



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **SEP 27 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

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:

INSTRUCTIONS

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 initially approved by the Director, Nebraska Service Center. In a December 28, 2009 Notice of Revocation (NOR), the director ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The petitioner appealed the director's revocation to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on May 24, 2013. 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 travel agency. It seeks to employ the beneficiary permanently in the United States as a systems analyst/programmer, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).<sup>1</sup> As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). On December 28, 2009, 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 revoked the approval of the petition accordingly. On May 24, 2013, the AAO dismissed the appeal, finding that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

The record shows that the motion to reconsider is properly filed and timely. The motion to reconsider qualifies under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that "the AAO erred in not considering that the job offer to the beneficiary is a realistic and bona fide one as the petitioner has the financial ability to pay the offered wages of the beneficiary." Counsel contends that the petitioner has the financial ability to pay the proffered wage as its net income is in excess of the beneficiary's proffered wage. Counsel asserts that "[E]ven if the petitioner's income is not sufficient for the year 2001 alone, its succeeding income and reputation in the business should have been considered by the AAO to show financial ability pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612." However, as set forth below, following consideration of the record on motion, the petition remains denied and the AAO's decision of May 24, 2013 is affirmed.

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 appeal.<sup>2</sup>

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<sup>1</sup> 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 Immigration and Nationality Act (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.

<sup>2</sup> The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). No

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.

As set forth in the AAO's previous decision, an issue in this case is 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.

The regulation 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 25, 2001. The proffered wage as stated on the Form ETA 750 is \$87,297.60 per year. The Form ETA 750 states that the position requires six (6) years of grade school, six (6) years of high school, four (4) years of college with a Bachelor's degree in computer science/mathematics, and two (2) years of experience in the job offered as a systems analyst/programmer.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation.<sup>3</sup> On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$41,701,537, and to employ 29 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 12, 2001, the beneficiary claimed to have worked for the petitioner in the position offered from April 2000 to the present.

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additional evidence was submitted on motion.

<sup>3</sup> It is noted that for 2004 the petitioner filed a Form 1120S, U.S. Income Tax Return for an S corporation.

In its May 24, 2013 decision, the AAO determined that: the record failed to contain any Forms W-2 or other evidence of wages paid to the beneficiary by the petitioner, with the exception of the beneficiary's pay stubs issued by the petitioner in the amount of \$52,600 in 2005;<sup>4</sup> the petitioner failed to establish its ability to pay the proffered wage to the instant beneficiary and the beneficiaries of its other Form I-140 petitions in 2001 through 2004 out of its net income; the petitioner failed to establish its ability to pay the proffered wage from 2001 through 2004 out of its net current assets; and the petitioner failed to establish its ability to pay the proffered wage under a totality of the circumstances analysis. Accordingly, the AAO concluded that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, net current assets, or a totality of the circumstances analysis.

On motion, counsel asserts that the petitioner has the financial ability to pay the proffered wage as the petitioner's net income is in excess of the beneficiary's proffered wage, with the exception of year 2001. However, in its May 24, 2013 decision, the AAO stated that the petitioner's Form 1120 tax returns demonstrate its net income<sup>5</sup> as \$114,635 in 2001, \$65,295 in 2002, and \$68,293 in 2003, and the petitioner's Form 1120S stated its net income as \$91,901 in 2004. While the petitioner's net income was greater than the proffered wage in 2001 and 2004, the petitioner failed to establish its ability to pay the proffered wage in 2002 and 2003 through its net income.

The AAO also stated that USCIS records indicate that the petitioner filed at least 63 additional petitions since the petitioner's establishment in 1995, including 43 I-129 petitions, and 20 I-140 petitions. Under the circumstances, the petitioner must demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715. The petitioner did not submit evidence of its total immigrant and nonimmigrant wage obligations, wages paid to each of its immigrant and nonimmigrant beneficiaries, or otherwise establish its capacity to meet these wage obligations. Therefore, the AAO determined that the petitioner failed to establish its ability to pay the proffered wage to the instant beneficiary and the beneficiaries of the other numerous petitions from 2001 onward out of its net income, as well as its net current assets.<sup>6</sup>

<sup>4</sup> The record of proceeding fails to contain the beneficiary's Form W-2 for 2005. On motion, the petitioner did not provide any Forms W-2 for the beneficiary from 2001 onward. No additional paystubs were provided from before or after 2005.

