



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 07 2013 OFFICE: NEBRASKA 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on May 12, 2008, the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider. On March 29, 2011, the AAO granted the motion but affirmed the prior decision of the AAO dismissing the appeal. The petitioner has filed a second motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The AAO will grant the motion but affirms its prior decisions of May 12, 2008 and March 9, 2011. The petition will remain denied.

The petitioner, [REDACTED] is a restaurant. It sought to employ the beneficiary permanently in the United States as a Mexican specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director denied the petition on August 16, 2007, concluding that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. On May 12, 2008, the AAO dismissed the appeal¹ and affirmed the director's denial, determining that the petitioner had failed to demonstrate that it has had the continuing ability to pay the proffered wage.² On March 29, 2011, the AAO considered the petitioner's motion to reopen and reconsider the AAO's prior determination that the petitioner failed to demonstrate the continuing ability to pay the proffered wage and found that the petitioner had not overcome the reasons for the dismissal of the appeal.

The petitioner filed a second motion to reopen and to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, the petitioner submits new evidence related to the petitioner's ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Act 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.

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

¹ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

² The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, 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. Comm. 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the Form ETA 750, the priority date is April 23, 2001. The proffered wage is \$11.87 per hour, which amounts to \$24,689.60 per year. The record does not indicate that the petitioner has employed or paid compensation to the beneficiary.

In its previous decisions, the AAO explained the process of reviewing a petitioner's ability to pay a proposed wage offer to a beneficiary. In that case, it reviewed the 2001 to 2008 corporate tax returns that were provided, as well as other materials, and determined that the corporate petitioner had not demonstrated that it had the continuing ability to pay the proffered wage of \$24,689.60 beginning as of the April 23, 2001 priority date. Specifically, the AAO noted that the corporate petitioner's ability to pay had not been established for 2001, 2002 and 2003 and that neither the 2006 change of filing status to a C corporation or the omissions in Schedule L had been adequately explained. Moreover, as noted in the AAO's prior decisions, the petitioner failed to provide any financial information covering the priority date of April 23, 2001 as required by the regulation at 8 C.F.R. § 204.5(g)(2).

The AAO also noted that USCIS records reflected that [REDACTED] had filed at least 32 other I-140 petitions including at least six in 2007 and, if filed by the petitioner, the petitioner would need to establish its ability to pay for each sponsored worker from each respective priority date onward. The AAO further found the petitioner's assertion unpersuasive that other separate entities' financial documentation with separate tax identification numbers should be considered in that instant petitioner's ability to pay the proffered wage.

It is noted that it has been disclosed that the instant beneficiary, who is a substitution for the original beneficiary sponsored on the labor certification, is the nephew of one of the corporate petitioner's

50% shareholders. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000).

On motion, the petitioner’s president does not address the petitioner’s change in filing status or address the multiple sponsored workers, but states that although incorporated on August 28, 2000, the company did not begin doing business until August 2001. The petitioner’s president contends that proffered wage should be prorated only for the five months that the business was open in 2001. The AAO finds this assertion unpersuasive as the regulation requires that the ability to pay the proffered wage is measured from the priority date onward, not when the petitioner may be operational. This information also raises a question as to the *bona fides* of the job offer as the recruitment efforts that the petitioner attested to on the labor certification took place in March 2001 when the petitioner was not even open for business and presumably unable to offer employment to any otherwise qualified U.S. worker as a Mexican specialty cook.

As noted in the AAO’s previous decisions, the petitioner failed to establish that it has had the *continuing* ability to pay the proffered wage in 2001, 2002 or 2003 through either its net income or net current assets.³

The petitioner’s instant motion asserts that the petitioner’s gross and net revenues have increased during the relevant years. The petitioner also submits copies of articles from January 2001 and 2006 referring to businesses also owned by the petitioner’s president but at different locations than the petitioning business. As noted in the AAO’s decision of March 29, 2011, in some cases, USCIS may consider the overall circumstances 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

³ The petitioner failed to provide a tax return for tax year 2000 that covered the priority date of April 23, 2001 onward until August 1, 2001. The tax return submitted for 2001 also failed to show that either its net income of -\$126,379 or its net current assets of -\$426,095 could pay the proffered wage. In 2002, neither its net income of -\$6,065 nor its net current assets of -\$380,443 could cover the proffered wage. Additionally, in 2003, neither its net income of \$17,631 nor its net current assets of -\$218,475 could cover the proffered wage. Finally, although copies of the petitioner’s corporate tax returns of 2007 and 2008 have been submitted, which both show sufficient net income to cover the proffered wage of the instant beneficiary, until the petitioner provides information as to which preference petitions it has filed for other beneficiaries, including proof of employment and wages paid if applicable, it is unclear if the remaining years of tax returns from 2004, 2005, 2006, 2007 and 2008 would be sufficient to cover multiple petitions.

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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the instant case, while the petitioner has shown increasing gross sales since 2001, it is also noted that it filed a labor certification application less than a year after it was incorporated, and as noted above, was not operational when it advertised for the job. Additionally, as noted above, the petitioner's documentation did not demonstrate the ability to pay the proffered wage for 2001, 2002 and 2003. It posted negative or very modest net income for the first three years and negative net current assets for the first three years. No unique business circumstances, including reputational factors analogous to those in *Sonegawa*, have been submitted in this case except for articles related to separate businesses with separate tax identification numbers at different locations. As these articles relate to separate entities other than the petitioner, they would not support eligibility for approval of this petition on this basis. The petitioner has also failed to account for the multiple beneficiaries that it sponsored as raised previously by the AAO and is required to establish the continuing ability to pay for each respective beneficiary. As noted above the record does not provide any information as to which preference petitions it has filed for other beneficiaries, including proof of employment and wages paid if applicable. Therefore, it is unclear if the remaining years of tax returns from 2004, 2005, 2006, 2007 and 2008 would be sufficient to cover multiple petitions. Further, no explanation has been offered for its change of filing status, and it has failed to provide financial documentation covering the priority date consistent with 8 C.F.R. § 204.5(g)(2).

Based on the foregoing, the petitioner has failed to establish that it has had the *continuing* ability to pay the beneficiary the required wage from the priority date until the time of adjustment.

The motion to reconsider and motion to reopen is granted. The prior decisions of the AAO, dated May 12, 2008 and March 29, 2011, are affirmed. The petition remains denied. The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decisions of the AAO, dated May 12, 2008 and March 29, 2011, are affirmed. The petition remains denied.