

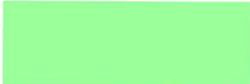
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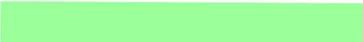
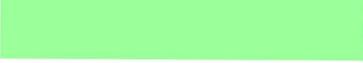
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



Date: **MAY 31 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)

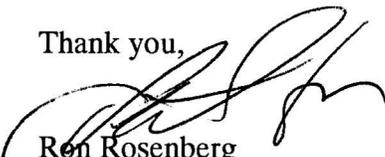
ON BEHALF OF PETITIONER:



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: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion reconsider. The AAO will grant the motion but affirm the previous decision of the director and the dismissal of the appeal. The petition remains denied.

The petitioner is a restaurant. It sought to employ the beneficiary permanently in the United States as a Korean cook.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to show that it had the continuing ability to pay the beneficiary the proffered wage² and denied the petition accordingly on April 30, 2008 and subsequently on October 28, 2008 in response to the petitioner's motion to reopen and reconsider.

The AAO dismissed the appeal on July 31, 2012, finding that the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) do not permit that a different employer, [REDACTED] is substituted for the original petitioner, [REDACTED] on the Form I-140 as requested by counsel.⁴ As noted in the record, counsel indicated that [REDACTED] is

¹ Section 203(b)(3)(A)(i) of the Act 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 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.

In this case, the priority date was established by the Form ETA 750 as December 18, 2001. The proffered wage as set forth on the Form ETA 750 is \$10.42 per hour, which amounts to \$21,673.60 per year. If an employment-based petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

³As indicated by the record, the petitioner's address is [REDACTED] CA 90715. The address of [REDACTED] is [REDACTED] CA 90501. They also have different federal employer identification numbers (FEINs) as shown on the tax returns.

⁴ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). An application or petition that fails to comply with the technical requirements of the law may be denied

not the successor-in-interest to the petitioner. An affidavit from the beneficiary also specifically stated that there was no relationship between the petitioner and [REDACTED]. Pursuant to this finding, the AAO determined that in reviewing the petitioner's ability to pay the proffered wage, it could not consider unrelated federal tax returns submitted by [REDACTED], individual tax returns of [REDACTED] and [REDACTED] who are shareholders of [REDACTED], or a 2007 tax return of [REDACTED], a company that the petitioner indicated is a sister company of [REDACTED]. The AAO concluded that the petitioner had not established its continuing ability to pay the proffered wage from the December 18, 2001, priority date onward.

Counsel has filed a motion reconsider. 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. Counsel reasserts that the substitution of [REDACTED] as the beneficiary's employer is authorized by AC21 in the adjudication of the Form I-140 proceeding. Additionally, based on this interpretation, counsel maintains that [REDACTED] documents show that the beneficiary was employed and paid by this company. The AAO accepts counsel's filing as a motion to reconsider, but for the reasons set forth below affirms the dismissal of the appeal.

American Competitiveness in the Twenty-First Century Act of 2000 (AC21)

As noted in its prior decision, the terms of AC21 are applicable in an Application to Register /Permanent Residence or Adjust Status (Form I-485) adjudication, not in the adjudication of the Form I-140. AC21 was passed by Congress in 2000 in order to benefit persons whose application for adjustment of status filed pursuant to section 245 had been filed and remained unadjudicated for 180 days or more. It provided that they should remain valid with respect to a new job if the person changes jobs or employers and if the new job were in the same or similar occupation. It was designed to provide job flexibility for applicants whose I-140 petitions had been approved but whose Form I-485 applications were not adjudicated in a timely fashion. *Matter of Al Wazzan*, 25 I&N Dec. 359 (Interim Dec. 3699) 2010 WL 45661296 (BIA), was initially decided by this office on January 12, 2005, and designated as an "adopted decision" of U.S. Citizenship and Immigration Services (USCIS). It was not designated as a precedent until October 20, 2010. It also involved the denial of a Form I-485 application. The AAO found that the portability provisions of AC21 did not require USCIS to consider unadjudicated Form I-140 petitions as "valid" merely because it was filed with USCIS and the alien's Form I-485 application had been pending for 180 days. A petition must have been filed for an alien who is "entitled" to the requested classification and that petition must have been "approved by a USCIS

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*, 299 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 at 145 (the AAO's *de novo* authority is well-recognized). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

officer. *See id.* at 363. On May 30, 2008, (prior to the director's last decision) USCIS issued supplemental guidance memorandum adopting the ruling in *Matter of Al Wazzan*. *See* Memorandum from Donald Neufeld, Acting Assoc. Dir. Of Domestic Operations, USCIS, *Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and IK-129 H-1B Petitions, and Form I-485 Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act (Public Law 106-313), as amended, and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C of Public Law 105-277* (May 30, 2008). It is noted that the court in *Ravulapalli et. al. v. Napolitano*, 773 F. Supp. 2d 41 (D.D.C. 2011) found *inter alia*, in a case involving the denial of applications to adjust status, not an I-140 proceeding, that the portability provisions of AC21 preserve the validity of only those Form I-140 petitions that have been approved.

In this case, the Form I-140 has never been approved. The AAO reaffirms its finding in its prior decision that the substitution of employers in this Form I-140 proceeding is not authorized by the terms of AC21, or by any successor-in-interest relationship.

Ability to Pay the Proffered Wage Pursuant to 8 C.F.R. § 204.5(g)(2)

As hereinabove noted, the regulation at 8 C.F.R. § 204.5(g)(2) obliges a petitioner to establish its ability to pay the proffered wage from the priority date onward until the beneficiary obtains permanent residence status. As this is not a case where a successor-in-interest relationship is argued, it may not be found that the petitioner has established its continuing ability to pay the proffered wage.

As set forth in the AAO's prior decision, the petitioner is structured as a sole proprietor, which is indistinguishable from the individual owner. Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

A copy of the sole proprietor's 2005 individual tax return was submitted to the record. The petitioner did not provide its federal tax returns or other regulatory-prescribed evidence of its ability to pay for 2001, 2002, 2003, 2004, 2006 or 2007. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The 2005 tax return (line 37) reflects that its reported adjusted gross income of that year was \$6,304. As set forth in the AAO's prior decision, the sole proprietor's adjusted gross income of \$6,304 could not cover payment of the proffered wage of \$21,673.60 in that year.

As explained above, the financial information relevant to [REDACTED] its shareholders or the sister company will not be considered as it is not the entity on the labor certification, or a successor entity. Therefore, from the priority date onward, the petitioner has failed to establish its continuing ability to pay the proffered wage.

Counsel refers to documents provided by [REDACTED] showing that the beneficiary was employed and paid by this entity in asserting that the AAO should look at the ability to pay the proffered wage in the context of *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As set forth in its prior decision, the documentation provided by [REDACTED] shall not be considered as it is not a successor-in-interest and is an unrelated entity to the petitioner. The petitioner provided no evidence analogous to the facts set forth in *Sonegawa*. The petitioner had minimal gross receipts and minimal wages paid to all employees in 2005. The petitioner provided no other regulatory-prescribed evidence pertinent to the other years under consideration. The AAO does not conclude that such unique and unusual circumstances as those which prevailed in *Sonegawa* merit an approval in this case.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Based on the foregoing and for the reasons set forth above and in the AAO's prior decision, the AAO does not conclude that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

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 to reconsider is granted. The prior decision of the AAO, dated July 31, 2012 is affirmed. The petition remains denied.