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



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 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 7, 2011, the Administrative Appeals Office (AAO) granted the motion to reopen but dismissed the appeal. The petitioner has now filed another motion to reopen. The motion will be granted and the appeal will be reopened. The appeal will be dismissed.

The petitioner is in the business of designing and manufacturing metal and iron works / ornamentals for special events, such as weddings, birthday parties, and so forth. It seeks to employ the beneficiary permanently in the United States as a designer, 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 an ETA Form 9089, Application for Permanent 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 from the priority date.

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, consistent with the decision in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) (*Sonogawa*). Specifically, counsel contends that the petitioner has the ability to pay if the AAO considers the good name or reputation of the business and the unforeseen spike in the cost of materials used to manufacture and produce the ornamental decorations.

To show that the petitioner has good reputation, counsel submits the following evidence:

- Letters of recommendation from the petitioner's clients and other businesses recognizing the uniqueness of the petitioner's artistic designs and products;
- Various pictures of the petitioner's art designs and products; and
- Various pictures depicting the petitioner's art designs and products prominently displayed in the wedding of [REDACTED] and [REDACTED]

To show that the petitioner suffered from unusual circumstances or had uncharacteristically substantial expenditures in 2006 and 2007 that parallel those in *Sonogawa*, counsel requests that the AAO consider the following evidence:

- A graphic chart entitled "Construction Cost Trends for 2007" showing the increase in the price of construction material, lumber, steel products, aluminum sheet, cement and concrete products, and copper;
- A graphic chart showing the fluctuations in the price of aluminum from 2002 to 2011;

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.

- An article published in December 2008 in *Pumps & Systems* indicating that the rate of acceleration of the cost of raw materials, including steel, iron ore, copper, and aluminum has reached unprecedented levels in the pump and rotating equipment industries in the past year;
- A table produced by U.S. Geological Survey showing production (sales), imports, exports, apparent consumption, and unit value (98\$/t) of iron and steel slag from 1993 to 2009; and
- A table produced by U.S. Geological Survey showing production (sales), imports, exports, apparent consumption, unit value (\$/t) and unit value (98\$/t) of iron and steel scrap from 1993 to 2009.

Referring to the graphic chart entitled “Construction Cost Trends for 2007,” counsel in his brief states the following about the price of raw materials from 2004 to 2006:

From 2004 to 2006, the price of copper rose 106% from January 2004 through December 2006. Aluminum rose nearly 30%. Steel rose 63% in that same time period.

The effect of this jump in material prices is reflected in Petitioner’s tax returns. The cost of “purchases” rose from \$144,177 (2005) to \$211,198 (2006) and \$278,076 (2007). These purchases include tubing, bars, brackets, solid metal ornamental details. These items are made from case iron, malleable iron, aluminum, bronze, stainless steel, and steel.

To demonstrate the ability to pay, the petitioner additionally submits the following evidence:

- Copies of the Internal Revenue Service (IRS) Forms 1120 U.S. Corporation Income Tax Return for the years 2004 through 2007;² and
- Copies of the IRS Forms W-2 Wage and Tax Statements issued by the petitioner to the beneficiary for the years 2008 through 2012.

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

² The AAO notes that the petitioner submitted copies of its 2004 and 2005 tax returns. However, the petitioner’s 2004-05 tax returns are for years prior to the priority date of the visa petition; and, therefore, have little probative value when determining the petitioner’s continuing ability to pay the proffered wage from the priority date of August 14, 2006. Therefore, the AAO will not consider the petitioner’s 2004-05 tax returns when determining the petitioner’s ability to pay the proffered wage, except when considering the totality of the circumstances affecting the petitioning business, if the evidence warrants such consideration.

(3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in this proceeding.³

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 re-reviewed.

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.

Considering the evidence submitted, we acknowledge that the petitioner is a viable business. However, we cannot sustain the appeal and approve the petition 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.

A review of the petitioner's tax returns reflects that the petitioner had the following net income and net current assets for the years 2006 and 2007:

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).

<i>Tax Year</i>	<i>Net Income (Loss)⁴ – in \$</i>	<i>Net Current Assets⁵ – in \$</i>	<i>The Proffered Wage – in \$</i>
2006	1,309	(27,107)	33,841.60
2007	8,961	(25,337)	33,841.60

On motion, counsel argues that the petitioner experienced unusual and unforeseen spike in the raw materials as evidenced by the increase in the costs of “purchase” in 2006 and 2007 as compared to 2005. Counsel submits various charts and articles intended to prove that the prices of various materials, i.e. steel products, aluminum, and copper, among other things, did significantly increase in 2006.

Counsel’s arguments are not persuasive. First, we note that the chart that counsel refers to in his brief – the one entitled “Construction Cost Trends for 2007” – is intended to demonstrate that the reason for the spike in 2006 is due to housing construction boom. It is not clear how the housing construction boom is relevant to the petitioner’s type of business. Second, we do not see how the increase in the price of raw construction materials affected the petitioner’s profitability.

In addition, we do not have the petitioner’s federal tax returns for the years 2008 onward to compare the purchases incurred in 2006 and 2007 and conclude that these were unusual and unforeseen. More importantly, we do not have any specific evidence demonstrating the accounting of the petitioner’s purchases in 2006 and 2007 that would have impacted its net income and/or net current assets. For the reasons stated above, we do not find that 2006 and 2007 were unusual years for the petitioner.

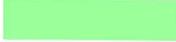
Although the beneficiary received more than the proffered wage of \$16.27/hour or \$33,841.60/year from 2008 to 2012,⁶ we nonetheless find that the petitioner have not established by a preponderance of the evidence that it has the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives his lawful permanent residence,

⁴ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120.

⁵ 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.

⁶ A review of the beneficiary’s Forms W-2 for 2008 through 2011 shows that the petitioner paid the beneficiary the following amounts: \$48,825 in 2008; \$37,755 in 2009; \$34,268.20 in 2010; \$34,365 in 2011; and \$33,877.50 in 2012.

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especially in 2006 and 2007. 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 reconsidered. Upon review the appeal is dismissed.