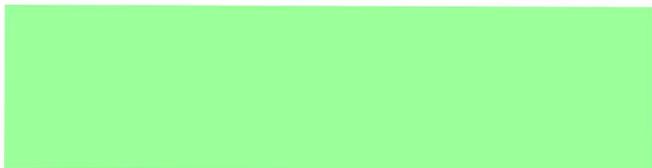




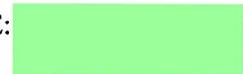
U.S. Citizenship
and Immigration
Services

(b)(6)

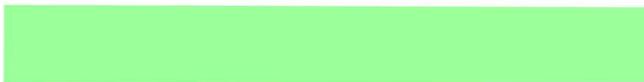


DATE: **AUG 07 2013** OFFICE: NEBRASKA SERVICE CENTER

FILE:

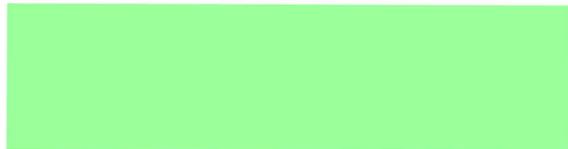


IN RE: Petitioner:
 Beneficiary:



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,

Rachel M. Torino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The approval of the preference visa petition was revoked by the Director, Nebraska Service Center.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 a motion to reopen and a motion to reconsider. The motion to reconsider will be granted, the previous decision of the AAO will be affirmed, and the petition will remain revoked.

The petitioner is an information technology consultant services business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).¹ In a Notice of Revocation (NOR) dated June 14, 2010, the director determined that the petitioner had not established that it had the continuing ability to pay the proffered wages of all beneficiaries for whom it had filed preference visa petitions as of the priority date and until the beneficiaries obtain lawful permanent residence, or the petitions were withdrawn or revoked. The director revoked approval of the petition accordingly.

In a decision dated April 16, 2013, the AAO withdrew the director's decision that the petitioner failed to establish ability to pay the full proffered wage to the beneficiary for 2008 and 2009, and determined that the petitioner failed to establish ability to pay the full proffered wage in 2006 and 2007 to the beneficiary and all of the beneficiaries who were in the list provided by the petitioner in 2006 and 2007. Additionally, the AAO concluded that the petitioner failed to establish that the beneficiary is qualified for the offered position.

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 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

¹ This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on September 18, 2006. The proffered wage as stated on the ETA Form 9089 is \$75,000.00 per year. The ETA Form 9089 states that the position requires a bachelor's degree in computer science, math, engineering or a related field plus 60 months of experience in the proffered position or 60 months in a relevant IT position.

Counsel declares on motion that the petitioner had established the ability to pay the beneficiary the proffered wage in 2006 and 2007, and that the beneficiary was qualified for the offered position. Counsel contends that the beneficiary indicated in Section J of the ETA Form 9089 that he was employed by the petitioner. Counsel declares that since November 13, 2006 the beneficiary has been employed with the petitioner and, since 2008, was paid at or above the proffered wage of \$75,000.00. Counsel asserts that the beneficiary's employment with the petitioner for six and one-half years demonstrates that the offered position is a realistic one.

Counsel declares that if the wages offered to the beneficiary in 2006 are prorated to the priority date, then the deficit between the proffered wage and the wage actually paid to the beneficiary would be \$2,136.03, significantly lower than the petitioner's 2006 net income of \$102,251.00. Counsel asserts that even though the beneficiary was paid \$61,675.56 in 2007, which is \$13,324.44 less than the proffered wage, the petitioner's net income of \$107,068.00 for 2007 was more than that deficit.

Counsel contends that because the proffered wage is significantly less than the petitioner's net current assets of \$327,057.00 (2006) and \$429,149.00 (2007), its net current assets are sufficient to pay the beneficiary's proffered wage for 2006 and 2007.

Counsel states that the submitted letter from the petitioner dated May 13, 2013 describes the petitioner's financial struggles in 2006 and explains why it was not able to meet the proffered wage requirements in 2006. Counsel contends that the petitioner asserts that, for 2006, if the proffered wage is prorated to the priority date of every beneficiary, and the wages paid are prorated in the same manner, the resulting wage deficit is \$124,168.21, and the petitioner's net current assets in 2006 – which the denial letter on page 8 states is \$327,057.00, covers the wage deficit. Furthermore, counsel asserts that the petitioner's letter² shows that if the proffered wages are prorated in 2007 for

² The petitioner states in the May 13, 2013 letter that footnote 5 of the AAO's denial stated that it would prorate the proffered wage "if the record contains evidence of net income or payment of the

the two employees who resigned from the company and had worked only part of the year in 2007, the petitioner demonstrates that the actual wage deficit is \$366,525.00, which is less than the AAO's stated net current assets of \$429,149.00 for 2007. Counsel submits the documents "Wage Deficit Calculation for Year 2006" and "Employee Journal by Check," Form W-2 Wage and Tax Statements, and Quarterly Wage Reports for the State of New Jersey for 2007.

