

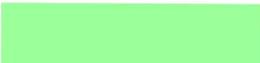


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 17 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 (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 preference visa petition was denied by the Director, Nebraska Service Center (the director), and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion to reconsider will be granted, a portion of the previous decision of the AAO will be withdrawn and the dismissal affirmed in part, and the petition will remain denied.

The petitioner is a [REDACTED] franchise. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL).¹ The director determined that the petitioner did not submit the requisite evidence to show that it had the ability to pay the proffered wage or that the beneficiary possessed the education and experience required by the terms of the labor certification. The director denied the petition accordingly.

On appeal, the AAO affirmed the director's finding that the petitioner failed to establish its ability to pay or that the beneficiary has the education and experience as required by the terms of the labor certification.

The record shows that the motion is properly filed, timely and makes a specific allegation of error in law or fact. 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.² On motion, counsel submits a brief, a letter from the Internal Revenue Service (IRS) regarding the petitioner's Federal Employment Identification Number (FEIN), IRS Wage and Income Transcripts and Account Transcripts for the beneficiary, IRS Account Transcripts for the petitioner, copies of another labor certification application submitted on behalf of the petitioner and certified by the DOL and copies of documentation already in the record.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(3) Requirements for motion to reconsider.

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. A motion to reconsider a decision on

¹ The petitioner submitted two Forms I-140 for the beneficiary relying on the same ETA 750. The first petition was submitted on February 21, 2008 ([REDACTED]) resulting in a denial dated January 21, 2009. The second Form I-140 ([REDACTED]) was filed March 6, 2009 and is the basis for the instant appeal.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). While the petitioner did not comply with regulations governing motions, which require the submission of any documentation with the motion, the AAO will consider the documents newly submitted subsequent to motion.

an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

On motion, counsel contends that the petitioner met its burden of proof in showing that it had the ability to pay the proffered wages along with copies of financial and business documentation to overcome inconsistencies noted in the AAO's decision. Counsel contends that the beneficiary's education and experience met the minimum requirements of the labor certification. The motion therefore meets the requirements for a motion to reconsider.

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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$550 per week (\$28,600 per year).

The evidence in the record shows that the petitioner was structured as a C corporation in 2001 and elected to be an S corporation in 2002. On the petition, the petitioner stated it was established on March 15, 1993 and currently employs 12 workers. On the Form ETA 750B, signed by the beneficiary on April 25, 2001, the beneficiary stated that he began working for the petitioner in May 2000.

As discussed in the AAO's decision, the IRS Forms W-2, Wage and Tax Statements issued to the beneficiary and the Forms 1120S the petitioner wished to utilize to establish its ability to pay were issued by and belonged to a business by the name of [REDACTED]. The AAO found that the petitioner failed to establish any relationship between the petitioner, [REDACTED]. The AAO found that it could not accept the Forms W-2 and Forms 1120S as evidence of the petitioner's ability to pay the proffered wage because the FEIN listed for the petitioner on the Forms I-140 did not match the FEIN on the Forms W-2 and Forms 1120S.

On motion, counsel contends that the FEIN listed on the Forms I-140 are due to the attorney's error and states that [REDACTED] and the petitioner are one and the same. In support of his contentions, counsel submits a letter from the IRS stating that [REDACTED] located at [REDACTED] Illinois, was issued FEIN [REDACTED] in 1993.³ Counsel also submits IRS Wage and Income Transcripts for the beneficiary from 2003 through 2012 reflecting that the beneficiary received wages from [REDACTED] in the same amounts reflected on the Forms W-2 submitted below and an IRS Account Transcript for the beneficiary in 2002. Counsel also submitted IRS Account Transcripts for the petitioner for 2001 and 2003 through 2012, reflecting that the petitioner reported ordinary business income matching the amounts set forth on the Forms 1120S submitted below. Despite the varying home addresses listed on the beneficiary's Forms W-2, the AAO is inclined to accept the overwhelming official evidence from the IRS that [REDACTED] is the petitioner. The AAO finds that the petitioner has resolved any inconsistencies in the record regarding its FEIN by independent, objective evidence and withdraws its finding that it could not accept the Forms W-2 and Forms 1120S submitted below.⁴ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As advised in the AAO's decision, USCIS electronic records show that the petitioner filed one other Form I-140 petition which has been pending during the time period relevant to the instant petition. Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). The other petition was submitted by the petitioner on August 16, 2007. It has a priority date of January 21, 2005 and was approved on January 21, 2009. On motion, the petitioner submits a copy of the labor certification certified by the DOL for the other Form I-140. The labor certification reflects that the other Form I-140 has a proffered wage of \$24,000.00 and counsel makes no claims as to whether the beneficiary of the other Form I-140 has ever been employed or paid by the petitioner during the relevant years. Therefore, the petitioner must demonstrate its ability to pay the proffered wage to the instant beneficiary from the April 2001 priority date onward, and for the two (2) other beneficiaries (\$52,600.00) from 2005 to the present.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record includes IRS Forms W-2

[REDACTED] matches the FEINS listed on the Forms W-2 and Forms 1120S submitted below.

