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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



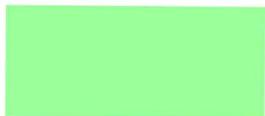
U.S. Citizenship
and Immigration
Services



DATE: **FEB 04 2014**

OFFICE: TEXAS SERVICE CENTER

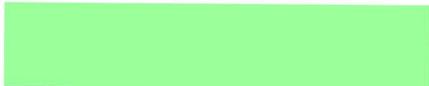
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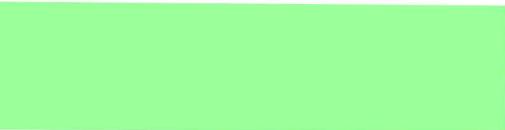
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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

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DISCUSSION: The Director, Texas Service Center (director), revoked the approval of the employment-based, immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on the petitioner's motion to reconsider.¹ The motion will be granted, the appeal's dismissal will be affirmed, and the petition's approval will remain revoked.

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204 [of the Act]." The director's realization that a petition was approved in error may constitute good and sufficient cause to revoke the petition's approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a retail store.² It seeks to permanently employ the beneficiary in the United States as a merchandise displayer. The petition requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).³

A Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The petition's priority date, which is the date that an office in the DOL's employment service system accepted the labor certification for processing, is April 13, 2001. *See* 8 C.F.R. § 204.5(d).

U.S. Citizenship and Immigration Services (USCIS) initially approved the petition on July 15, 2003. However, the director revoked the petition's approval and certified his decision to the AAO on July 22, 2013. The director found that the petitioner failed to demonstrate that the beneficiary possessed the qualifying experience for the offered position by the petition's priority date, and the petitioner's

¹ In Part 2 of the Form I-290B, Notice of Appeal or Motion, the petitioner states that it is filing an "appeal." However, the AAO lacks authority to review its own decisions on appeal. *See* DHS Delegation No. 0150.1 para. (2)(U), Mar. 1, 2003 (granting the AAO appellate jurisdiction over only the matters specified in former 8 C.F.R. § 103.1(f)(3)(iii) (2002) as of February 28, 2003); *see also* 68 Fed. Reg. 10922 (Mar. 6, 2003) (explaining the repeal of former 8 C.F.R. § 103.1(f)(3)(iii) (2002) and the delegation of its jurisdictional authority). Because the petitioner's filing alleges a misapplication of law or policy, the AAO will treat the filing as a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3).

² Copies of the petitioner's federal tax returns and corporate documents describe the petitioner as a manufacturer of draperies.

³ Section 203(b)(3)(A)(i) of the Act authorizes the granting of preference classification to qualified immigrants who are capable 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 Act allows the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

continuing ability to pay the beneficiary's proffered wage from the priority date onward. On October 2, 2013, the AAO dismissed the petitioner's appeal, affirming the director's findings.

On motion, the petitioner asserts that the AAO erred in finding a factual inconsistency in the record regarding the beneficiary's employment experience. Counsel also asserts that the AAO used "erroneous methods" in determining the petitioner's ability to pay the proffered wage.

Because the filing alleges that the AAO misapplied law or policy, the AAO will grant the filing as a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3).

The record documents the procedural history of this case, which is incorporated into the decision. The AAO will elaborate on the procedural history only as necessary.

The AAO reviews cases anew, without deferring to previous legal conclusions. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.⁴

The Beneficiary's Qualifying Experience for the Offered Position

Counsel asserts that the AAO mischaracterizes a statement in a letter from the beneficiary's claimed former employer. Contrary to the AAO's finding, counsel argues that the statement does not conflict with other evidence of the beneficiary's qualifying employment experience.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating a beneficiary's qualifications for the offered position, USCIS must examine the job offer portion of the labor certification to determine the minimum job requirements. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position of merchandise displayer

⁴ The petitioner submitted a brief and additional evidence 28 days after this filing. The AAO cannot consider these materials because neither the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), or the regulation at 8 C.F.R. § 103.5(a)(1) allow submissions in support of motions more than 30 days after the date of the adverse decision. *Cf.* "Appeals," Instructions to Form I-290B, USCIS, p. 2, available at <http://www.uscis.gov/sites/default/files/files/form/i-290binstr.pdf> (allowing a petitioner to submit a brief and/or evidence within 30 days of filing an *appeal*). In the instant case, because the AAO will treat the filing as a motion to reconsider, any evidence submitted after the Form I-290B cannot be considered.

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requires 2 years of experience in the job offered. The duties of the offered position include: displaying merchandise in store windows and on the floor; building or assembling pre-fabricated displays; and arranging mannequins, furniture, merchandise, and backdrops according to plans or to the displayer's own ideas. On the labor certification, the beneficiary states that she worked full-time as a retail merchandise displayer at [REDACTED] in Brazil from March 1995 to February 1998.