Counsel asserts that the AAO was in error in examining the petitioner's ability to pay the proffered wage of all beneficiaries. Counsel contends that there is no precedent for this approach and the decision cited by the AAO for this proposition, *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977), does not involve multiple beneficiaries or indicate they are considered in the ability to pay analysis. Counsel asserts that "in the interest of justice and fairness and consistent standards" the AAO should reconsider its finding about the petitioner's ability to pay the proffered wage in 2006 and 2007.

Counsel declares that, even if all of the beneficiaries with approved Form I-140 petitions are considered, the AAO should have concluded the petitioner had the ability to pay the proffered wages in 2007 in view of the factors discussed in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel refers to Exhibit C, the Response to the Request for Evidence (RFE) dated March 14, 2013, to assert that the petitioner passed the net current assets test because the aggregate wage deficit in 2007 was \$409,250.08, whereas net assets for 2007 are \$429,149.00.

As to the petitioner's business, counsel asserts that if the overall magnitude of the petitioner's business activities were considered properly, the AAO would have concluded the petitioner had the ability to pay the proffered wages since the priority date. Counsel declares that the petitioner's income tax returns reflect expenses did rise significantly between 2005 and 2007.³ Counsel asserts that there was a significant upward trend in wages because more individuals were hired between 2005 and 2006. Counsel states that tax filings show for 2005 and 2006 a significant increase in rents (from \$19,133.00 to \$46,038.00), and in taxes and licenses (from \$185,892.00 in 2005 to \$231,544.00 in 2006)⁴, which were due to a change in business location at the end of 2005. Counsel states that between 2006 and 2007 there was an upward trend in net assets, from \$327,057.00 (2006) to \$429,149.00 (2007). Counsel contends that, in accord with *Matter of Sonogawa*, if a petitioner establishes a history of profitability, has available cash to pay wages, and a reasonable expectation of increased future profits then the petitioner demonstrates ability to pay. Counsel asserts that the petitioner experienced a rise in expenses from 2005 to 2007, but, in assessing the totality of the circumstances, has demonstrated recovery from those expenses and the ability to pay the proffered wage. Counsel declares that the petitioner's financials were not good in 2006, but this does not preclude showing that the petitioner's ability to pay the proffered wage to the beneficiary as well as

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."

³ Counsel asserts that in 2005 total expenses (line 20 of the 2005 Form 1120S) were \$2,784,935.00; in 2006 (line 20 of the 2006 Form 1120S) total expenses were \$3,780,253.00; and in 2007 (line 20 of the 2007 Form 1120S) total expenses were \$4,506,089.00.

⁴ Counsel refers to line 12 of the Form 1120S for 2005 and 2006 federal income tax returns.

the wages of the outstanding Form I-140 petitions. Counsel states that the petitioner has been in business since 1996 and will be in business in the future in view of the submitted client contracts. Counsel contends that the AAO is in error in dismissing the petitioner's contracts, which are typical IT consulting contracts, as being "at will." Counsel asserts that income tax returns show that in 2006, the petitioner had \$4,013,363.00 in revenue; in 2007, \$4,861,028.00, and in 2008, \$5,605,294.00. Counsel declares that the petitioner is successful and has paid the beneficiary above the proffered wage since 2008. In sum, counsel contends that the petitioner had the ability to pay the offered wage in 2007, and, in light of the factors in *Sonegawa*, had the ability to pay the proffered wage for all beneficiaries as of the priority date.

Counsel contends that the AAO is in error in stating that the petitioner consistently underpays the proffered wage or prevailing wage to its workers. Counsel cites to 8 C.F.R. section 204.5(g)(2) to declare that a petitioner must demonstrate ability to pay the proffered wage at the time of the priority date and until the sponsored beneficiary adjusts status. Counsel cites *Matter of Rajah*, 25 I&N Dec. 127, 132-133 (BIA 2009), to assert that an employer is only required to employ a sponsored beneficiary when he/she adjusts status. Counsel contends that "it is unclear on what factual basis the AAO makes this derogatory claim, and what relevance this claim has in the discussion."

