



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

JAN 14 2013

OFFICE: TEXAS 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:

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 U.S. Citizenship and Immigration (USCIS) Director, Texas 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 dismissed, the previous decision of the AAO will be affirmed, and the petition will remain denied.

A motion to reconsider (MTR) 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 USCIS policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider contests the correctness of the original decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new or previously unavailable evidence. See *Matter of Cerna*, 20 I&N Dec. 399, 403 (BIA 1991).

A motion to reconsider cannot be used to raise a legal argument that could have been raised earlier in the proceedings. See *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Rather, the “additional legal arguments” that may be raised in a motion to reconsider should flow from new law or a *de novo* legal determination reached in its decision that could not have been addressed by the party. Further, a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal and seek reconsideration by generally alleging error in the prior decision. *Matter of O-S-G-*, 24 I&N Dec. 56, 58 (BIA 2006). Instead, the moving party must specify the factual and legal issues raised on appeal that were decided in error or overlooked in the initial decision or must show how a change in law materially affects the prior decision. *Id.* at 60.

The present motion to reconsider does not allege that the issue regarding whether the beneficiary could be substituted on the previously approved labor certification after the original beneficiary adjusted to permanent residence, as addressed in the previous AAO decision on appeal, involved the application of precedent to a novel situation, or that there is a new precedent or a change in law that affects the AAO’s prior decision. Instead, counsel provided a brief in support of the motion to reconsider nearly identical to the brief filed in support of the appeal. Although the statement referenced the AAO decision previously entered, it did so only to state that the decision was in error and did not contain new precedent or a change in law that would affect the AAO’s prior decision and relied on the same argument made in the brief submitted originally on appeal. The only additional case cited was *Matter of Harry Bailen Builders, Inc.*, 19 I&N Dec. 412, however, that decision was issued in 1996, some 15 years prior to the 2011 AAO decision, and was used to support an argument made in the previous submission to the AAO. As noted above, a motion to reconsider must include specific allegations as to how the AAO erred as a matter of fact or law in its prior decision, and it must be supported by pertinent legal authority. 8 C.F.R. § 103.5(a)(3); see *Matter of Medrano*, 20 I&N at 219; *Matter of O-S-G-*, 24 I&N Dec. at 58-60.

Concerning the issue raised *sua sponte* by the AAO regarding the petitioner’s ability to pay the proffered wage,¹ the petitioner did submit arguments with its MTR. First, the petitioner

¹ The regulation at 8 C.F.R. § 204.5(g)(2) states:

challenged the AAO's ability to raise an additional basis of denial on appeal from the reason specified by the director's decision. The petitioner states that the additional basis is not a "technical deficiency" but instead a "substantive requirement." The petitioner provides no case law to demonstrate that a difference exists between "technical" and "substantive" requirements or deficiencies as argued by counsel in the MTR. Instead, the court in *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003), stated that when considering the AAO's denial of the application "on new and different grounds, [the petitioner] provides no legal authority that an . . . application that fails to comply with the specific technical requirements of the law cannot be denied, because the service center did not identify all grounds for denial." The specific technical requirement at issue here is whether the petitioner submitted evidence of its ability to pay the proffered wage from the priority date onwards. The petitioner does not provide any evidence or argument to demonstrate how the ability to pay the proffered wage would be outside of the AAO's *de novo* review authority. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Second, to demonstrate the ability to pay the proffered wage, the petitioner argues that the AAO should have accepted the letter from its Chief Financial Officer (CFO) stating that the petitioner's 2002 sales were almost \$7,400,000, that in 2003, the petitioner's revenue exceeded \$18,000,000, and in 2004, the revenue exceeded \$38,000,000² and that for 2005, the petitioner's revenue was \$56,000,000. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) Although USCIS may accept the CFO statement as evidence of a petitioner's ability to pay in the instant case, specific concerns were raised about the number of beneficiaries sponsored so that the CFO's statement was insufficient to demonstrate the petitioner's ability to pay without additional evidence.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

² The AAO notes that the petitioner's compiled financial statement for 2004 indicates revenue of \$18,051,236, with a net income of -\$169,069 for fiscal year 2004.

(b)(6)

As noted by the previous AAO decision, the petitioner has filed over 3,681³ petitions, predominantly I-129 H-1B petitions, as of September 2012.⁴ In 2010, the petitioner filed 203 petitions, and it filed 326 petitions in 2011. With the MTR, the petitioner states that the AAO's analysis of whether it demonstrated the ability to pay the proffered wage is flawed in that the AAO assumed that all of the petitions were for new employees and new positions and all would be at the same remuneration rate as the beneficiary. The petitioner submitted no evidence with its MTR to demonstrate that any of the sponsored workers were already being paid their individual proffered wages, that the petitioner was meeting its wage obligations to any or all of the sponsored workers, or that it otherwise had the ability to pay each sponsored beneficiary the proffered wage. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Without evidence that the petitioner has met the salary obligations of the other sponsored workers through wages paid, it cannot demonstrate its ability to pay the proffered wage to the instant beneficiary or any of the other sponsored workers in any year.

Even if the petitioner did have the ability to pay the proffered wage to the additional sponsored workers, which has not been established, as stated in the AAO's previous decision, the petitioner submitted no evidence concerning its ability to pay the proffered wage in 2003 and insufficient evidence to demonstrate its ability to pay the proffered wage in 2004 and 2005.⁵ 8 C.F.R. § 204.5(g)(2) specifically states that a petitioner must demonstrate its ability to pay the proffered wage in each year from the priority date onwards. The petitioner submitted no evidence with its MTR to demonstrate its ability to pay in any of these years.

³ We note that since the previous AAO decision, the petitioner has filed additional petitions bringing the total to over 4,500.

⁴ The petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2).

⁵ The petitioner submitted a reviewed financial statement for 2005 and a compiled financial statement for 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. As the accountant's report makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Instead, the petitioner asserts that its ability to pay should be assessed under a totality of the circumstances argument.⁶ We reiterate the totality of the circumstances assessment made in the previous decision:

In the instant case, the petitioner has significant gross revenue based on the audited financial statement during tax year 2006. However, the record is devoid of any other evidence as to the petitioner's ability to pay the proffered wage in any other year during the period of time from 2003 to the present. Beyond the petitioner's 2006 audited financial statement and the assertions of counsel and the petitioner's officer with regard to the petitioner's earlier gross profits, the record contains no further evidence or information on any other aspect of the petitioner's financial viability. The record contains no further discussion or information on issues such as officer compensation, longevity of business, and/or the petitioner's reputation within the IT business community. 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 as of 2003 and onward.

The petitioner submitted no additional evidence concerning how it demonstrated its ability to pay the proffered wage through an analysis of the totality of the circumstances. Instead, the petitioner cites to the unaudited 2004 and 2005 financial reports and the wages paid to the beneficiary in 2006 and 2007. Although the petitioner paid the beneficiary 70% of the proffered wage in 2006 and provided pay stubs to demonstrate that the beneficiary was being remunerated

⁶ 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 (BIA 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.

at a similar rate in that year, it submitted no evidence for 2003 through 2005, nor did it claim that any of those years constituted an unusual year or were subject to unusual expenses. Without additional evidence concerning the petitioner's financial state in every year from the priority date onwards, save for 2006, the petitioner has not demonstrated an ability to pay the proffered wage through a totality of the circumstances analysis.

For the foregoing reasons, the motion to reopen and reconsider is dismissed. The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden.

ORDER: The motion to reconsider is dismissed, the decision of the AAO dated January 20, 2011 is affirmed, and the petition remains denied.