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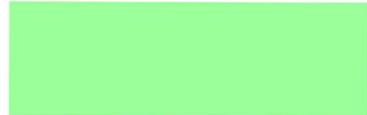
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



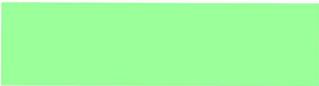
U.S. Citizenship
and Immigration
Services



DATE: **FEB 28 2013** OFFICE: NEBRASKA SERVICE CENTER

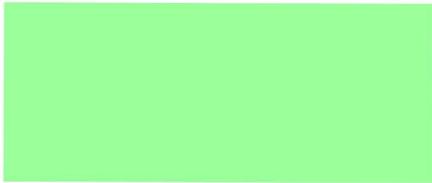


IN RE: Petitioner:
Beneficiary:



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 Director, Nebraska Service Center, denied the preference visa petition. The petitioner appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed in part and withdrawn in part, and the petition will be denied.

The petitioner is a dairy farm. It seeks to employ the beneficiary permanently in the United States as a dairy farm manager at an offered annual wage of \$97,560. 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 priority date of the petition is March 23, 2005, the date the DOL accepted the petitioner's labor certification. See 8 C.F.R. § 204.5(d).

On appeal, the AAO affirmed the director's determination that the petitioner failed to establish the continuing ability to pay the offered wage since the petition's priority date. The AAO also found that the petitioner failed to establish the beneficiary's qualifications for the offered position. The AAO dismissed the appeal accordingly.

The record shows that the motion is properly filed, timely and meets the applicable requirements for a motion to reopen. See 8 C.F.R. § 103.5(a)(2). 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 regulation at 8 C.F.R. § 204.5(g)(2) states:

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.

Although the petitioner demonstrated its ability to pay the offered wage in 2005, 2007 and 2008, the AAO determined that the petitioner failed to establish its ability to pay the offered wage in 2006. AAO Decision, p. 8. The petitioner argued that its 2006 federal income tax return overstated its year-end current liabilities by mistakenly including amounts due on three, long-term loans as current liabilities. *Id.*, p. 6. It submitted a letter of explanation from its accountant and an amended 2006 tax return showing a year-end net current asset amount of \$806,745, more than enough to pay the annual offered wage rate. *Id.*

The AAO, however, found the petitioner's evidence insufficient to support the explanation and to assuage this office's concern that the petitioner amended its tax return solely to establish its ability to pay the offered wage. AAO Decision, pp. 6-7. The petitioner failed to submit evidence that it filed the amended 2006 tax return with the U.S. Internal Revenue Service (IRS), as well as copies of the loan agreements to verify the long-term liability amounts that it claimed its accountant misclassified. *Id.*, p. 7. The AAO also noted that the amended 2006 return did not include all required schedules

and attachments, and that the federal employer identification number (EIN) on the petitioner's tax returns differed from the EIN it listed on its Form I-140, Petition for Alien Worker. *Id.*

In the petitioner's motion, counsel asserts that the IRS does not require and would not accept the petitioner's amended 2006 tax return because its amendments to the return's Schedule L balance sheet do not affect the petitioner's tax liability. The petitioner submits a February 7, 2011 letter from its accountant, copies of its amended 2006 tax returns, and IRS Forms 1120S and 1120X in support of counsel's assertion.

Counsel also argues that the petitioner has had two EINs since its establishment as a limited liability company in 1997, receiving one at its inception. The IRS required the petitioner to obtain a new EIN when it converted to a corporation in 2005, according to counsel. The petitioner submits a copy of online information from the Wisconsin Secretary of State's office and copies of correspondence with the IRS to evidence its conversion to a corporation, its previous EIN, and its assignment of a new EIN in 2005.

The petitioner also submits documentation regarding the three loans, the balances of which it claims its accountant misclassified on its 2006 income tax return. The documentation includes two promissory notes and a letter regarding the loans. The petitioner also submits copies of its 2007 and 2008 federal income tax returns, which counsel asserts are consistent with the long-term liability amounts on its amended 2006 return.

