



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: OCT 10 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [Redacted]

IN RE:

Petitioner:

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:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a microbiology and immunology laboratory testing business. It seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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.

On March 18, 2013, the AAO dismissed the appeal, holding that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The petitioner then filed the instant motion to reconsider the AAO decision. The instant motion is granted. The 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.

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.

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.

As noted in the AAO's prior decision, 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). Here, the Form ETA 750 was accepted on September 2, 2004. The proffered wage as stated on the Form ETA 750 is \$25.51 per hour (\$53,060.00 per year based on 40 hours per week).

In the AAO's March 18, 2013 decision, we specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of Internal Revenue Service (IRS) Form W-2s from 2006 through 2008 and 2011 and pay stubs for 2009 and 2012. The AAO's decision stated that the

petitioner demonstrated its ability to pay the proffered wage in 2011. In addition to Forms W-2 stating wages paid by the petitioner to the beneficiary of \$22,480.00 in 2006, \$41,090.00 in 2007, \$46,640.00 in 2008 and pay stubs stating wages paid by the petitioner to the beneficiary of \$1,892.00 in 2009 and \$45,698.00 in 2012, the petitioner's 2004 IRS Form 1120 states net income of \$106,188.00 and net current assets of -\$112,300.00, its 2005 Form 1120 states net income of \$5,059.00 and net current assets of -\$100,678.00, its 2006 Form 1120 states net income of -\$43,965.00 and net current assets of -\$129,370.00, its 2007 Form 1120S states net income of -\$44,402.00 and net current assets of \$25,510.00, its 2008 Form 1120S stated net income of \$30,030.00 and net current assets of -\$16,959.00.

Although the petitioner's net income or net current assets were higher than the proffered wage or difference between the actual wage paid and the proffered wage in 2004, 2007, and 2008, we were unable to conclude that the petitioner demonstrated its ability to pay the proffered wage in these years because USCIS records indicate that the petitioner filed another Form I-140 petition and the petitioner submitted no evidence about the proffered wages for the beneficiary of that other petition, about the current immigration status of the beneficiary, whether the beneficiary has withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offer to the beneficiary, the current employment status of the beneficiary, the date of any hiring, and any current wage of the beneficiary.

The previous AAO decision also considered counsel's argument that officer compensation should be considered in the calculation of whether the petitioner demonstrated its ability to pay the proffered wage. The decision noted that the petitioner did not submit any specific information corroborating this claim made by counsel on appeal, including Forms W-2 issued by the petitioner to any of its officers or statements from any of the petitioner's officers verifying that they would be willing and able to forego such compensation. Further, the petitioner's 2006, 2007, and 2008 tax returns do not reflect any amount of officer's compensation paid in those years (page 1, Line 12). The petitioner submitted no evidence on motion to address this point.

On motion, the petitioner submitted additional Forms W-2 demonstrating the following wages paid:

- The 2009 IRS Form W-2 states wages paid to the beneficiary of \$45,936.00.
- The 2010 IRS Form W-2 states wages paid to the beneficiary of \$49,776.50.
- The 2012 IRS Form W-2 states wages paid to the beneficiary of \$60,698.00.

This additional evidence establishes the petitioner's ability to pay the proffered wage in 2012 alone. The petitioner submitted no evidence concerning the additional sponsored worker or any wages paid, so the evidence in the record is insufficient to establish the petitioner's ability to pay the proffered wage in any other year or any other factor that would demonstrate its ability to pay the proffered wage in 2006, 2007, 2008, 2009, and 2010.¹

¹ The Form I-290B Notice of Appeal or Motion filed for the instant motion to reconsider states that a brief will be submitted in 15 days. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) requires that any

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 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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 the instant case, the petitioner submitted no new reliable evidence concerning its ability to pay the proffered wage from 2006 through 2008. The new Forms W-2 submitted do establish the petitioner's ability to pay in 2011, however, the petitioner must demonstrate its ability to pay the proffered wage in each year from the priority date onwards. No evidence in the record establishes the petitioner's ability to pay the proffered wage for 2006 through 2010. As stated in the previous AAO decision, between 2004 and 2011, the petitioner's gross sales dropped by approximately 66 percent, the petitioner's officer compensation payments dropped by approximately 59 percent, and the petitioner's payroll costs dropped by approximately 48 percent. The petitioner submitted information regarding the reputation of Dr. [REDACTED] the petitioner's CEO and Technical Director, in the medical community, including a printout from the petitioner's website. However, the petitioner failed to explain how Dr. [REDACTED]'s reputation actualized the petitioner's ability to pay from the priority date and subsequently. In addition, the foundation date listed by Dr. [REDACTED] differs from the date listed by the petitioner on Form I-140 and on its tax returns. The petitioner submitted no evidence to resolve this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) ("It is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.")

brief be submitted contemporaneously with the motion. In any event, no brief was submitted at any time in support of the instant motion.

Thus, 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.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider is granted and the decision of the AAO dated March 18, 2013 is affirmed. The petition remains denied.