



U.S. Citizenship  
and Immigration  
Services

(b)(6)



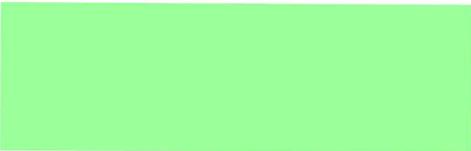
DATE: **AUG 26 2013** OFFICE: NEBRASKA SERVICE CENTER

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,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center (the director), and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a statistician. 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. 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 appeal, the AAO affirmed the director's finding that the petitioner did not establish the ability to pay the proffered wage.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. 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.

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 motion.<sup>1</sup> On motion, counsel submits a brief, the petitioner's 2007 Internal Revenue Service (IRS) Form 1120S and a copy of the AAO's decision.

8 C.F.R. § 103.5(a) provides, in pertinent part:

*(3) Requirements for motion to reconsider.*

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 Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the AAO erred in finding that the petitioner did not establish its ability to pay the proffered wage because the AAO failed to render a correct decision based on the evidence in the record. The motion therefore meets the requirements for a motion to reconsider.

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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 by 8 C.F.R. § 103.2(a)(1). While the petitioner did not comply with regulations governing motions, which require the submission of any documentation with the motion, the AAO will consider the documents newly submitted subsequent to motion.

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.

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, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on October 15, 2001. The proffered wage as stated on the Form ETA 750 is \$32.95 per hour (\$68,536.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires a Bachelor's degree in Math or two (2) years of experience in the proffered position.

The evidence in the record of proceeding shows that the petitioner was structured as a C corporation until 2004 and as an S corporation since 2004. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$31,518,307.00, and to currently employ 11 workers. On the Form ETA 750B, signed by the beneficiary on August 7, 2001, the beneficiary claimed to have worked for the petitioner since April 2001.

As advised in the AAO's decision, the beneficiary's IRS Forms W-2, Wage and Tax Statement, and IRS Form 1099-Misc, Miscellaneous Income, established that the petitioner paid partial wages to the beneficiary in 2001 through 2005 and in 2007. As advised in the AAO's decision, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2001 through 2005 and in 2007, which is \$56,536.00 in 2001; \$57,049.64 in 2002; \$47,911.00 in 2003; \$45,936.00 in 2004; \$44,336.00 in 2005; and \$31,236.00 in 2007. The petitioner must establish that it also has the ability to pay the full proffered wage to the beneficiary in 2006.<sup>2</sup>

As advised in the AAO's decision, for the years 2001 through 2005, the petitioner had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage, and in 2006 to pay the full proffered wage; however, USCIS records indicate that, outside of

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<sup>2</sup> In any future filings, the petitioner should also provide evidence of full or partial payment of the proffered wage from 2007 through the date of filing.

the petition filed on behalf of the beneficiary, the petitioner has filed 63 petitions since its establishment in 1995, including 43 Form I-129 nonimmigrant petitions, and 20 Form I-140 immigrant petitions. Under the circumstances, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715. As advised in the AAO's decision, the record did not include a copy of the petitioner's 2007 IRS Form 1120S and the AAO could not make a determination as to whether it had the ability to pay the proffered wage or the difference between the wage actually paid to the beneficiary and the proffered wage in 2007. Therefore, on appeal, the petitioner failed to establish its ability to pay the proffered wage or difference between the wages paid and the proffered wage to the instant beneficiary and the beneficiaries of the other Form I-140 petitions in 2001 through 2007 out of its net income.

As advised in the AAO's decision, for the year 2001, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage. Additionally, the record did not include a copy of the petitioner's 2007 IRS Form 1120S Schedule L, and the AAO could not make a determination as to whether it had the ability to pay the proffered wage or the difference between the wages actually paid to the beneficiary and the proffered wage in 2007. Moreover, as discussed above, the petitioner had filed 63 petitions since the petitioner's establishment in 1995, including 43 Form I-129 petitions, and 20 Form I-140 petitions, about which the petitioner failed to provide required information. Therefore, as advised in the AAO's decision, the petitioner failed to establish its ability to pay the proffered wage or difference between the wages paid and the proffered wage in 2001 through 2005 out of its net current assets, and the full proffered wage in 2006.

On motion, counsel contends that the petitioner has the ability to pay the proffered wages to all the beneficiaries. Counsel states that the director computed the total proffered wages of the beneficiaries to be \$346,465.00 in the instant case and that \$59,654.00 should be deducted from that amount as one of the petitions has been withdrawn. Counsel contends that the director found that there were only four (4) individuals on whose behalf the petitioner had filed petitions which were relevant to its ability to pay the proffered wage. As advised in the AAO's decision, the director found that she was able to calculate the proffered wages for four (4) of the petitions filed by the petitioner on behalf of other beneficiaries, but she clearly stated that these were not the only beneficiaries on whose behalf the petitioner was required to establish the ability to pay the proffered wages.<sup>3</sup> As discussed in the AAO's decision, the petitioner has filed 63 petitions since the petitioner's establishment in 1995 and that further documentation and information was required in order to determine whether the petitioner had the ability to pay the proffered wages to all the beneficiaries.<sup>4</sup> Counsel has failed to provide such

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<sup>3</sup> Additionally, the AAO is unable to calculate the wages for the referenced four (4) individuals based on the information contained in the record and it is unclear from where the director obtained this information.

