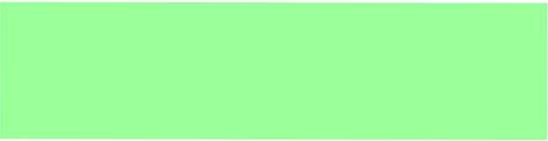


U.S. Department of Homeland Security
U. S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., NW, MS 2090
Washington, DC 20529-2090

(b)(6)



U.S. Citizenship
and Immigration
Services



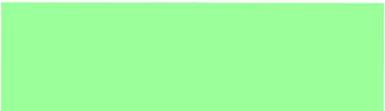
DATE: **MAY 06 2013**

OFFICE: NEBRASKA 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.

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 with the field office or service center that originally decided your case by filing a 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 the AAO dismissed the appeal. Counsel to the petitioner filed a Motion to Reopen and Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The AAO dismissed the motion. Counsel has filed another Motion to Reopen and Reconsider the AAO's previous decision.¹ The AAO will dismiss this motion.

Following a review of the petitioner's financial documentation including copies of the petitioner's federal income tax returns for 2002, 2003, 2004, 2005 and 2006, the director denied the petition on January 7, 2008 based on the petitioner's failure to establish its *continuing* ability to pay the proffered wage of \$26,187² per annum, pursuant to 8 C.F.R. 204.5(g)(2).³ The director noted that the petitioner had reported negative net income in 2002 and less than \$7,200 in net income in 2004.

¹ 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).

² The AAO notes that the priority date is July 11, 2002, and that the proffered wage should be \$22,913.80 since the work week stated on the Form ETA 750 is 35 hours per week, rather than 40 hours per week. (\$12.59 per hour x 35 hours x 52 weeks = \$22,913.80 per year).

³ Even if counsel's motions were approved, the AAO finds that the petition would remain denied. 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted in the director's decision, USCIS reviews actual wages paid to the beneficiary, as well as the net income figure and net current assets reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses, contrary to the assertions of the accountant's letter submitted on appeal. USCIS reviews a petitioner's ability to pay a proffered wage through the examination of wages paid to a beneficiary by the petitioner, the petitioner's net income or the petitioner's net current assets for a given period. 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, or as appropriate, its net current assets, 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 gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 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).

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 this case, the petitioner reported -\$22,857 in net income (Schedule K, line 23) in 2002; \$10,099 in net income in 2003 (Schedule K, line 23); \$6,832 in net income in 2004 (Schedule K, line 17e); \$22,361 in net income in 2005 (Schedule K, line 17e); and \$2,411 in net income in 2006 (Schedule K, line 2006). Except for 2005, the petitioner's net income could not cover the proffered wage of \$22,913.80 in any of the other years. Further, as noted by the director, although requested by the director, the petitioner submitted no evidence of compensation paid to the beneficiary by the petitioner. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Additionally, none of the years reflected sufficient net current assets to cover the proffered wage. Net current assets are the difference between current assets (lines 1 through 6 of Schedule L of the corporate tax return) and current liabilities (lines 16 through 18 of Schedule L) and represent a readily available cash or cash equivalent resource from which the petitioner may cover the proffered wage for a given period. In this case, the petitioner's net current assets of \$1,743 in 2002; -\$2,731 in 2003; -\$11,046 in 2004; -\$16,715 in 2005; and net current assets of -\$54,860 in 2006 were all not sufficient to cover the proffered wage or demonstrate the petitioner's ability to pay the proffered wage.

Counsel's assertion that USCIS should measure the ability to pay the proffered wage from the priority date of July 11, 2002 to July 11, 2003 is not persuasive in this case. USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. It is additionally noted that the federal tax returns submitted to the record measure the petitioner's fiscal year as a calendar year, not from a portion of a year beginning, i.e., July 11, 2002 to the following July 11th.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional

Through counsel, the petitioner filed an appeal on February 5, 2008. The petitioner indicated on Part 2, B of the Form I-290B, Notice of Appeal or Motion that a brief and/or additional evidence would be submitted to the AAO within 30 days. As stated in the AAO's dismissal of the appeal, the AAO received no additional brief or evidence, therefore the appeal was dismissed on July 20, 2009.