Counsel notes that the AAO stated that USCIS records showed that the petitioner had not listed approved or pending Form I-140 petitions filed on behalf of at least six other beneficiaries. Counsel contends that pursuant to 8 C.F.R. section 103.2(b)(16)⁵, the AAO must provide the receipt numbers or names of the six beneficiaries for whom the petitioner filed the Form I-140, but are not on the list that the petitioner provided to the AAO. Counsel asserts that because the petitioner was not provided with derogatory information unknown to the petitioner and because a Notice of Intent to Deny (NOID) based on this information was not issued, the denial must be reconsidered. Counsel cites *Matter of Cuello*, 20 I&N Dec. 94 (BIA 1989), and *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988), to support his contentions.

Counsel asserts that the AAO was in error in placing the burden on the petitioner to provide proof of the residency status of employees. Counsel contends that the petitioner submitted detailed charts containing information of its employees for 2006 and 2007, a copy of a letter requesting withdrawal of 13 petitions, and W-2s for all employees for 2006 and 2007. Counsel contends that the AAO's conclusion, that the petitioner failed to provide dates and evidence to establish the reason for petitions it claimed were withdrawn, and failed to provide dates and evidence to establish that all of those beneficiaries it claims adjusted status, is arbitrary and capricious and untenable. Counsel contends that the AAO should have the records of the six individuals not shown on the petitioner's

⁵ 8 C.F.R. § 103.2(b) provides:

(16) Inspection of evidence. An applicant or petitioner shall be permitted to inspect the record of proceeding which constitutes the basis for the decision, except as provided in the following paragraphs.

list of beneficiaries. Counsel contends that it is not always known to an employer/petitioner whether a beneficiary is granted lawful permanent residence because it is the beneficiary who files the adjustment application. Counsel states that an employee can port under section 204(j) of the Act, or obtain residency through marriage or another avenue. Counsel cites to the website of the Office of Special Counsel of the Department of Justice to question the legality of requesting proof of lawful permanent residency from employees where the employee has provided some other proof of work authorization to satisfy Form I-9 requirements.

Counsel declares that the beneficiary has the requisite 60 months of experience for the proffered position. Counsel contends that the AAO should consider the March 6, 2013 letter from [REDACTED] describing in detail the beneficiary's work in conjunction with the ETA Form 9089, which states that under penalty of perjury the position with [REDACTED] was full-time. Additionally, counsel asserts that the submitted letter on [REDACTED] letterhead, dated May 8, 2013 from [REDACTED], Finance Director of [REDACTED], provides details of the beneficiary's work experience with [REDACTED] and the companies it acquired, states the beneficiary's employment was full-time, and throughout his employment had performed the same duties.

Counsel states that the preponderance of the evidence is the proper evidentiary standard for the instant case, and that the petitioner has met its burden of proving ability to pay the proffered wage in 2006 and 2007, and that the beneficiary qualifies for the proffered position.

A motion to reconsider must establish that the decision was based on an incorrect application of law or Service policy and be supported by pertinent precedent decisions. *See* 8 C.F.R. § 103.5(a)(3). A motion to reopen must state new facts and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2).

In the instant case, the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. However, for the reasons set forth in this decision, we will again dismiss the appeal and deny the Form I-140 petition.

Counsel makes five new arguments on motion to reconsider. Counsel's first assertion is that the petitioner established ability to pay in 2007 if the proffered wages are prorated for the two employees who had resigned after working only a portion of the year in 2007. Counsel's argument is based on submitted documents on motion—an employee journal by check, Form W-2 Wage and Tax Statements, and state quarterly wage reports. The prior AAO decision stated that USCIS will not prorate the proffered wage for the portion of the year that occurred after the priority date because it will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. However, the AAO stated that 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. In the instant case, the evidence submitted on motion is not a substitution for pay stubs, and the petitioner has not submitted monthly income statements into the record.

Counsel's second assertion, that the AAO's decision must be reconsidered on the basis that the petitioner was not provided with derogatory information unknown to the petitioner and a NOID based on that derogatory information was not issued, is not persuasive because the AAO did not base its denial on the approval of six I-140 petition beneficiaries who were unknown to the petitioner. The AAO stated in its decision that it "will accept the list provided by the petitioner as the only other beneficiaries for whom the petitioner filed I-140 petitions for purposes of the instant adjudication only."