<sup>5</sup> 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, and Line 21 of the Form 1120S, U.S. Income Tax Return for an S Corporation.

<sup>6</sup> The petitioner's Form 1120 tax returns for 2001 through 2003 and Form 1120S tax return for 2004 demonstrate its end-of-year net current assets as \$28,109, \$102,952, \$427,110, and \$456,273, respectively. Therefore, for the year 2001, the petitioner failed to establish that it had sufficient net current assets to pay the proffered wage. Moreover, as previously discussed in the AAO's May 24, 2013 decision, the petitioner filed 63 petitions since the petitioner's establishment in 1995, including

On motion, counsel asserts that, based on the director's December 28, 2009 decision, the director computed the total proffered wage to be \$286,811, and "these are the only beneficiaries whose petitions are currently pending before the Service at the time [the] instant petition was denied by the Service." As stated in the AAO's prior decision, the director listed the proffered wages of four petitions filed by the petitioner, totaling \$286,811. However, the director also noted that USCIS is aware of other beneficiaries that are not included in this calculation. As stated in the AAO's prior decision, USCIS records indicate that the petitioner filed at least 63 additional petitions since the petitioner's establishment in 1995, including 43 I-129 petitions, and 20 I-140 petitions. Therefore, the petitioner must demonstrate its ability to pay all of the beneficiaries' proffered wages, which is more than \$286,811.

On motion, counsel asserts that the petitioner need only demonstrate its ability to pay the proffered wages of petitions pending before the Service "at the time [the] instant petition was denied by the Service." On the contrary, the petitioner must demonstrate its ability to pay the proffered wages of all of its beneficiaries from the instant priority date until the beneficiaries obtain permanent residence, not from the time the instant petition was denied. See 8 C.F.R. § 204.5(g)(2). Notwithstanding, on prior appeal and on motion, the petitioner failed to provide the required information<sup>7</sup> in regard to the other individuals on whose behalf the petitioner has filed I-140 and I-129 petitions, preventing the AAO from analyzing whether the petitioner has the ability to pay the proffered wages of the instant beneficiary and all other beneficiaries from the instant priority date onwards. Therefore, the petitioner has failed to overcome the AAO's previous findings. In any future filings, it is incumbent upon the petitioner to submit documentation regarding all of the other individuals on whose behalf the petitioner has filed I-140 and I-129 petitions, which were active from the instant priority date onward.

On motion, counsel also asserts that "[E]ven if the petitioner's income is not sufficient for the year 2001 alone, its succeeding income and reputation in the business should have been considered by the AAO to show financial ability pursuant to *Matter of Sonogawa*." As discussed in the AAO's previous decision, 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

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43 I-129 petitions, and 20 I-140 petitions, which the petitioner has failed to provide required information. Therefore, the AAO concluded that petitioner failed to establish its ability to pay the proffered wage from 2001 through 2004 out of its net current assets.

<sup>7</sup> The petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The petitioner must demonstrate its ability to pay the proffered wages of all of its active beneficiaries from the instant priority date until the beneficiaries obtain lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The required evidence must document the priority date, proffered wage or wages paid to each beneficiary; whether any of the other petitions have been withdrawn, revoked, or denied; and whether any of the other beneficiaries have obtained lawful permanent residence.

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 *Sonegawa* was based in part on the 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 its May 24, 2013 decision, the AAO carefully considered the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage pursuant to *Sonegawa*. The AAO stated that the petitioner's gross sales amounts reflected on the petitioner's tax records do not reflect a steady increase over the years; the petitioner's 2003 tax return shows total salaries and wages paid which were less than the \$286,811 minimum proffered wage amount calculated with just a sample size of only four employees; and the record contains insufficient evidence of the historical growth of the petitioner's business, or of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered. Further, the petitioner failed to submit necessary information regarding the petitioner's other I-140 and I-129 petitions, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for any relevant year. Accordingly, the AAO concluded that, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the beneficiary's proffered wage.