On August 12, 2009, counsel submitted a motion to reopen and reconsider the AAO's dismissal. With the motion, counsel states that his office submitted additional evidence in support of the appeal to U.S. Citizenship and Immigration Services (USCIS) by mail and enclosed a copy of a mail receipt dated February 26, 2008, addressed to the Nebraska Service Center. Counsel requests that the case be reopened and reconsidered. The AAO did not concur and dismissed this motion.⁴

Counsel has submitted another motion to reopen and reconsider, citing the same reasoning and claiming that the brief was submitted to the Service Center because the Service Center still had the case and it would have been illogical to send it to the AAO. It remains that USCIS regulations require that any appeal, motion or other documents must be filed at the location and executed in accordance with the instructions on the form, such instructions being hereby incorporated within

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

In this case, the Form ETA 750 was filed less than one month after the petitioner was established. Further, excepting 2005, none of the petitioner's tax returns' indicate the ability to pay the proffered wage of \$22,913.80 through either net income or net current assets. It is noted that the petitioner's accountant's letter proposes that depreciation expenses taken in 2002 be somehow added back to the petitioner's revenue. The AAO does not concur and no legal authority has been cited for this proposition. As noted above, depreciation will not be added back to the petitioner's net income. See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009). Further, despite the petitioner's expenses in its initial year as stated by its accountant, as noted herein, it elected to sponsor a foreign worker within a month of its creation and is subject to 8 C.F.R. § 204.5(g)(2) requiring the ability to pay the proffered wage be established from the priority date onward.

Based on the evidence in the underlying record and as submitted on appeal, the AAO cannot conclude that the factual circumstances are analogous to *Sonegawa* or establish a basis to approve the petition based on such unique circumstances that prevailed in that case.

⁴ USCIS regulations require that any appeal, motion or other documents must be filed at the location and executed in accordance with the instructions on the form, such instructions being hereby incorporated within chapter 1 requiring its submission. See 8 C.F.R. §103.2(a). In this case, Form I-290B provides that the petitioner may submit a brief and/or additional evidence to the AAO, not the Service Center, within 30 days of the appeal. The AAO never received any additional documentation and appropriately dismissed the appeal. The regulation at 8 C.F.R. § 103.3(a)(2)(vi) and (viii) provide that the affected party may request additional time to file a brief with the AAO and the AAO may, for good cause allow the affected party additional time to submit a brief. In such a case, the affected party shall submit a brief directly to the AAO.

chapter 1 requiring its submission. *See* 8 C.F.R. §103.2(a). In this case, Form I-290B provides that the petitioner may submit a brief and/or additional evidence *to the AAO*, not the Service Center, within 30 days of the appeal. The AAO never received any additional documentation and appropriately dismissed the appeal.

In view of the fact that no additional brief/and or evidence was submitted to its office within 30 days as indicated on the Form I-290B, the AAO dismissed the appeal.⁵ This decision was correct based on the evidence of record at the time. The petitioner's claim on both motions do not support reconsidering the dismissal because the petitioner failed to send the additional evidence to the correct office in accordance with the Form I-290B and regulations, and fails to show that the AAO's decision was an incorrect application of law or Service policy. Further, the petitioner's motion is not eligible to be treated as a motion to reopen because the petitioner does not show that the evidence was submitted to the required location within the allotted time period.

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.

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 sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed.

⁵ As indicated in the dismissal, the petitioner's brief statement in the notice of appeal, without more, does not provide a substantive basis for appeal. As noted in the AAO's dismissal and on the I-290B, the petitioner merely stated that it "is a viable, business entity that had and still has sufficient financial ability to pay or have paid the offered salary to the beneficiary through a combination of income, depreciation and assets." The director considered the petitioner's net income and net current assets and stated that there was no precedent that allowed consideration of depreciation. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009).