The AAO accepts the petitioner's explanations for not filing its amended 2006 tax return and regarding its two EINs. The only amendments to the petitioner's 2006 tax return occurred on Schedule L. The IRS entitles these schedules "Balance Sheets per Books" because the agency expects corporations to complete the schedules in accordance with their financial records (or "books"). See Instructions to Form 1120S at www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on February 4, 2013). The Form 1120X and its instructions focus on taxes due or taxes overpaid. The form and instructions do not contemplate a need to amend inaccurate information that does not affect a corporation's tax liability. The AAO therefore finds the preponderance of the evidence supports the petitioner's explanation that the IRS does not require the petitioner to amend its 2006 tax return.

In addition, the information from the Wisconsin Secretary of State's office confirms that the petitioner organized as a limited liability company in 1997 and converted to a corporation in 2005. The information indicates that Wisconsin considers the petitioner a continuous entity since 1997. In addition, according to online IRS information, every new corporation must receive its own EIN. See www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Do-You-Need-an-EIN%3F (accessed on February 4, 2013). The petitioner's correspondence with the IRS also shows that its previous EIN is the EIN listed on its Form I-140. The AAO therefore finds that the preponderance of the evidence indicates that the EIN listed on the petitioner's Form I-140 was its previous EIN and that the EIN listed on its tax returns since 2005 is its new corporate EIN.¹

¹ Counsel does not specifically explain why the petitioner's first EIN, which would have become invalid upon its corporate conversion in 2005, was listed on its Form I-140, which the petitioner did

Despite the petitioner's submission of documentation regarding the three loans, the AAO still has material doubts about the petitioner's explanation of the misclassification of the loans' balances on its 2006 tax returns. In a March 2, 2009 letter that the petitioner previously submitted, the petitioner's accountant stated that one loan was a note payable to [REDACTED].² The accountant said he originally reported the loan on the petitioner's 2006 tax return as reflecting \$257,635.97 in current liabilities. He said he amended the return to reflect \$72,635.97 in current liabilities, and \$185,000 in long-term liabilities because most of the loan was not due within the next 12 months. In a February 7, 2011 letter submitted with this motion, the accountant states the balance of the [REDACTED] loan was \$185,000 at year-end 2006, \$185,000 at year-end 2007 and \$182,135 at year-end 2008. The copy of the promissory note that the petitioner submitted was dated March 1, 2008 and indicated a "principal sum" of \$182,133.67, payable on February 28, 2010 at an annual interest rate of 9%.

The petitioner has not explained why the promissory note is dated March 1, 2008 for a "principal" balance amount of only \$182,133.67 if the petitioner owed \$257,635.97 on the same loan at the end of 2006. The petitioner has not submitted evidence to support the assertions of counsel and its accountant that it owed more than \$257,635.97 on this loan as of the end of 2006. Rather, the documentation submitted only establishes that the petitioner owed \$182,133.67 on the loan as of March 2008. *See 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) (Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.)).

Also, in his 2009 letter, the accountant stated that he originally reported \$275,000 in current liabilities on the petitioner's 2006 tax return regarding a loan from [REDACTED]. He stated that he amended the return to reflect \$55,000 in current liabilities and \$210,000 in long-term liabilities. In his 2011 letter, the accountant said the balance of the [REDACTED] loan totaled \$210,000 at year-end 2006, \$210,000 at year-end 2007, and \$150,000 at year-end 2008. The petitioner submitted a letter dated December 12, 2006 from [REDACTED] a subsidiary of [REDACTED]. According to the letterhead, [REDACTED] also includes [REDACTED] as a subsidiary. The letter, which was addressed to the petitioner's CEO, indicates a balance to the petitioner of \$475,000 at a "service fee" of 10.5%.

The petitioner does not explain inconsistencies in the [REDACTED] loan balance. If the petitioner's accountant originally listed the loan to reflect \$275,000 in current liabilities and then amended the tax return to reflect \$55,000 in current liabilities and \$210,000 in long-term liabilities on the amended return, then there is \$10,000 unaccounted for on the amended return, as \$55,000 plus \$210,000 equals \$265,000, not \$275,000. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988)(attempts to reconcile conflicting accounts, absent competent objective evidence pointing to the truth, will not suffice).

not file until 2007. The AAO assumes it was an inadvertent error. The AAO does not find the different EINs to be a material fact in this matter.

