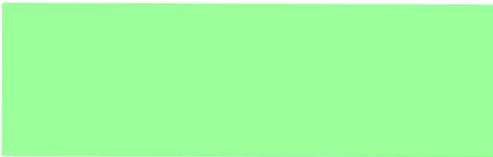


(b)(6)

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

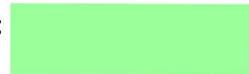


U.S. Citizenship
and Immigration
Services



DATE: OCT 28 2013

OFFICE: NEBRASKA SERVICE CENTER FILE:

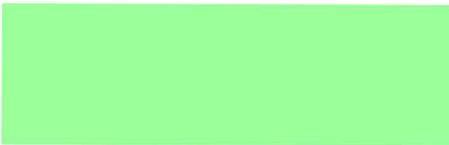


IN RE: Petitioner:
Beneficiary:



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 Director, Nebraska Service Center, denied the immigrant visa on August 20, 2011. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 9, 2013, the AAO dismissed the appeal. The petitioner has filed a motion to reconsider.¹ The AAO will grant the motion but affirms its prior decision of March 9, 2013. The appeal will remain dismissed. The petition will remain denied.

The petitioner is a construction company. It sought to employ the beneficiary permanently in the United States as a drywall installation mechanic.² As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director denied the petition on August 20, 2011, concluding that the petitioner had failed to establish its continuing financial ability to pay the proffered wage. On March 9, 2013, the AAO dismissed the appeal³ and affirmed the director's denial, determining that the petitioner had failed to demonstrate that it has the continuing ability to pay the proffered wage.⁴

The petitioner has filed a motion to 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

¹The petitioner has submitted a Form I-290B, Notice of Appeal or Motion. Part 2.A of the Form I-290B indicates that the petitioner is filing an appeal. The AAO, however, does not exercise appellate jurisdiction over its own decisions. The AAO only exercises appellate jurisdiction over matters that were specifically listed in the regulation at 8 C.F.R. § 103.1(f)(3)(iii).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv). The AAO has no jurisdiction over a filing designated as an appeal of a prior appellate decision of the AAO. However, because the cover letter accompanying the filing characterizes it as a request for reconsideration, the AAO will treat the filing as a motion to reconsider.

² 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.

³ 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.

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).

on the evidence contained in the record at the time of the initial decision. Included with the motion, the petitioner submits additional evidence related to the petitioner's ability to pay the proffered wage.

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 establish that its job offer to the beneficiary is a realistic one. Because the filing of anm ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the approved labor certification, 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. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as shown on the ETA Form 9089, the priority date is October 21, 2009.⁵ The proffered wage is \$20.56 per hour, which amounts to \$42,764.80 per year, based on 40 hours per week.

As found in the AAO's previous decision of March 9, 2013, neither the petitioner's net income of \$33,133 in 2009 nor its net current assets of -\$60,072 could establish the ability to pay the proffered wage in that year. Similarly, in 2010, neither the petitioner's net income of \$9,270, nor its net current assets of -\$25,307 could demonstrate its ability to pay the proffered wage in that year.

⁵If the 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 *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear.

In the AAO's decision, it was recognized that the petitioner claimed paying the beneficiary \$77,946.20 in 2009 and \$90,968.00 in 2010, which were asserted to be included in payments made to subcontractors⁶ as reflected on the petitioner's tax returns, however the record did not contain any Forms W-2s, 1099s or other documentation that would corroborate that the wages were paid to the beneficiary individually.

On motion, the petitioner, through counsel, submits a declaration from the beneficiary's wife stating that she formed a company in 2005 because the beneficiary had no social security number or work authorization. She additionally stated that this company, [REDACTED] pays the beneficiary for drywall work and that [REDACTED] provides drywall services to the petitioner. Two declarations from the petitioner's vice-president and the beneficiary also state that the petitioner pays [REDACTED] for drywall services. The petitioner's vice-president claims that the work was solely performed by the beneficiary. Submitted with the motion are copies of various Form 1099s, including a Form 1099 issued in 2009 by the petitioner to [REDACTED] for \$77,946.20, a 2011 Form 1099 issued by the petitioner to [REDACTED] for \$53,022.25, and a Form 1099 issued by the petitioner in 2012 to [REDACTED] for \$78,833.68. For 2010, however, the only Internal Revenue Service documentation submitted is one page of an unidentified tax return with a notation of \$99,164 and the petitioner's name. This is not sufficient to identify the nature and kind of work performed. Moreover, the amount exceeds the vice-president's previous declaration that \$90,968 was earned by the beneficiary in 2010. It is noted that no tax returns filed by [REDACTED] have been submitted. Further, as raised by the AAO in its prior decision, if the beneficiary has been a subcontractor of the petitioner and earned close to 50% more in compensation than the proffered wage in 2009 and 2010, it is not clear whether the beneficiary, or others working at his direction at the petitioner's job site, may have performed services for the petitioner other than as a drywall installer.

As the record stands, the petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The burden of proof in these proceedings rests solely with the petitioner. The petitioner has not met that burden. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The motion to reconsider is granted. The prior decision of the AAO, dated March 9, 2013 is affirmed. The petition remains denied.

⁶A labor certification can not be granted to an employer who intends to employ an alien as an independent contractor. *See* 20 C.F.R. § 656.3.