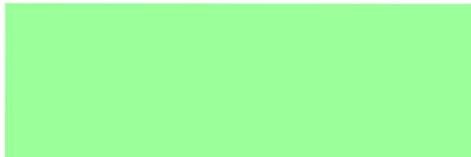




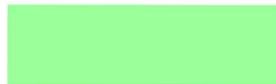
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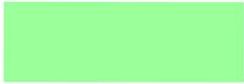


Date: JUN 04 2013

Office: TEXAS SERVICE CENTER

FILE: 

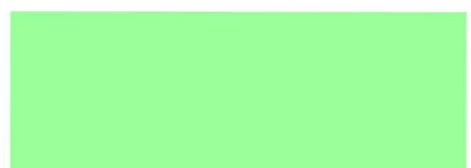
IN RE:

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:



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.

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** On July 1, 2010 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director), denying the instant Form I-140 petition. The petitioner has now filed a motion to reopen and a motion to reconsider the AAO's decision. The motion will be granted, the appeal will be sustained, and the petition will be approved.

The petitioner is a Pittsburgh-based web design and e-marketing firm. It seeks to employ the beneficiary permanently in the United States as a director of digital marketing pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. §§ 1153(b)(3)(A)(i) and (ii).<sup>1</sup> 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 denied the petition, finding that the petitioner failed to establish the ability to pay the beneficiary's proffered wage from the priority date and continuously until the beneficiary receives his lawful permanent residence (LPR) status.

On appeal to the AAO, the petitioner asserted its ability to pay based on the totality of the business' circumstances, i.e. its good name reputation, length in the business, and the historical growth over the years, pursuant to the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Upon review, the AAO dismissed the appeal finding that the petitioner failed to show why 2003 – the only relevant year in which the petitioner did not have sufficient net income or net current assets to pay the proffered wage – was an aberrant year. The AAO specifically stated, “Unlike *Sonogawa*, *id.*, the record does not include evidence that reflects the occurrence of uncharacteristic business expenditure or losses that would explain why the petitioner was unable to pay the proffered wage in 2003.”

On motion to reopen/reconsider, the petitioner submits additional evidence to establish that 2003 was an unusual year and that its business has continued to grow and its reputation to increase. Further, counsel maintains that the petitioner has the continuing ability to pay based on the totality of the business' circumstances and cites several of the AAO non precedent decisions.

A motion to reopen must state the new facts to be proved 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 U.S.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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.

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

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, the motion to reopen/reconsider is properly filed, timely and states specific reasons for reconsideration. Further, counsel for the petitioner provides additional facts and evidence. The motion is granted, and the appeal is reopened and reconsidered.

As set forth in the AAO's July 1, 2010 decision, the single issue in this case is whether or not the petitioner has the continuing ability to pay the proffered wage from the priority date in 2003 onwards based on the totality of its circumstances.

As indicated previously, 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. at 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.

Here, to demonstrate that the petitioner has the continuing ability to pay based on the totality of circumstances as outlined in *Sonogawa*, counsel submits the following evidence:

- Copies of Internal Revenue Service (IRS) Form 1120S, U.S. Corporation Income Tax Return for an S Corporation, for the years 2000 through 2009;
- Copies of IRS Forms W-2 Wage and Tax Statement issued by the petitioner to the beneficiary for the years 2002 through 2009;

- Copies of IRS Forms W-2 issued by the petitioner to all of its employees from 2001 to 2009;
- Copies of the company's health benefits statements and invoices for 2003;
- Copies of various news articles and journals describing the petitioner's accomplishments and services including awards and citations received by the petitioner over the years;
- A copy of an article published in [REDACTED] on February 7, 2003 stating that the demand for IT professionals has plummeted to its lowest level since the early 1990s;
- A list of the petitioner's major clients such as [REDACTED] among others;
- Various copies of invoices billed to the petitioner's major clients;
- Various articles and brochures/pamphlets discussing [REDACTED] the petitioner's well known marketing software;
- A letter dated July 26, 2010 from the petitioner's certified public accountant, [REDACTED] who prepared various financial summaries, charts, and statistics showing the petitioner's growth from 2000 to 2009;
- Various financial summaries, charts, and statistics prepared by Mr. [REDACTED] including:<sup>2</sup>
  - ❖ Revenue and Expense summary for the years 2000 through 2009;
  - ❖ Cost of developing [REDACTED] from 2001 to 2003;
  - ❖ A chart showing the number of employees hired by the petitioner between 2000 to 2009;
  - ❖ A chart showing the revenues earned by the petitioner between 1992 and 2007;
  - ❖ A chart showing the gross sales of the petitioner from 2000 to 2009; and
  - ❖ A chart showing the health care and insurance costs paid by the petitioner from 2000 to 2008.
- A lease agreement for a space in the [REDACTED] Pennsylvania, signed on November 11, 2002 effective as of December 1, 2002 and terminated on October 31, 2005; and
- A lease agreement for property at [REDACTED] Pennsylvania, signed on October 25, 2005 for 63 months (five years and three months).

