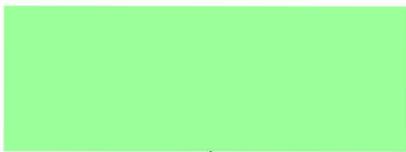


(b)(6)

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:

JAN 14 2013

Office: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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:

SELF-REPRESENTED

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 a construction company. It seeks to employ the beneficiary permanently in the United States as a cement mason 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 January 21, 2010, the AAO dismissed the subsequent appeal, affirming the director's denial. The petitioner filed a motion to reconsider the AAO decision.¹ The record shows that the motion is properly filed and timely and provides information concerning assets acquired by the petitioner. 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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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

¹ The petitioner also checked Box B on the Form I-290B indicating that he was appealing a decision. As no appeal is provided for an AAO decision, the petitioner's submissions will be considered as a motion to reconsider the previous decision.

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 April 30, 2001. The proffered wage as stated on the ETA Form 750 is \$19.16 per hour (\$39,852 per year).

In the AAO's January 21, 2010 decision, the AAO specifically reviewed evidence of wages paid to the beneficiary (\$19,858.96 in 2001, \$17,336.18 in 2002, \$20,219 in 2003, \$5,616 in 2004, \$10,970 in 2005, and \$14,255 in 2006). We noted the petitioner's net income (the 2001 Form 1120 stated net income of \$11,235,² the 2002 Form 1120 stated net income of \$7,527, the 2003 Form 1120 stated net income (loss) of -\$3,495, the 2004 Form 1120 stated net income of \$1,265, the 2005 Form 1120 stated net income of \$3,005, and the 2006 Form 1120 stated net income of \$34,984). We also noted the petitioner's net current assets (in 2001, the Form 1120 stated net current assets of -\$16,904; in 2002, the Form 1120 stated net current assets of \$6,074; in 2003, the Form 1120 stated net current assets of \$3,440; in 2004, the Form 1120 stated net current assets of \$5,249; and in 2005, the Form 1120 stated net current assets of \$10,900). The AAO decision stated that the petitioner established the ability to pay in 2006, but the evidence in the record did not establish the ability to pay from 2001 through 2005.

Despite notification in the AAO decision of the types of evidence that the petitioner needed to submit under the regulation at 8 C.F.R. § 204.5(g)(2) (annual reports, federal tax returns, or audited financial statements) as evidence of its ability to pay the proffered wage, the petitioner submitted no such evidence with its motion to reconsider.

On motion, the petitioner submits:

- A December 6, 2002 Bill of Sale for a 235 CAT Excavator with Bucket and corresponding wire transfer of payment;
- A May 6, 2002 quote for the purchase of two augers;
- A June 18, 2002 quote for the purchase of three core barrels;
- Certificates of Title for a trailer and two commercial vehicles;
- Minutes of the 2002 Annual Shareholder's Meeting where it was decided that the petitioner would transfer three vehicles to another company for no consideration;
- A delinquent payment notice from [REDACTED];
- Four invoices from [REDACTED] dated July 5, July 16, and November 15, 2002 (2); and
- A June 12, 2002 bill of sale from [REDACTED] for a drill.

The petitioner states that these documents establish "additional financial gain" demonstrating the ability to pay the proffered wage. The petitioner argues that the assets reflected on the tax

² The petitioner's 2001 tax return represents the time period April 1, 2001 to March 31, 2002.

returns did not fully demonstrate the assets it held from 2000 to 2006. We disagree. Schedule L of the Form 1120 provides for a statement of assets held by a corporation. Assets such as property and equipment are found on lines 10 through 14. In determining the petitioner's net current assets, only lines 1 through 6 are considered as those lines indicate cash and readily available assets that could be used to pay the proffered wage. The depreciable assets listed by the petitioner will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. As a result, the new evidence submitted does not demonstrate the petitioner's ability to pay the proffered wage in any year.

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 from 2001 through 2006 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. The evidence submitted on motion does not demonstrate that the petitioner had additional assets available to pay the proffered wage. Additionally, the petitioner submitted no evidence of its reputation to liken its situation to that of *Sonogawa*. 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.

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