<sup>4</sup> The AAO advised that, while counsel submitted evidence that the petitioner has withdrawn one of the I-140 petitions filed on behalf of one of the other beneficiaries, the petitioner must still establish its ability to pay the proffered wage of this beneficiary until the immigrant visa petition was withdrawn in 2010. Additionally, the petitioner was advised that it failed to provide the required

information on motion.<sup>5</sup> In any future filings, the petitioner must also provide evidence regarding petitions filed on behalf of other beneficiaries from 2007 through the date of filing.

On motion, counsel contends that the petitioner did not submit its 2007 IRS Form 1120S because the director had determined that it had established its ability to pay the proffered wage in 2007; however, the AAO finds that the director made no such finding in her denial of the instant Form I-140 immigrant petition. The AAO notes that, even if the petitioner's complete 2007 tax return was submitted previously, the petitioner has not demonstrated its ability to pay the proffered wages to all beneficiaries in all relevant years from the priority date in 2001. In any future filings, the petitioner should also provide evidence of its net income from 2007 through the date of filing.

On motion, counsel again contends that the business was established in 1995 and suffered an industry related loss in response to the September 11, 2001 attacks. Counsel states that despite these setbacks, the company has continuously grown since 2001 and that it has received airline-company awards which reflect its reputation in the travel industry.<sup>6</sup> Counsel again references a printout dated February 5, 2010 from the website About.com, to support his assertion that the petitioner suffered uncharacteristic business loss as a result of the 9/11 attacks. The printout discusses the impact of 9/11 on the airline industry and does not reference the petitioner's business specifically, or even the travel agency industry at all. The author of the article concludes in a five-sentence statement, without citation to any statistics, that many airlines collapsed after the 9/11 attacks. As discussed in the AAO's decision, the gross sales amounts reflected on the petitioner's tax records do not reflect a steady increase over the years and, as discussed above, the petitioner failed to establish that it would be able to pay the proffered wage and prevailing to beneficiaries on whose behalf it filed petitions from 2001 through 2007.

As advised in the AAO's decision, counsel's assertions on appeal could not 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

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information with regard to the other individuals on whose behalf the petitioner has filed Form I-140 and Form I-129 petitions. Even if accepted, the director's computation of proffered wages for four (4) of the individuals on whose behalf the petitioner filed Form I-140 immigrant petitions, this amount is greater than the petitioner's net income and net current assets in 2001 and 2002. 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). 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 petitioner has the burden of proving eligibility for the benefit sought.

<sup>5</sup> It is noted that even if the petitioner had filed the information on motion, the petitioner has only filed a motion to reconsider and not a motion to reopen. New evidence is not reviewable under 8 C.F.R. § 103.5(a)(3) relating to motions to reconsider.

<sup>6</sup> The awards issued to the petitioner by airlines do not reflect a continuing high reputation within the industry. The awards are distributed to travel agencies that patron the particular airline and do not reflect the petitioner's reputation with its customers and with other travel agencies.

for processing by the DOL. On motion, counsel's assertions also cannot be concluded to outweigh the evidence.

As advised in the AAO's decision, in the instant case, the petitioner failed to submit necessary information regarding other Form I-140 and Form I-129 petitions filed on its behalf, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for any relevant year. In addition, there was insufficient evidence in the record of the historical growth of the proprietor's business, or of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Further, the petitioner failed to submit its 2007 tax return, precluding the AAO from making a determination on appeal as to whether it had the ability to pay the proffered wage for that year. Thus, assessing the totality of the circumstances in this individual case, it was concluded that the petitioner had not established that it had the continuing ability to pay the proffered wage.

On motion, counsel contends that the petitioner should have been found to have the financial ability to pay the proffered wage based on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel quotes an AAO decision to support his contentions; however, the decision cited by counsel is not precedent. Additionally, the case quoted by counsel is distinguishable from the instant case. The petitioner in the quoted case did not have other beneficiaries on whose behalf it had filed Form I-140 immigrant petitions. The petitioner in the quoted case had established its ability to pay the proffered wage in three of the five years relevant to its ability to pay, whereas the petitioner here has not established its ability pay the proffered wages to the beneficiaries in any relevant year. The petitioner in the quoted decision made payment of wages in excess of \$2 million, whereas the instant petitioner has routinely paid less than \$500,000.00 in wages each year.

On motion, counsel claims that the petitioner has established its historical growth and that USCIS found that it had the ability to pay the proffered wage in all years except 2001 and 2002. As discussed above, the AAO has found that the petitioner did not establish its historical growth, nor has it established its ability to pay the proffered wages to all the beneficiaries in any of the relevant years.

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 met that burden.

**ORDER:** The motion to reconsider is granted. Upon reconsideration, the AAO's decision, dated April 5, 2013, is affirmed. The petition will remain denied.