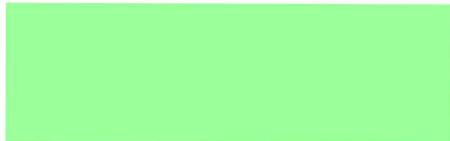




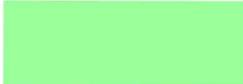
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAY 15 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

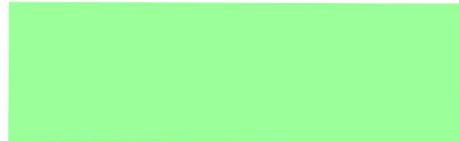
Petitioner:

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: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion will be granted, and the previous decision of the AAO, dated September 25, 2012, will be affirmed.

The petitioner describes itself as a “gold manufacturer.” It seeks to employ the beneficiary permanently in the United States as a jewelry designer. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification (labor 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.¹ The director denied the petition accordingly.

On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and that it further had failed to show that the beneficiary satisfied the minimum work experience requirements for the proffered position as set forth in the labor certification. Accordingly, the AAO, in a decision dated September 25, 2012, dismissed the petitioner’s appeal.

On October 24, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO’s decision. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner submits evidence to establish that it has the ability to pay the proffered wage. The record shows that the motion to reopen is properly filed and timely. Further, the motion provides new facts and is supported by documentary evidence. The motion to reopen is granted. However, as set forth below, following consideration, the petition remains denied and the AAO’s decision of September 25, 2012 is affirmed. The remaining procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the AAO’s previous decision, the issues in this case are: (1) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and (2) whether the beneficiary satisfies the minimum requirements for the proffered job stated in the labor certification.

¹ The director’s decision also noted that the tax returns in the record did not reflect the name of the petitioning business identified in the labor certification and Form I-140, Immigrant Petition for Alien Worker.

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. § 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 Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on September 21, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year. The Form ETA 750 states that the position requires four years of high school education, a bachelor's degree in art or design, and two years of experience as a jewelry designer.

The petitioner claims to be structured as a sole proprietorship.² On the petition, the petitioner claimed to have been established in 1998 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on September 21, 2001, the beneficiary claimed to work for the petitioner since January 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later

² The AAO notes that this assertion appears to be contradicted by the name of the petitioning business itself, which indicates that the petitioner is holding itself out to be an incorporated entity rather than a sole proprietorship as counsel claims.

based on the ETA 750, 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'l Comm'r 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'l Comm'r 1967).

In the instant case, the petitioner has failed to demonstrate its ability to pay the beneficiary the proffered wage. As indicated by the director, and by the AAO in its prior decision, the record does not contain any tax returns for the petitioning business, Gold Productions, Inc., the employer listed on both the labor certification and the Form I-140, Immigrant Petition for Alien Worker. The petitioner has proffered the income tax returns (IRS Form 1040) of the sole proprietor for the tax years 2001 through 2008, with the corresponding Schedule C for the sole proprietorship business for each year. Box "D" on Schedule C of the sole proprietor's tax returns does not reflect the federal employment identification number (EIN) for the business in any of those years. For the tax years 2001 and 2002, the name of the sole proprietorship listed on the Schedule C was [REDACTED], located at [REDACTED] Texas, which matches the employer information as listed originally on the labor certification. However, the Schedule C of the tax returns for 2003 through 2006 reflect a different business name, [REDACTED] located at [REDACTED] Texas,³ which is identical to the address on the Form I-140 and the amended address on the labor certification. For the years 2007 and 2008, the business listed on the Schedule C changed to [REDACTED] now located in Dallas, Texas.

The AAO noted previously that the petitioner had failed to show that [REDACTED] [REDACTED] are the same business as [REDACTED], the petitioner listed on the labor certification and Form I-140, or that they are its *bona fide* successors-in-interest. The AAO, therefore, determined that the petitioner had failed to establish that the tax returns in the record relate to its business, such that they may be used to establish its ability to pay.

The petitioner, on appeal, fails to address this issue entirely, although it was raised by both the director and the AAO. The petitioner must overcome inconsistencies in the record by competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the AAO observes that the beneficiary's IRS W-2 forms for the years 2001 through 2008 list his employer as [REDACTED] located at the same address originally set forth on the labor certification [REDACTED] Texas) and the same federal EIN as indicated for the petitioner

³ The DOL permitted an amendment of the labor certification to reflect the petitioner's new address at [REDACTED] Texas. However, we note that the labor certification does not reflect a corresponding change of the employer name to reflect either a new name or its successor-in-interest that would match any of the various business names listed on the Schedule C of the sole proprietor's tax returns in the record.

on the Form I-140. However, the record is unclear whether [REDACTED] are the same entity. As discussed above, the sole proprietor's tax returns do not indicate that the business possesses an EIN, changed its name, or underwent a corporate change. Additionally, even if the record demonstrated that [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the petitioner still failed to establish its ability to pay as the record contains no corresponding tax returns for that business from 2003 onwards.⁴

The AAO, thus, concludes that the petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for Gold Productions, Inc., or any successor-in-interest, for each year from the priority date onwards, as required by regulation at 8 C.F.R. § 204.5(g)(2), is sufficient cause to dismiss this appeal.

