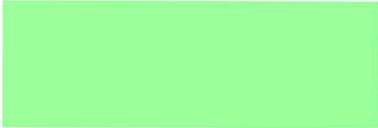


(b)(6)

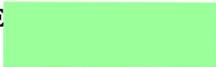
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **FEB 28 2013**

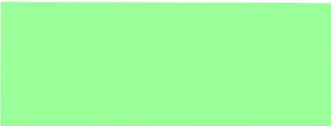
OFFICE: NEBRASKA SERVICE CENTER FILE 

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:

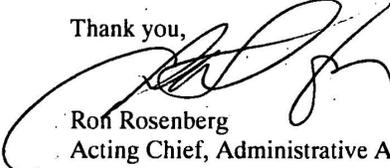


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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

[www.uscis.gov](http://www.uscis.gov)

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

The petitioner is a bakery shop. It seeks to employ the beneficiary permanently in the United States as a pastry baker. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage as of the priority date of the visa petition and denied the petition on December 4, 2007.

The AAO dismissed the petitioner's appeal<sup>1</sup> on February 1, 2010 and affirmed the director's denial, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage from the priority date onward.<sup>2</sup>

On March 8, 2010, the petitioner, through counsel, has filed a motion to reconsider and to reopen. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits new evidence related to the individual's shareholder's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act 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

<sup>1</sup> The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>2</sup> The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).<sup>3</sup>

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the Form ETA 750, the priority date is April 6, 2001. The proffered wage is \$8.38 per hour, based on a 35 hour week as stated on the ETA 750, amounts to \$15,251.60 per year. The record does not indicate that the petitioner paid compensation to the beneficiary, although the petitioner was requested to submit such evidence by the director.<sup>4</sup>

In its previous decision the AAO explained the process of reviewing a petitioner's ability to pay a proposed wage offer to a beneficiary. In that case, it reviewed the 2001 to 2005 corporate tax returns that were provided, as well as other materials, and determined that the corporate petitioner had not demonstrated that it had the continuing ability to pay the

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<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

<sup>4</sup> The beneficiary claims on a G-325A, Biographic Information form, signed by him on June 7, 2007 and submitted in connection with his Application to Register Permanent Residence or Adjust Status (Form I-485), that the petitioner had employed him since November 1998.

proffered wage of from the priority date onward. Specifically, the AAO examined the corporate petitioner's net income and net current assets and found that the petitioner's ability to pay had not been established for any of the years from 2001 to 2005. The AAO additionally noted that the petitioner had not submitted a tax return, audited financial statement, or annual report for 2006 even though requested specifically by the director. See 8 C.F.R. § 103.2(B)(14). The AAO concluded that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel renews the assertion on motion that the AAO erred in not sufficiently considering the application of "compensation of officers," a deduction taken on line 12 of the Form 1120, U.S. Corporation Income Tax return. In each of the tax returns submitted from 2001 to 2005, the deduction amounted to \$15,600. Additionally, the amount of officer compensation paid to the sole shareholder does not vary over the course of the pertinent years. The petitioner failed to submit evidence to show that officer compensation payment were not fixed by contract or otherwise. Relevant to officer compensation, the AAO does find the application of officer compensation to the corporate petitioner's legal obligation to pay the proffered wage to be persuasive. 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 its previous decision, the AAO had observed that "the officer compensation of \$15,600 exceeds the proffered wage by only \$348.40. There is no evidence to suggest that the petitioner's sole shareholder could support himself on such minimal compensation." On motion, counsel submits copies of the shareholder's individual income tax returns and asserts that the shareholder would have the ability to support himself after deducting officer compensation of \$15,600 and applying it toward payment of the proffered wage of \$15,251.60.

Counsel's assertion is unpersuasive. As stated above, the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its continuing financial ability to pay the proffered wage from the priority date onward until the beneficiary obtains permanent resident status. In this case, the AAO determined in its previous decision that the petitioner had not established its ability to pay the proffered wage in any of the relevant years.

In fact, the corporate tax returns show that the petitioner's president is the spouse of the sole shareholder and only the sole shareholder is listed as an officer on Schedule E of the tax returns. It is also noted that the record does not contain an affidavit or statement from the sole shareholder and only officer on the tax returns that he would have been able and willing to forego officer compensation in any of the relevant years. Further, before the AAO would consider the individual income tax returns and the ability to forego officer compensation of \$15,600 in each year, the sole shareholder would need to provide to the

record summaries of his household expenses for each of the relevant years. In several years, the sole shareholder's mortgage expenses and claimed medical expenses would utilize most of the shareholder's officer compensation and personal income. From the record, it is not clear that the officer and his spouse could forego compensation and support themselves. If USCIS fails to believe that a fact stated in the petition is true, USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The record does not currently contain such information.

Finally, the petitioner has never provided a corporate tax return, audited financial statement or annual report for 2006, which would show net income, net current assets, or any other expenses such as officer compensation. As such, the petitioner has not established the continuing ability to pay the proffered wage as required by 8 C.F.R. § 204.5(g)(2).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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 and reconsider is granted. The AAO affirms its previous decision of February 1, 2010. The appeal remains dismissed.