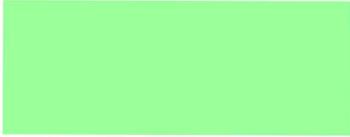




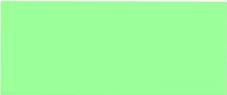
**U.S. Citizenship  
and Immigration  
Services**

(b)(6)

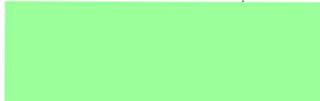


DATE: **JAN 14 2013**

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 AAO 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.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed the director's decision which was summarily dismissed by the Administrative Appeals Office (AAO). The petitioner filed an appeal, a motion to reopen, a motion to reconsider, and a motion to reopen and reconsider the decision. The matter is again before the AAO. The appeal is rejected and the motion to reconsider is granted. The director's decision is affirmed, and the petition remains denied.

The petitioner is a semiconductor equipment trading company. It seeks to employ the beneficiary permanently in the United States as an engineer/prgrammer. 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 June 18, 2009, the petitioner filed a Form I-290B, Notice of Appeal, of the director's decision to the AAO. On July 13, 2010, the AAO summarily dismissed the petitioner's appeal under 8 C.F.R. § 103.3(a)(1)(v) for failure to identify specifically any erroneous conclusion of law or statement of fact for the appeal. On August 12, 2010, the petitioner filed another Form I-290B and indicated it was filing an appeal, a motion to reopen, a motion to reconsider, and a motion to reopen and reconsider.

Although counsel attempted to file an appeal of the AAO decision, the AAO, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).<sup>1</sup> For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, counsel also checked box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), and box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B. The instant Form I-290B will be treated as a motion to reconsider the AAO decision.

In its decision, the AAO summarily dismissed the appeal because the petitioner had not identified specifically any erroneous conclusion of law or statement of fact for the appeal. 8 C.F.R. § 103.3(a)(1)(v). The AAO noted that the petitioner indicated it would file a brief and/or additional evidence within 30 days, and that as of the date of the decision, over one year after the appeal had been filed, the AAO had still not received the brief and/or additional evidence. In the instant case,

---

<sup>1</sup> In the process of reorganizing the immigration regulations, the Department of Homeland Security (DHS) deleted the list of the AAO's appellate jurisdiction that was previously found at former 8 C.F.R. § 103.1(f)(3)(iii) (2002). 68 FR 10922 (March 6, 2003). DHS replaced the appellate jurisdiction provision with a general delegation of authority, granting U.S. Citizenship and Immigration Services (USCIS) the authority to adjudicate the appeals that had been previously listed in the regulations as of February 28, 2003. See DHS Delegation No. 0150.1 para. (2)(U) (Mar. 1, 2003); 8 C.F.R. § 103.3(a)(iv). As a result, there is no generally accessible list of the AAO's jurisdiction that may be cited in immigration proceedings or in federal court.

the motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy.

In its motion, counsel for the petitioner states that it filed a brief and additional evidence with the Nebraska Service Center on July 17, 2009. In support of its contention, the petitioner submits a print-out from the U.S. postal service showing that an item was signed for and received in Lincoln, Nebraska on July 17, 2009. However, the regulation requires that the petitioner submit a brief or any additional evidence directly to the AAO. 8 C.F.R. §§ 103.3(a)(2)(vii) and (viii). The petitioner failed to properly submit its brief directly to the AAO pursuant to the regulations. Therefore, the AAO's summary dismissal was proper.

In its brief, the petitioner's counsel argues that as an S corporation, the petitioner is not a separate entity from its owner, and therefore, the assets of the petitioner's owner should be considered in determining its ability to pay the prevailing wage. The petitioner's counsel further asserts that since the sole shareholder of the petitioner also owns other corporations that have elected S corporation tax treatment, then the other corporations' income and assets should be considered in the ability to pay the proffered wage as well.

A corporation, however, is a separate and distinct legal entity from its owners and shareholders, and therefore the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Additionally, the petitioner was a C corporation for two of the relevant years. The record shows that it filed Corporate Income Tax Form 1120 for 2005 and 2006. Its S corporation election, Form 2553, was not filed until October 2005. Therefore, the petitioner's counsel's argument would not be relevant to the years preceding the IRS' acceptance of the petitioner's S corporation election. In this case, the petitioner was still a C Corporation in 2005 and 2006.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2010) of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 20, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner did not have additional income, credits, deductions, or

other adjustments, shown on its Schedule K for 2007, the petitioner's net income is found on line 21 of page one of the petitioner's IRS Form 1120S for 2007.

The petitioner's counsel further argues that the beneficiary is working for another company owned by the petitioner's owner and is being paid the prevailing wage set for his H1B visa, which is lower than the prevailing wage on the labor certification. Therefore, the petitioner should only have to show that it has the ability to pay the difference in the H1B prevailing wage rate and the labor certification prevailing wage rate.

USCIS will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. However, if the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, then USCIS will examine net income and net assets to determine if the petitioner has the ability to pay the proffered wage.

In this case, the petitioner's counsel confuses the prevailing wage with the proffered wage. The petitioner must show that it can pay the entire proffered wage, and not only the prevailing wage. Additionally, as discussed previously, the petitioner is a separate and distinct legal entity from the petitioner's owner or any of the other corporations owned by the petitioner's owner. The payroll of a separate entity cannot be used to show that the petitioner has the ability to pay the proffered wage. The petitioner's counsel has not shown that the petitioner has paid the beneficiary at any time during the relevant period, and thus, the petitioner must show that it has the ability to pay the entire proffered wage.

The petitioner's counsel also argues that the totality of the circumstances should be evaluated in determining the petitioner's ability to pay the proffered wage.

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 (Reg'l Comm'r 1967). 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 has not demonstrated that it has paid the beneficiary the proffered wage, nor has it demonstrated sufficient net income or net assets to pay the proffered wage in all relevant years. The petitioner also failed to include any evidence of historical growth of the petitioner's business, the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses, such as those in *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.

Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion to reconsider is granted. The previous decision of the AAO is affirmed.