⁴ It is noted that the a 2001 W-2 issued to the beneficiary by another Dunkin Donuts under a different FEIN and address will not be accepted as evidence of the petitioner's ability to pay the proffered wage.

issued by the petitioner to the beneficiary in 2001-2003 and 2007-2012. The below table reflects the amounts paid to the beneficiary by the petitioner, whether the payment to the beneficiary was partial, the difference between the actual wages paid and the proffered wage and the total amount of proffered wages (including the proffered wage of \$24,000.00 for the beneficiary of the other Form I-140) the petitioner must establish it had the ability to pay during the relevant years:

<u>Year</u>	<u>W-2 Wage</u>	<u>Balance Due to Instant Beneficiary</u>	<u>Other I-140 Proffered Wage</u>	<u>Total Remaining Balance</u>
2001	\$30,451.76	\$0.00	\$0.00	\$0.00
2002	\$34,183.34	\$0.00	\$0.00	\$0.00
2003	\$53,244.00	\$0.00	\$0.00	\$0.00
2004	None reported	\$28,600.00	\$0.00	\$28,600.00
2005	None reported	\$28,600.00	\$24,000.00	\$52,600.00
2006	None reported	\$28,600.00	\$24,000.00	\$52,600.00
2007	\$19,228.15	\$9,371.85	\$24,000.00	\$33,371.85
2008	\$28,350.00	\$250.00	\$24,000.00	\$24,250.00
2009	\$36,852.00	\$0.00	\$24,000.00	\$24,000.00
2010	\$41,400.00	\$0.00	\$24,000.00	\$24,000.00
2011	\$47,026.00	\$0.00	\$24,000.00	\$24,000.00
2012	\$51,974.00	\$0.00	\$24,000.00	\$24,000.00

Therefore, for the years 2001 through 2003 and 2009 through 2012, the petitioner has established that it employed and paid the beneficiary at least the proffered wage. The petitioner has established that, for the years 2007 and 2008, it employed and paid the beneficiary partial wages. Since the proffered wage is \$28,600.00 per year, the petitioner has to establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2007 and 2008. For the years 2004 through 2006, the petitioner has not established that it employed and paid the beneficiary the full or partial proffered wage.

The record before the director closed on October 23, 2009 with the receipt by the director of the petitioner's submission in response to the Request for Evidence (RFE). As of that date, the most current tax return available was the petitioner's 2008 federal tax return. The petitioner submitted additional tax records with the instant motion. The record contains the following:

- In 2001, a Form 1120⁵ stated net income of \$44,752.
- In 2002, a Form 1120S stated net income⁶ of \$2,775.

⁵ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments

- In 2003, a Form 1120S stated net income of \$48,256.
- In 2004, a Form 1120S stated net income of \$81,744.
- In 2005, a Form 1120S stated net income of \$120,584.
- In 2006, a Form 1120S stated net income of \$203,866.
- In 2007, a Form 1120S stated net income of \$62,953.
- In 2008, a Form 1120S stated net income of \$112,544.
- In 2009, a tax transcript stated net business income⁷ of \$113,460.
- In 2010, a tax transcript stated net business income of \$118,849.
- In 2011, a tax transcript stated net business income of \$116,468.

Therefore, in 2001 through 2004 and 2009 through 2012, the petitioner has established that it paid the beneficiary at least the proffered wage and had sufficient net income to pay the beneficiary of the other Form I-140 the proffered wage of \$24,000.00 for 2008 through 2012. In 2007 and 2008, the petitioner has established that it paid the beneficiary partial wages and had sufficient net income to pay the beneficiary of the other Form I-140 the proffered wage of \$24,000.00 and the difference between the actual wages paid the beneficiary and the proffered wage. In 2005 through 2006, the petitioner established that it had sufficient net income to pay the instant beneficiary and the beneficiary of the other Form I-140 the total proffered wages.

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. 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

from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2002-2003), line 17e (2004-2005), or line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 11, 2011) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for all of the years at issue, the petitioner's net income is found on Schedule K for all years.

⁷ Net business income reflected on the tax transcript does not account for an S corporation's income, credits, deductions or other adjustments from sources other than a trade or business, as reported on Schedule K.

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.

