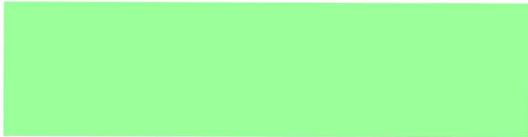


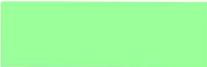
(b)(6)

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

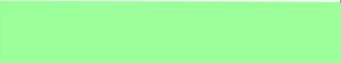
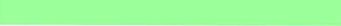


U.S. Citizenship
and Immigration
Services



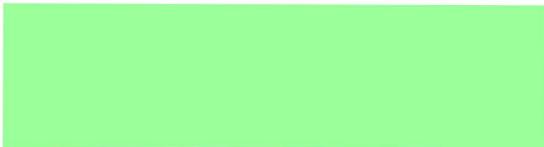
Date: Office: NEBRASKA SERVICE CENTER File: 

FEB 08 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:



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 subsequent appeal was dismissed by the Administrative Appeals Office (AAO). 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 be denied.

The petitioner is an electrical contractor. It seeks to employ the beneficiary permanently in the United States as an estimator pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a skilled worker. As required by statute, the petition is accompanied by a Form ETA 750, Application for Permanent Alien Certification (Form ETA 750) approved by the Department of Labor (DOL). The director determined that the petitioner did not demonstrate its ability to pay the proffered wage from the priority date onwards. The director denied the petition accordingly.

On December 9, 2009, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner filed a motion to reconsider the AAO decision. The record shows that the motion is properly filed, timely, and provides new evidence. 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 United States Citizenship and Immigration Services (USCIS) 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. 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).

Here, we will accept the motion to reconsider the matter based on the new information submitted. The instant motion is granted. 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

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.

As noted in the AAO's prior decision, 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 July 18, 2002. The proffered wage as stated on the ETA Form 750 is \$52,077 per year.

In the AAO's December 9, 2009 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary: \$13,556.22 in 2002, \$9,572.10 in 2003, \$24,078.72 in 2004, \$23,345.53 in 2005, and \$31,750.99 in 2006). We also noted the petitioner's net income (the 2002 Form 1120 stated net income of \$0, the 2003 Form 1120S stated net income of -\$1,509, the 2004 Form 1120S stated net income of \$2,737, the 2005 Form 1120S stated net income of -\$8,411, and the 2006 Form 1120S stated net income of \$12,379). We also noted the petitioner's net current assets (in 2002, the Form 1120 stated net current assets of -\$136,770; in 2003, the Form 1120S stated net current assets of -\$226,503; in 2004, the Form 1120S stated net current assets of \$38,705; in 2005, the Form 1120S stated net current assets of \$55,673; and in 2006, the Form 1120S stated net current assets of \$71,330). The AAO decision stated that the petitioner established the ability to pay in 2004, 2005, and 2006, but the evidence in the record did not establish the ability to pay in 2002 or 2003. We further noted that USCIS records reflected that the petitioner had filed immigrant petitions for six other workers from December 1999 to April 2007 and the record did not establish that the petitioner could pay the respective wage for all sponsored workers.

On motion, the petitioner submitted the 2007 and 2008 Form 1120S returns for [REDACTED] Inc. This company has a different Federal Employer Identification Number than the petitioner. Schedule K-1 lists the corporation's name as [REDACTED]. The sole shareholder of [REDACTED] was listed on the petitioner's tax returns as its president in 2003, 2004, and 2005. The petitioner's address is the same as that of [REDACTED].

However, the petitioner is a different entity from the employer listed on these tax returns. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

In the present case, the petitioner has not submitted evidence on motion to demonstrate a relationship between the petitioner and [REDACTED]. As a result, the tax returns for [REDACTED] may not be accepted as evidence of the petitioner's ability to pay the proffered wage. Furthermore, the petitioner has failed to submit new evidence to rebut the AAO's prior findings that it had failed to establish the ability to pay in 2002 and 2003. The petitioner has also failed to establish that it could pay the respective wages for the other six sponsored workers.

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 *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 evidence concerning wages actually paid to the beneficiary or any evidence to supplement the financial records previously submitted. The record does not contain evidence concerning the petitioner's financial history to determine any historical pattern of growth or that any particular year represented an unusual year. On motion, counsel reiterates its contention that the events of September 11, 2001 and a building boom in China dramatically increased the cost of supplies for electrical contractors in 2002 and 2003, however, the petitioner provided no evidence to support counsel's assertions despite the previous AAO decision stating precisely that "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. 1998) (citing *Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm. 1972))." Counsel cited an unpublished AAO decision to bolster the argument that the events of September 11, 2001 should be considered when looking at a company with losses suffered in the next couple of years. Contrary to the petitioner in that decision, however, who provided news articles "discuss[ing] the impact and later subsequent

recovery of the hospitality and other industries following the events of September 11, 2001," the petitioner submitted no evidence of any global events impacting its industry or its business.

Counsel also argues on motion that the *Sonegawa* analysis was deficient in assessing the impact of a debt owed to the petitioner of almost \$750,000 for work already performed during 2002 and 2003. As stated in the previous AAO decision:

The petitioner did submit evidence of a letter of engagement with an attorney to recover funds from [REDACTED] and a legal notice to [REDACTED] stating that [REDACTED] owed the petitioner \$741,556.84. However, this cannot account for the petitioner's inability to pay the beneficiary's proffered wage, as well as other sponsored workers' wages, for all of the years in question. Instead of 2002 and/or 2003 being shown to be uncharacteristic years with uncharacteristic losses due to the problem with [REDACTED] 2002 and 2003 show similar net income and net current assets to the other years considered here. The petitioner also submits a number of contracts signed in 2006 and 2007 for work to be done and proposals for work to be done dated 2005 and 2006. These contracts and proposals demonstrate that the petitioner operates an active business, however, the petitioner has provided no evidence to show that the revenue generated from these projects was not reflected on the tax returns nor did the petitioner demonstrate that the work proposed was accepted and generated additional revenue not shown elsewhere either on the tax returns or in other financial documents. In addition, these contracts and proposals are dated from 2005 to 2007 and therefore cannot demonstrate the petitioner's ability to pay the proffered wage in preceding years. As stated above, the petitioner's gross receipts declined substantially on its 2006 tax returns despite the contracts submitted, and, therefore, would not demonstrate any reasonable expectation of growth.

The petitioner submitted no additional evidence with its motion concerning the [REDACTED] debt or any impact upon the petitioner's financial circumstances as a result. The tax returns submitted with the motion for 2007 and 2008 were for a company other than the petitioner and, therefore, cannot demonstrate a further upturn in the petitioner's business activities to establish longevity. Additionally, the petitioner submitted no evidence of its reputation or future business prospects to liken its situation to that of *Sonegawa*. 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 from the priority date onwards.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reconsider is granted and the decision of the AAO dated January 21, 2010 is affirmed. The petition remains denied.