



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 06 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 that reads "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by 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. The director denied the petition accordingly.

As set forth in the director's April 8, 2008 denial, and the AAO's November 29, 2010 decision, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO determined that the petitioner had demonstrated its ability to pay the proffered wage for 2009, but had not submitted sufficient evidence to demonstrate that it had the ability to pay the proffered wage in 2005 and 2006. The AAO notes that the petitioner did not submit any evidence to establish its ability to pay the proffered wage in 2007 and 2008.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issue. Therefore, on motion the issue is whether or not the petitioner has provided evidence to establish its ability to pay the proffered wage for 2005, 2006, 2007, 2008, 2010, 2011, and 2012.

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.S. § 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.

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).

Here, the ETA Form 9089 was accepted on January 7, 2008. The proffered wage as stated on the ETA Form 9089 is \$11.77 per hour (\$24,481.60 per year). The ETA Form 9089 states that the position requires 24 months of work experience in the job offered.

The AAO conducts 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 upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2003 and that it currently employs six 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, the beneficiary does not claim to have been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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. 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 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. Comm. 1967).

As noted in the AAO's prior decision, the petitioner failed to submit evidence to establish its ability to pay the proffered wage to the beneficiary as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets for 2005 and 2006. It is further determined that the petitioner has not submitted any evidence to establish its ability to pay the proffered wage in 2007, 2008, 2010, 2011, and 2012.

On motion, the petitioner asserts that USCIS erred in not properly taking into account the totality of circumstances and assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. The petitioner asserts that it is an established restaurant, is expanding its business (including contracts with Amtrak) and can afford to hire additional employees and pay their wages. The petitioner also asserts that its revenue is increasing. The petitioner states that its business has an established reputation in that it has been featured on numerous local television

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

stations in the [REDACTED] area and that it has catered several high-profile events. The petitioner also states that the restaurant has been featured in several publications and submits as evidence a copy of a menu, newspaper articles, and website articles. The petitioner asserts that it has established its ability to pay the proffered wage with evidence previously submitted, and that the evidence submitted on motion establishes its reputation within the community.

Contrary to the petitioner's claims, the evidence in the record fails to demonstrate its ability to pay the proffered wage. Although the petitioner has established its reputation within the community as a restaurant, it lacks tax returns, wage statements, and/or audited financial reports to demonstrate its ability to pay the proffered wage in 2007 and 2008. In addition, the evidence fails to demonstrate through wages, net income, or net current assets the petitioner's ability to pay the proffered wage in 2005 and 2006.

The petitioner states that its income has steadily increased and that its gross receipts will continue to increase as a result of the business relationships and contract opportunities it has established with [REDACTED] and other business entities. Reliance on the petitioner's gross receipts is misplaced. Reliance on the petitioner's future receipts is misplaced. Showing that the petitioner's gross receipts are expected to exceed the proffered wage is insufficient. Furthermore, the petitioner has not shown through professional prepared financial documents that the increase and anticipated increase in income will be significant enough to allow it to pay the beneficiary's wage. Regardless, future projections of increased income are insufficient to demonstrate the petitioner's ability to pay the proffered wage in as of the priority date in 2005. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The record of proceeding contains the petitioner's unaudited financial statements for 2010. However, the petitioner's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner requests oral argument on the legal issues presented. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. §103.3(b). In this instance, the petitioner identified no unique factors or issues of law that need to be addressed and resolved orally. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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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. 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. The petitioner has an established metropolitan reputation, but considering the lack of financial documentation in support of the petitioner's ability to pay the proffered wage for the relevant years, the AAO does not find that the totality of the circumstances establishes the petitioner's ability to pay the proffered wage. The petitioner suggests that USCIS should consider the petitioner's anticipated business growth and increased profits in the future. While the petitioner may anticipate business growth and increased profits in the future, it still must show that it had such capacity beginning in 2005.

Accordingly, 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, it is also concluded that the petition is not supported by a *bona fide* job offer. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm'r 1986). Specifically, it appears from the evidence in the record that the beneficiary is the petitioner's owner's brother and that they share the same home address. Under 20 C.F.R. § 626.20(c)(8) and §656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l);

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.” *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000); *see also Keyjoy Trading Co.*, 1987-INA-592 (BALCA Dec. 15, 1987) (en banc).

Based on the relationship described above, and considering the evidence in the record relating to the employer and the job opportunity, the petitioner has failed to establish that the instant petition is based a *bona fide* job opportunity available to U.S. workers. Accordingly, the petition must also be denied for this reason.

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.

ORDER: The AAO’s prior decision, dated November 29, 2010, is affirmed. The petition remains denied.