In the instant case, the petitioner has been in business since 1993 and the financial records for the business reflect growth in sales and net income over the years. Further, the petitioner has demonstrated that it paid the beneficiary at least the proffered wages in 2001 through 2004 and 2009 through 2012, and had sufficient net income to pay the beneficiary and the beneficiary of the petitioner's other Form I-140 immigrant petition for 2005 through 2008. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage. The AAO's finding to the contrary is withdrawn.

On motion, counsel contends that the beneficiary meets the minimum requirements for the proffered position.

It is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

The Form ETA 750 requires eight years of grade school,⁸ three years of high school, and two years of experience as a baker with the following specific job description:

Mixing, forming and frying dough to produce doughnuts according to work order. Glaze doughnuts using hand dipper, roll dough with rolling pin and form doughnuts with hand cutter. Lower wire tray of uncooked doughnuts into fryer, using hooks. Tend automatic equipment that mixes, cuts and fries doughnuts, weigh cut dough and fried doughnuts to verify weight specifications. Adjust controls of equipment accordingly.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The Form ETA 750B states that the beneficiary attended [REDACTED] from September 1985 to June 1992, and that he attended [REDACTED] from September 1992 to June 1996. It also states

⁸ The petitioner provided a School Leaving Certificate issued by the [REDACTED] Committee indicating that the beneficiary attended seven years of primary school at [REDACTED] from July 7, 1986 to May 31, 1993.

that the beneficiary worked at [REDACTED] Michigan from April 1998 to May 2000, and that he worked at [REDACTED] Illinois from May 2000 to the date he signed the Form ETA 750B on April 25, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record contains a Leaving Certificate from [REDACTED] stating that the beneficiary attended its school from June 15, 1993 to February 27, 1997⁹ and a Leaving Certificate from [REDACTED] Balol stating that the beneficiary attended the school from June 15, 1995 to April 9, 1996. The record also contains a School Leaving Certificate stating that the beneficiary attended [REDACTED] from June 15, 1993 to May 29, 1995,¹⁰ a Leaving Certificate from [REDACTED] Balol stating the beneficiary attended the school from June 15, 1995 to April 9, 1996, and a Leaving Certificate from [REDACTED] stating that the beneficiary attended from July 22, 1996 to April 8, 1997. As advised in the AAO's decision, the beneficiary's Form I-485 and prior and current Form I-140 are inconsistent regarding the beneficiary's education documentation in that they reflect that the beneficiary resided in the United States at the time the claimed education was gained. Additionally, the AAO noted that the leaving certificates from [REDACTED] listed different pupil numbers for the beneficiary and different leaving dates. On motion counsel references the beneficiary's affidavit, dated February 9, 2010, stating that "the reference to July 1996 as the date of [his] entry into the United States on [the Form I-485] is a typographical mistake." As noted in the AAO's decision, the beneficiary's affidavit is self-serving and does not provide independent,

⁹ The handwritten certificate from [REDACTED] references the [REDACTED]

¹⁰ The typewritten certificate from [REDACTED] references the [REDACTED]. It is unclear why the two certificates from [REDACTED] list different pupil numbers and different leaving dates. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

objective evidence of his prior education. *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)). On motion, counsel contends that the beneficiary entered without inspection and is therefore unable to provide proof of his entry into the United States. However, such contentions do not offer an explanation as to why the beneficiary's education documents reflect varying leaving dates and pupil numbers or that the beneficiary does not have 8 years of grade school. Even if counsel were able to provide independent and objective evidence of the beneficiary's entry into the United States in July 1997, the AAO finds that the inconsistencies on the beneficiary's education documents call into question whether the beneficiary has the required education. Further, as noted in the AAO's decision, the information submitted on appeal conflicts both with the information provided by the beneficiary on the Form ETA 750B and the documents submitted with the petition. The petitioner has not resolved the inconsistencies in the record with independent, objective evidence and, therefore, the petitioner has not established that the beneficiary has the required education for the proffered position.

As noted in the AAO's decision, the experience letter in the record did not comply with 8 C.F.R. §204.5(l)(3) and the self-serving affidavit of the beneficiary did not establish that the beneficiary had two (2) years of experience in the proffered position. The AAO noted that the petitioner submitted no evidence verifying that the beneficiary lived in or around [REDACTED] Michigan so as to corroborate the experience letter and that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The AAO found that, as in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* On motion, counsel contends that the beneficiary has not submitted independent, objective evidence to support the experience letter and his affidavit because he entered the United States without inspection and did not have valid documentation to work in the United States. However, on motion the petitioner has not established that, based on the record before the AAO on appeal, the beneficiary has the required two years of experience in the job offered. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider is granted. Upon reconsideration, the AAO's decision, dated May 30, 2013, is withdrawn in part and affirmed in part. The petition will remain denied.