Counsel's third assertion is that had the AAO properly assessed the overall magnitude of the petitioner's business activities, it would have concluded that the petitioner had the ability to pay the offered wages to all beneficiaries from the priority date. Counsel's claim that the AAO has no basis in which to claim that the petitioner consistently underpays the proffered wage or prevailing wage is not supported by the record, as the petitioner's evidence – the list of employees and its financial records, reveals that the petitioner consistently underpays the proffered wage or prevailing wage. Counsel asserts that the AAO was wrong to dismiss the petitioner's customer contracts as "at will." The AAO noted that the petitioner's customer agreements had no information of their monetary value and appeared to be temporary and at-will, and the submitted evidence on motion, which is a memo listing the date, number, and amount of charges to two clients it is not enough to establish the monetary value of other customer contracts. Counsel's claim on motion that the petitioner's expenses rose significantly in 2005 and 2006 due to relocation expenses, and increases in wages and rents, and taxes and license fees is not convincing because the income tax records for 2007, 2008, 2009, and 2010 reflect similar expenses (deductions) to those claimed in 2005 and 2006. Counsel asserts that the AAO should consider the change in the petitioner's net assets, and its revenue and length of business operations. The AAO previously considered these factors in assessing the magnitude of the petitioner's business activities. Thus, counsel makes no persuasive argument on motion that establishes that the AAO was incorrect in concluding that in the totality of the circumstances analysis the petitioner did not establish the ability to pay the proffered wage.

Counsel's fourth contention is that the AAO was in error in placing the burden on the petitioner to provide proof of the residency status of employees. The petitioner provided as Exhibit C a list of employees in response to the AAO's RFE. This list stated that 13 of the beneficiaries sponsored by the petitioner are lawful permanent residents. In light of this statement, the petitioner should be able to provide the proof upon which the claim of residency is based.

Counsel fifth contention is that the AAO should consider the March 6, 2013 letter from [REDACTED] describing in detail the beneficiary's work in conjunction with the ETA Form 9089, which states that under penalty of perjury the position with [REDACTED] was full-time. The regulation states that employment letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). Thus, the petitioner is required to provide evidence that the beneficiary meets the experience requirements of the proffered position, which in the instant case is 60 months of experience in the proffered position or 60 months in a relevant IT position.

It is noted that counsel on motion also reiterates several ability to pay arguments previously made. Counsel asserts that if the proffered wage is prorated for the portion of the year in 2006 that occurred after the priority date, the petitioner established ability to pay the proffered wage to the beneficiary and to the other beneficiaries of a pending or approved Form I-140 petition. In its prior decision the AAO explicitly declined to prorate the beneficiary's proffered wage for the portion of the year in 2006 that occurred after the priority date, and counsel has not established how the AAO's decision was in error.⁶ Likewise, counsel's contention that the proffered wage is significantly less than the petitioner's net current assets of \$327,057.00 (2006) and \$429,149.00 (2007), and therefore its net current assets are sufficient to pay the beneficiary's proffered wage for 2006 and 2007, was rejected in the prior AAO decision, and counsel has not established that the AAO's decision was erroneous. Counsel's assertion that the AAO is in error in examining the petitioner's ability to pay the proffered wage of all beneficiaries was rejected in our prior decision, and counsel has not established on motion that our decision was in error.

As to motion to reopen, 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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.⁷

Counsel submits the aforementioned letter from the petitioner dated May 13, 2013, and a new letter on [REDACTED] letterhead dated May 8, 2013 from [REDACTED] Finance Director of [REDACTED]. This letter states that the beneficiary worked full-time for [REDACTED] in Dubai, United Arab Emirates from August 21, 2002 to November 9, 2006, and that all of the positions held by the beneficiary consisted of the same duties, regardless of their title, and describes in detail the beneficiary's duties with [REDACTED].

In this matter, the AAO finds that the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion to reopen was previously available and could have been discovered or presented in the previous proceeding. It is further noted that the petitioner has submitted evidence with this motion that was originally requested by the AAO in a request for additional evidence dated January 31, 2013. As the petitioner was previously put on notice and provided with a reasonable

⁶ The petitioner states in the letter that footnote 5 of the AAO's denial stated that it would 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 AAO finds that the employee journal by check is not a substitute for employee pay stubs and the petitioner has not submitted monthly income statements into the record.

⁷ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

opportunity to provide the required evidence, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

The arguments and evidence on motion do not establish that the petitioner had the continuing ability to pay the proffered wage in 2006 and 2007, and that the beneficiary is qualified for the proffered position.

Accordingly, for the above stated reasons, with each considered as an independent and alternative basis, the prior AAO decision denying the appeal will be affirmed. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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 met that burden.

ORDER: The motion to reconsider is granted, the decision of the AAO dated April 16, 2013 is affirmed, and the petition remains revoked.