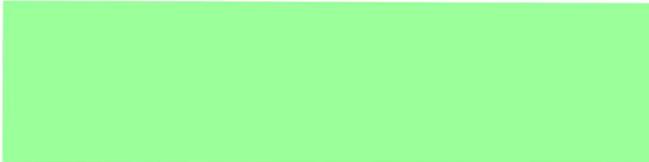


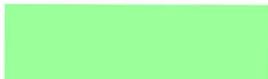


U.S. Citizenship
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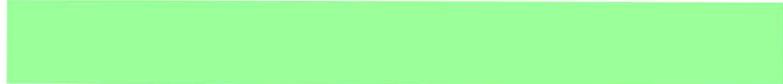


Date: Office: TEXAS SERVICE CENTER

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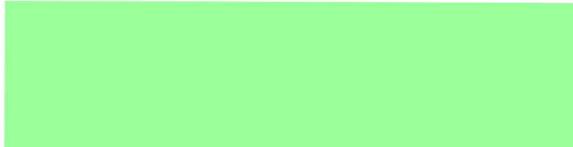
MAR 29 2013

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: On July 19, 2012 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director), to revoke the approval of the petition. The petitioner has now filed a motion to reopen the AAO's decision. The motion will be granted, and the appeal will be reopened. Upon review, the appeal will be dismissed, and the approval of the petition will remain revoked.

The petitioner is a landscaping company. It seeks to employ the beneficiary permanently in the United States as a landscape gardener, 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).¹ 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 AAO dismissed the appeal, finding that the petitioner failed to establish the continuing ability to pay the proffered wage of the beneficiary and of the other beneficiaries as previously indicated from their respective priority dates.²

On motion to reopen, counsel for the petitioner maintains that the petitioner has the continuing ability to pay the proffered wage from the priority date and urges the AAO to consider the totality of the business' circumstances, i.e. the size of its gross receipts/sales, compensation to its officers, and employees, its good name reputation, length in the business, and the historical growth over the years, consistent with the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). A letter from the petitioner's in-house attorney stating the size of the company's gross receipts/sales for the years 2002 through 2004 and various articles, journals, and awards are submitted to demonstrate that the petitioner has healthy growth and good name reputation and thus, has the ability to pay the proffered wage.

The record shows that the motion is properly filed, timely and supported by new evidence. The AAO conducts this appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in this proceeding.³

¹ 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.

² In adjudicating the appeal, we found that the petitioner filed multiple immigrant visa petitions (Form I-140) for alien beneficiaries other than the beneficiary in the instant proceeding since 2002. We will not repeat the details of the other beneficiaries sponsored by the petitioner in this decision.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, counsel asks the AAO to consider the totality of the petitioner's circumstances based on the *Sonegawa* holding. The motion is supported by documentary evidence. The motion to reopen is, therefore, granted, and the matter will be reopened and reviewed.

Upon review, we find that the petitioner has not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives his lawful permanent residence. As indicated earlier in the AAO decision, U.S. Citizenship and Immigration Services (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 Sonegawa*, 12 I&N Dec. at 612. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 *Sonegawa*, counsel submits the following evidence:

- A statement dated August 16, 2012 from the petitioner's in-house/business attorney stating:
 - a) that the petitioner has been in competitive business since 1977 (and incorporated since 1987), and remains a viable company even though it has suffered business losses for several years in a row;

- b) that with gross receipts approaching ten million dollars in 2002, 2003, and 2004 and wages approaching a half million dollars annually, the petitioner has the ability to pay \$20,165.20 per year (the proffered wage); and
 - c) that the petitioner has served the community for more than 35 years, has won dozens of awards on Cape Cod and the Islands, including but not limited to Best Florist (2004), Best Landscaper (2005), Best Flower Shop (2006 and 2007), Best Garden Center (2007).
- Various articles covering the reputation and the business acumen of the owner of the petitioner;
 - Various awards given to the petitioner throughout the relevant years (2004-2009); and
 - Various business journals discussing the petitioner's products and performance.

The AAO acknowledges the reputation of the petitioner, and that it has grown since its inception in 1977. However, we cannot sustain the appeal and approve the petition (and we have not thus far ruled in favor of the petitioner) based solely on the overall magnitude of the company's activities and reputation alone, especially when the petitioner has not established the ability to pay for more than one year. Nor has the petitioner established that it incurred uncharacteristic business expenditures or losses from 2001 to 2003.

In addition, we note that the letter from the petitioner's in-house attorney is not persuasive. 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 provides 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). Given the record as a whole and the petitioner's history of filing multiple petitions, we find that USCIS need not exercise its discretion to accept the letter from the petitioner's in-house business attorney as reliable. In this case, the petitioner has failed to establish the ability to pay from 2001 to 2003.

We held in our earlier decision that if the beneficiary were the only beneficiary in the instant proceeding, the petitioner would have had sufficient net income and net current assets to pay the beneficiary's proffered wage in 2001, 2002, and 2003. But this is not the case here. In the Request for Evidence (RFE) dated March 13, 2012, we requested, and the petitioner failed to submit, Internal Revenue Service (IRS) Forms W-2s, 1099-MISCs, or paystubs issued to the other eight beneficiaries identified.⁴ Responding to the AAO's RFE, counsel states that the petitioner no longer has other documentation to produce.⁵

⁴ The AAO notes that these eight additional Form I-140 petitions were pending as of the date of the director's initial approval of the instant petition on July 30, 2004; thus, further limiting the petitioner's available net income and net current assets to establish its ability to pay for the years 2001 through 2003.

⁵ The AAO notes that the petitioner could have attained evidence regards to wages paid to the other beneficiaries. According to the IRS website at <http://www.irs.gov>, the IRS offers several

As the petitioner has filed eight other employment-based petitions, USCIS must take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these other workers and intends to employ all eight of them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. We do not have specific information with regards to these other eight beneficiaries which the petitioner sponsored, i.e. we do not know the proffered wages and proffered job positions, but assuming that the proffered wage for each of these eight workers is the same as that for the beneficiary, the petitioner would be required to establish that it has the ability to pay an additional amount of \$161,324.80 per year in addition to the beneficiary's proffered wage of \$20,165.20 per year from 2001 to 2003 (for a total of \$181,486.80/year).

Given that the number of immigrant petitions reflects a significant increase of the petitioner's workforce, we cannot rely on a letter from the petitioner's in-house attorney referencing the ability to pay a single beneficiary. As we decline to rely on the petitioner's in-house's letter, we will examine the other financial documentation submitted.

A review of the petitioner's tax returns reflects that the petitioner had the following net income and net current assets for the years 2001 through 2003:

<i>Tax Year</i>	<i>Net Income (Loss)⁶ – in \$</i>	<i>Net Current Assets⁷ – in \$</i>	<i>Combined Proffered Wage – in \$</i>
2001	93,395	(196,822)	181,486.80
2002	43,620	(167,938)	181,486.80
2003	(185,131)	59,735	181,486.80

Therefore, the petitioner has failed to establish the ability to pay from 2001 to 2003.

In the RFE, the AAO specifically advised the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. §

different ways to get tax return information; the turnaround time for online and phone orders is typically five to 10 days.

⁶ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

⁷ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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103.2(b)(14). Without additional evidence as requested, the AAO cannot find that the petitioner has the continuing ability to pay the proffered wage of the current beneficiary and the other sponsored beneficiaries in any of the relevant years in this case.

The appeal will be dismissed, and the approval of the petition will remain revoked for the reason stated above. 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 not met that burden.

ORDER: The motion is granted; the matter is reopened and reviewed. Upon review the appeal is dismissed, and the approval of the petition remains revoked.