The AAO acknowledges that the petitioner has been in a competitive field since 1991,<sup>3</sup> and that based on the evidence submitted above, the business has grown from a one-man firm in 1991 to a

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<sup>2</sup> A review of the various charts and statistics submitted reflects that the petitioner experienced a slight dip in gross receipts/sales in 2002 and 2003. The gross receipts/sales, which usually were in well excess of \$1 million between 2000 and 2009, were less than a million dollars in 2002 and 2003. The gross receipts/sales in 2002 and 2003 were \$969,549 and \$927,632, respectively.

corporation that employed as many as 33 workers in 2007. The petitioner has additionally, over the years, expanded its business from a firm that only offers web design services to a major corporation that provides e-commerce services and sells e-marketing softwares. Its clients include

among others.

The petitioner also has won numerous awards from various marketing-based organizations nationwide and has been cited numerous times by local as well as national marketing journals, magazines, and newspapers. The petitioner has a board of directors who are nationally well-known in the marketing community. The petitioner operated out of the same location in Pittsburgh from 2002 to 2005 and since 2005.

The petitioner states that it has always met its payroll obligations and provides health benefits for its employees. The record reflects that the petitioner has given a pay raise each year to the beneficiary since 2003, and that the petitioner has paid the beneficiary in excess of the proffered wage in 2006, 2007, and 2009.

As noted in the previous AAO decision, the petitioner paid wages to the beneficiary in amounts less than the full proffered wage in 2003, 2004, 2005, and 2008. However, the AAO acknowledges that the petitioner's net income was sufficient to cover the difference between the amounts already paid to the beneficiary and the proffered wage in 2004, 2005, and 2008.<sup>4</sup>

The record establishes that the petitioning corporation is well-recognized locally and nationally. Its products and services are subjects of discussion in various business journals and newspapers. The corporation's Chief Executive Officer (CEO) and other officers have written numerous articles in various business journals and newspapers, and some of their writings and works are cited by others in the industry. The petitioner's clients, as listed above, include some of the most successful and respected institutions in the United States.

On appeal to the AAO in 2008, the petitioner cited the recession and the tragic events of September 11, 2001 for its inability to pay the proffered wage in 2003, and further stated that with the exception of a "slight dip" during the 2001-2003 recessions, it has otherwise experienced solid revenue growth since 1991. On motion to the AAO, counsel further asserts

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<sup>3</sup> A search of the website of the Pennsylvania Department of State reveals that the petitioner, was incorporated on

<sup>4</sup> Based on the tax returns submitted, the petitioner's net income for the years 2004, 2005, and 2008 was \$145,984; \$75,728; and \$19,055, respectively. The difference between the actual wage paid to the beneficiary and the proffered wage for the same years was \$12,016.71; \$7,016.67; and \$4,933.15, respectively. Therefore, the petitioner had sufficient net income to cover the difference between the actual wage and the proffered wage in 2004, 2005, and 2008.

that the petitioner “was by no means alone in having a ‘down year’ in 2003,” and that the e-marketing business (in which the petitioner operates) took a “particular hit in 2003.” In support, counsel cites to an article which appeared in the February 7, 2003 edition of computerweekly.com which in pertinent part stated:

The demand for IT professionals has plummeted to its lowest level since the last recession as businesses rein back their IT budgets and put major e-commerce projects on hold.

...

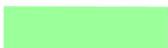
The downturn is so severe that some commentators have suggested that the slump could prove longer and deeper than the 1991-1993 recessions which led to more than 30,000 job losses.

The petitioner also submits a graph showing a significant drop in its gross sales growth in 2003 to \$927,632, down from \$1,587,210 in 2001 and \$969,549 in 2002. In 2004, it increased to \$1,422,758 and by the end of 2009 reached \$2,314,402 after a steady annual increase. Additionally, the petitioner only had 16 employees in 2003, the lowest number of employees hired by the petitioner between 2000 and 2009. Between 2000 and 2002, and again from 2004 to 2009, the petitioner constantly had more than 18 employees. Starting from 2005, the petitioner continuously has had more than 23 employees. Despite the slight dip in 2003, the record shows that the petitioner was able to pay full healthcare benefits to all of its employees and fulfill its other obligations such as its lease agreement.

The petitioner further stated on appeal that in 2003 the company launched four new e-marketing tools/software collectively known as [REDACTED] a product which in later years proved to help the petitioner to “bounce back” from the slight dip. In support, the petitioner submits a letter from [REDACTED] its certified public account, dated July 26, 2010, along with a chart evidencing the petitioner’s investment of \$781,342 to develop [REDACTED] including \$296,364 in 2003 alone. In addition, a review of the various articles, brochures, and pamphlets regarding [REDACTED] shows that [REDACTED] is one of the most productive marketing tools/software for the company and the most successful investment for the company.

Considering the evidence together and under the circumstances as described above, it is concluded that the petitioner has demonstrated by a preponderance of the evidence that it has the ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary obtains lawful permanent residence.

In addition, after reviewing the entire record, the AAO is persuaded that the beneficiary meets the minimum educational and work experience requirements for the job offered. Thus, the AAO concludes that the beneficiary is qualified to perform the duties of the position.



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 met that burden.

**ORDER:** The motion to reopen/reconsider is granted, the appeal is sustained, and the petition is approved.