² The copy of the promissory note identifies the lending company as [REDACTED]

Also, the December 12, 2006 letter from [REDACTED] states a balance of \$475,000 for the petitioner. But the petitioner's accountant indicated the year-end 2006 loan balance was \$275,000. The petitioner does not explain the difference in the amounts and/or provide objective evidence to resolve the inconsistency. *See Ho*, at 591-92.

Because of the inconsistencies and discrepancies in the petitioner's documentation regarding the loan balances, the AAO finds that the petitioner has failed to adequately support its claim of errors in its net current asset amount on its original 2006 tax return. The AAO therefore finds that the petitioner has failed to establish its ability to pay the offered wage rate in 2006.

The petitioner also submitted a copy of its 2009 federal income tax returns. Because the petitioner must establish its continuing ability to pay the offered wage until the beneficiary obtains lawful permanent resident, the AAO will analyze the petitioner's tax returns to determine its ability to pay the offered wage in 2009. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.³ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the petitioner did not employ the beneficiary in 2009. And, as indicated on line 21 of Form 1120S of its 2009 tax return, the petitioner's annual net income amount was \$(412,490)⁴ and its annual net current asset amount as indicated on Schedule L was \$(310,099), the result of \$2,992,494 in current assets and \$3,302,593 in current liabilities. Thus, based on the amount the petitioner paid the beneficiary, its net income, and its net current assets, the petitioner has also not established its ability to pay the offered wage in 2009.

In considering the overall magnitude of the petitioner's business activities in accordance with *Sonogawa*, the AAO acknowledges that the petitioner has conducted business since 1997, and, according to its tax returns, has generated revenues of more than \$4 million and paid annual wages of

³ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

⁴ Numbers in parentheses reflect negative amounts.

more than \$450,000 from 2005 to 2009.⁵ But unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not identified any unusual business losses or expenditures that otherwise explain its inadequate financial resources in 2006 and 2009. Therefore, considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the offered wage since the priority date. The AAO therefore affirms this portion of its previous decision.

In its decision, the AAO also determined that the petitioner failed to establish that the beneficiary possessed the minimum employment experience required for the offered position. The labor certification states that the offered position requires eight months of "Dairy Farming" training and at least seven years of full-time experience in the offered job of dairy farm manager. The AAO found a purported letter from [REDACTED] in Israel, indicating that the beneficiary worked there as a dairy farm manager for more than seven years, to be insufficient. AAO Decision, p. 9. The letter was not on letterhead and did not describe the duties of the position. See 8 C.F.R. § 204.5(l)(3)(ii)(B). In addition, the letter indicated that the beneficiary departed Israel in 1999 to take a position with the petitioner, while the labor certification did not indicate that the beneficiary had ever worked for the petitioner.

With its motion, the petitioner submits a new letter from [REDACTED] in Israel that meets the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) and indicates that the beneficiary gained more than seven years of experience there in the offered position. Both the letter from [REDACTED] and a letter from the petitioner explain that the beneficiary served an eight-month, dairy farming internship with the petitioner beginning in September 1999. A copy of the beneficiary's J-1 visa in his adjustment of status application also corroborates his internship with the petitioner. The petitioner indicates that the beneficiary's internship was not listed on the labor certification application because the internship did not establish the beneficiary's experience for the position.

The AAO finds that the petitioner has established the beneficiary's experience for the offered position and withdraws this portion of its prior decision. But the AAO notes that the beneficiary's internship should have been listed on the labor certification application, as the application form requires the listing of "any other jobs related to the occupation for which the alien is seeking certification." ETA Form 750-B, 15.

In summary, after granting the petitioner's motion to reopen and carefully reconsidering its decision in light of the new evidence, the AAO finds that the petitioner has established the beneficiary's

⁵ In its previous *Sonegawa* analysis, the AAO found that the petitioner did not pay wages in 2005, 2006 and 2007. In its motion, the petitioner explained that its wages are listed on line 24 of Schedules F of its federal income tax returns under "Labor hired." The AAO therefore withdraws that finding in its previous decision.

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qualifications for the offered position, but has not demonstrated its continuing ability to pay the offered wage rate since the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen is granted and the decision of the AAO dated January 11, 2011 is affirmed in part and withdrawn in part. The petition is denied.