

(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: OFFICE: TEXAS SERVICE CENTER

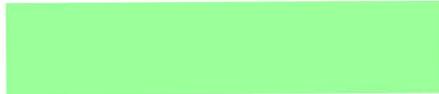
FILE:



JAN 31 2013

IN RE:

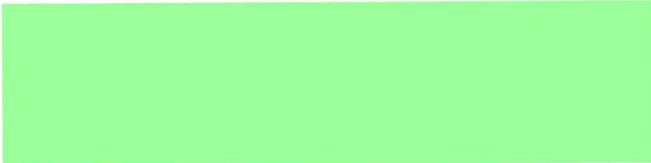
Petitioner:



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, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on June 22, 2010, the AAO dismissed the appeal. The petitioner filed a motion to reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner is a charter service. It seeks to employ the beneficiary permanently in the United States as a motor coach driver/mechanic. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by an ETA Form 9089, Application for Permanent 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 and denied the petition accordingly.

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.

As set forth in the director's January 12, 2008 denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 policy. 8 C.F.R. § 103.5(a)(3). Motions to reopen and reconsider must also state whether the unfavorable decision has been or is the subject of any judicial proceeding. 8 C.F.R. § 103.5(a)(1)(iii)(C).

The motion does not state new facts or contain new evidence pertaining to the period that was the basis of the prior decisions. Therefore, the instant motion does not qualify as a motion to reopen.

The motion also fails to cite any precedent decisions or state that the dismissal of the appeal was based on an incorrect application of law or policy. Therefore the instant motion does not qualify as a motion to reconsider.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

Even if the motion were granted, the AAO's prior decision would have been affirmed.

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 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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the labor certification was accepted on April 26, 2001. The proffered wage as stated on the ETA Form 9089 is \$11.07 per hour (\$23,025.60 per year). The ETA Form 9089 states that the position requires 12 months of training and two years of experience in the job offered.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.² On the petition, the petitioner claimed to have been established in 2003 and to

² A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

currently employ 25 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 22, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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'l Comm'r 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 totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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. In the instant case, the petitioner did not establish that it ever employed the beneficiary.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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). Reliance on the petitioner's wage expense is misplaced. Similarly, a showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of

accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on December 28, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was not yet due and the petitioner had requested an extension of its 2006 federal income tax return, therefore, the petitioner’s 2005 federal income tax return was the most recent return available. The petitioner’s tax returns stated its net income as detailed in the table below.

- In 2003, the petitioner’s Form 1065 stated net income of \$2,917.00.³

³ For an LLC taxed as a partnership, where a partnership’s income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of page one of the petitioner’s Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 (before 2008) of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed December 11, 2012) (indicating that Schedule K is a summary schedule of all partners’ shares of the partnership’s income, deductions, credits, etc.). In the instant case, the petitioner’s Schedule K for has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of

- In 2004, the petitioner's Form 1065 stated net income of \$0.00.
- In 2005, the petitioner's Form 1065 stated net income of \$0.00.

Therefore, for the years 2003, 2004 and 2005, the petitioner did not establish that it had sufficient net income to pay the proffered wage. Petitioner states that its federal income tax returns for 2001 and 2002 could not be located and the accountant who prepared them has died. The petitioner did not explain why certified copies were not obtained from the Internal Revenue Service.⁴

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns stated its net current assets as detailed in the table below.

- In 2003, the petitioner's Form 1065 stated net current assets of (\$15,355.00).
- In 2004, the petitioner's Form 1065 stated net current assets of (\$132,390.00).
- In 2005, the petitioner's Form 1065 stated net current assets of (\$220,420.00).

Therefore, for the years 2003, 2004 and 2005, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the labor certification was accepted for processing by the DOL, 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.

Schedule K of its tax returns.

⁴ The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel asserts that the beneficiary has been employed by the petitioner since 2001, has been paid the proffered wage of \$11.07 per hour, and that his salary is already included in the petitioner's expenses. Petitioner also provided an additional copy of its Employer's Quarterly Federal Tax Return, Form 941 from the first quarter of 2001 through the third quarter of 2007. However, the Form 941 does not include employee names and therefore does not provide evidence that the beneficiary is employed by the petitioner. As stated above, a showing that the petitioner was able to pay wages is not sufficient to establish its ability to pay the proffered wage.

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). The record contains no Forms W-2 or 1099 that would establish that the beneficiary was employed and paid by the petitioner, and the ETA Form 9089, certified by the beneficiary with his signature nearly six years after the priority date, does not list the petitioner as an employer.

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 did not establish the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director,⁶ the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 12 months of training in the job opportunity and two years of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a mechanic.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter signed by [REDACTED] President of [REDACTED] which states the beneficiary was employed by the company as a mechanic from September 1994 to October 2000. The beneficiary's training must be supported by transcripts, certificates of completion, or other evidence that the training was completed. The record contains no evidence of the beneficiary's training as required by the terms of the labor certification.

The evidence in the record does not establish that the beneficiary possessed the required training set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

(b)(6)

Page 9

ORDER: The motion to reconsider is dismissed.