On motion, counsel states that the petitioner has been in business for almost 15 years. Counsel incorrectly states that the petitioner's financial ability for the years 2001 and 2002 are the only years in question. As previously stated, due to the filing of multiple petitions, the petitioner's ability to pay the instant beneficiary and all other beneficiaries from the priority date onward has not been established. Counsel also asserts that the petitioner is engaged in the airline travel business, which counsel asserts is one of the industries hardest hit after the September 11, 2001 attacks. No evidence was submitted in support of counsel's claims, including evidence of how the petitioner was directly impacted by the tragic events of September 11, 2001. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the petitioner's tax returns contradict counsel's assertion because the

petitioner's gross sales increased from 2000 to 2001. Although net income decreased, this appears to be the result of increased salaries, not expenses based on an analysis of gross sales, costs of goods, and total income. Also, while the petitioner's gross sales for 2002 are lower than 2001, the petitioner's total income did not decrease significantly. Therefore, it is unclear what, if any, impact the petitioner is claiming. Given the above, unlike *Sonegawa*, the petitioner has failed to demonstrate it experienced an uncharacteristic loss that directly impacted its ability to pay the proffered wage.

Further, counsel asserts that the steady increase of the petitioner's income and assets on its tax returns since 2001. Counsel incorrectly states that the AAO found the petitioner's net current assets for the years 2001 through 2006. In its May 24, 2013 decision, the AAO only analyzed the petitioner's net current assets for the years 2001 through 2004 as the record does not contain the petitioner's tax returns for the years 2005 onward. The petitioner did not submit its tax returns for 2005, 2006 or any subsequent year on prior appeal or in the instant motion. Based on the petitioner's tax returns for years 2001 through 2004, the AAO acknowledges that the petitioner's net current assets reflect an increase from 2001 through 2004. However, as the petitioner failed to submit necessary information regarding other I-140 and I-129 petitions filed on its behalf, the AAO is precluded from making a determination as to whether the petitioner has the ability to pay the proffered wage for any relevant year. Further, the petitioner's tax returns reflect a high gross sales amount, but it is offset by the petitioner's high cost of goods sold in each year. It appears that the petitioner has a proportionally high commission cost for its sales people, which suggests that the petitioner has relatively less revenue after costs to support its ability to pay multiple beneficiaries the proffered wages. 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 of the instant beneficiary and the petitioner's other beneficiaries from the priority date onward.

Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date onwards.

Beyond the decision of the director,<sup>8</sup> the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

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<sup>8</sup> 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 (9<sup>th</sup> 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).

In the instant case, the labor certification states that the offered position requires two (2) years of experience in the job offered as a systems analyst/programmer. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a systems analyst/programmer for [REDACTED] from April 2000 to the present (April 12, 2001), and as a computer analyst/programmer for [REDACTED] from April 1989 to March 1999.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an experience letter from the manager, Benefits Administration, on [REDACTED] letterhead, certifying that the beneficiary was employed by the company on April 29, 1989 as a systems analyst/programmer. This letter does not meet the regulatory requirements because it fails to provide the end date of the beneficiary's employment and a description of the beneficiary's experience. *Id.* Also, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. Therefore, the letter is insufficient to document the beneficiary's claimed experience.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Therefore, on motion, the AAO finds that the petitioner failed to establish the continuing ability to pay the proffered wage of the beneficiary from the priority date, and the petitioner failed to establish that the beneficiary is qualified for the position offered.

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. With the current motion, the petitioner has not met that burden.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. 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. Accordingly, the motion will be granted, however the petition will remain denied for the reasons stated above.

**ORDER:** The motion is granted. The previous decision of the AAO is affirmed. The petition remains denied.