In its prior decision, the AAO set forth in detail, which will not be replicated here, its analysis of the petitioner's ability to pay, under the assumption that the tax returns in the record related to the petitioner. The AAO concluded that, if this assumption was accurate, the record may be sufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage for the tax years 2005 through 2008, however, it still failed to show the petitioner's ability to pay for the years 2001 through 2004.

Counsel's assertions on motion are limited to the AAO's adverse ability to pay determination for the years 2001 through 2004. Counsel appears to contend that the AAO erred in failing to apply the totality of the circumstances approach articulated in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967) in determining the petitioner's ability to pay the proffered wage. In support of the motion, counsel has submitted copies of invoices billed to [REDACTED] and duplicates of the sole proprietor's tax returns for 2001 through 2005, highlighting the increasing inventory of the business as reported on the Schedule C, Line 41, for each year to show that the company is "solvent and growing steady."

Contrary to counsel's contentions, once it was determined that the petitioner's net income and assets were insufficient to establish its ability to pay the proffered wage, the AAO, in its prior decision, then considered the overall magnitude of the petitioner's business activities, as reflected in the record of this proceeding, in determining whether the petitioner had the ability to pay the proffered wage, pursuant to *Sonogawa*. In doing so, the AAO concluded that the petitioner had failed to establish the historical growth of the business, the occurrence of any uncharacteristic business expenditure or losses, or its reputation in the industry. On motion, the record still lacks any evidence of the business' reputation or reliable evidence of its growth. The referenced growth in the business'

⁴ If in fact [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the existence of W2 forms it issued to the beneficiary from 2003 to 2008 would suggest that [REDACTED] are separate, unrelated businesses, such that their corresponding tax returns may not be used to satisfy the requirements of 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the beneficiary the proffered wage from 2003 through 2008.

inventory as reported in the 2001 to 2005 tax returns are not significant and do not necessarily correlate to a growth in the business or assets. A more accurate reflection of the business' assets would be found in an *audited* balance sheet, which is not part of the record. Unlike such balance sheets, the inventory figures reported in the tax returns are not balanced against any liabilities the business may have. Moreover, in direct contrast to the claimed growth of the business,⁵ the tax returns from 2001 through 2005 show significant and continuing decline in the gross receipts of the business, going from a high of \$273,807 in 2001 to only \$83,289 in 2005. Likewise, they show stagnant or declining net income for the business, and a steady decline in the wages paid by the business in those years. The AAO also observes again that the record demonstrates that the business' net income and assets are insufficient to establish the petitioner's ability to pay the beneficiary the proffered wage. Finally, the petitioner has failed to demonstrate that any of the tax returns in the record actually relate to the petitioning business indicated on the Form I-140, and has failed to offer a clear explanation for the discrepancies in the names and locations of the various businesses listed on the tax returns. Absent such information, the AAO cannot determine that *Sonegawa* should be favorably applied to the petitioner's case. Thus, again assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Counsel also argues that the AAO should assess the petitioner's ability to pay the proffered wage based on a "net sales to average assets ratio" and a "buoyancy of sales" ratio. Counsel does not demonstrate how these purported measures of profitability provide a realistic or more appropriate measure of the petitioner's ability to pay the proffered wage. No evidence was submitted to demonstrate that these ratios show the petitioner's sustainable ability to pay the proffered wage going. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Accordingly, the AAO concludes that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Lastly, in its September 2012 decision, the AAO noted that beyond the decision of the director, the petitioner had failed to meet its burden of proof to show that the beneficiary satisfied the minimum requirements of the proffered job as of the September 21, 2001 priority date. The labor certification in this case requires a minimum of two years of work experience as a jewelry designer to qualify for the proffered position. The beneficiary claims on the Form ETA 750 to have gained this experience

⁵ Presuming that the various aforementioned businesses reflected on the Schedule C in each of the tax years from 2001 through 2008 relate to the petitioning business indicated on the Form I-140, or its *bona fide* successors-in-interest, which the petitioner has not in fact addressed or established in this proceeding.

while employed by [REDACTED] Korea from February 1988 through July 1991. The “employment certificate,” dated November 30, 2006, submitted in support of this claimed work experience, however, indicates that the beneficiary was employed as an “Assistant Manager” in the “Jewelry Designer Department.” As noted by the AAO, the certificate failed to meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), as it did not include the name or title of the person preparing the certificate or a description of the beneficiary’s experience. Furthermore, it indicated that the beneficiary’s work experience was as an assistant manager, rather than in the proffered job position, as required.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). Accordingly, the AAO concluded that the petitioner had failed to establish that the beneficiary was qualified for the proffered position.

On motion, counsel does not address this issue raised by the AAO in its prior decision at all. Thus, even if the petitioner had established its ability to pay the proffered wage to the beneficiary, the petition must still be denied as the petitioner has not demonstrated that the beneficiary meets the minimum requirements of the proffered job.

In summary, the petitioner has not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; (2) whether a *bona fide* successor-in-interest exists, or that the petitioner has undergone a corporate name change; and (3) that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date.

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. The motion will be granted and the petition reopened. However, the AAO’s decision of September 25, 2012 is affirmed, and the underlying petition remains denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

ORDER: The motion is granted; the previous decision of the AAO dismissing the appeal, dated September 25, 2012, is affirmed, and the underlying petition remains denied.