A petitioner for a skilled worker or professional must support the beneficiary's claimed experience with a letter from the former employer giving the name, address, and title of the employer, and a description of the beneficiary's experience. 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains three letters from the beneficiary's claimed former employer in Brazil. A February 14, 2001 letter on [REDACTED] stationery states, in English, that the beneficiary worked there as a window dresser from March 1995 to February 1998.

In response to the director's Notice of Intent to Revoke (NOIR), the petitioner submitted a February 29, 2012 letter from same author of the previous letter, with an English translation. As translated, the letter identifies its author as the owner of [REDACTED] and states: "I hired [the beneficiary] to work as a window dresser and she helped me with serving customers ..." The letter states that the beneficiary worked full-time, Monday through Friday, from March 1995 to February 1998.

In response to the director's Notice of Certification, the petitioner submitted another letter from the owner, dated August 14, 2013, with an English translation. As translated, the letter includes a detailed description of the beneficiary's duties as a window dresser. The duties described in the letter substantially match the duties of the offered position and do not include "serving customers."

The AAO found that the August 14, 2013 letter states that the beneficiary worked solely as a window dresser at [REDACTED]. The AAO found that the February 29, 2012 letter states that the beneficiary worked as "a salesperson or other shop worker" in addition to serving as a window dresser. Citing this "discrepancy" between the experience letters, the AAO found that the record did not establish the beneficiary's qualifying experience for the offered position.

Counsel states: "The AAO's wording makes it appear that [the] Beneficiary's job consisted equally of window dressing and serving customers; while the actual wording of [the] Beneficiary's employer correctly describes [the] Beneficiary's position with the company[,] which is a window dresser."

The statement in the February 29, 2012 letter that the beneficiary was hired "to work as a window dresser and she helped [the owner] with serving customers" is ambiguous. The statement could mean that the beneficiary's work included both dressing windows and helping the owner serve customers. Or it could mean that the beneficiary worked only as a window dresser, which enabled the owner to serve customers.

However, the petitioner must establish the beneficiary's qualifications for the offered position by a preponderance of the evidence. *Matter of Cheung*, 12 I&N Dec. 715, 719 (BIA 1968) (the burden of

proof remains on a petitioner in visa revocation proceedings). The ambiguous statement in the February 29, 2012 letter casts substantial doubt on whether the beneficiary gained the requisite, full-time experience performing the job duties of the offered position. *See Matter of Ho*, 19 I&N Dec. 591-92 (a petitioner must resolve inconsistencies in the record with independent and objective evidence). Counsel's assertion on motion establishes neither the statement's meaning nor the nature of the beneficiary's prior employment. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (the assertions of counsel do not constitute evidence).

For the foregoing reasons, the AAO finds that the record does not establish the beneficiary's qualifying experience for the offered position as specified on the labor certification by the petition's priority date.

Ability to Pay the Proffered Wage

Counsel also asserts that the AAO erred in determining the petitioner's ability to pay the beneficiary's proffered wage. Specifically, counsel states: "It is not clear what methodology the AAO has used in reaching the figures it puts forth in its decision and it appears [it] used erroneous methods to determine [the] [p]etitioner's ability to pay." However, counsel fails to identify any specific errors in the AAO's calculations of wages paid to the beneficiary, net income, or net current assets in any year.

A petitioner must establish its ability to pay the beneficiary's proffered wage as of the petition's priority date and continuing until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). In determining a petitioner's ability to pay the proffered wage, USCIS first considers any wages the petitioner paid the beneficiary in the relevant years. If a petitioner did not pay the beneficiary the full proffered wage in the relevant years, USCIS then considers whether the petitioner generated sufficient net income to pay the proffered wage, or the difference between the proffered wage and the wages that the petitioner paid the beneficiary. If a petitioner did not generate sufficient net income in the relevant years, USCIS considers whether the petitioner's net current assets equal or exceed the proffered wage, or the difference between the proffered wage and the wages paid to the beneficiary.

In the instant case, the labor certification states the proffered wage of the offered position as \$11.00 per hour for a 35-hour work week, or \$20,020 per year. The record contains copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements for 2004 through 2012. The Forms W-2 show that the petitioner paid the beneficiary the following annual wage amounts:

Year	Amount of Wages Paid	Annual Offered Wage	Difference
2004	\$7,800	\$20,020	\$12,200
2005	\$18,657	\$20,020	\$1,363
2006	\$19,788	\$20,020	\$232
2007	\$17,028	\$20,020	\$2,992
2008	\$17,016	\$20,020	\$3,004

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Year	Amount of Wages Paid	Annual Offered Wage	Difference
2009	\$15,444	\$20,020	\$4,576
2010	\$17,820	\$20,020	\$2,200
2011	\$11,868	\$20,020	\$8,152
2012	\$7,524	\$20,020	\$12,496

The annual amounts on the Forms W-2 do not establish the petitioner's ability to pay the proffered wage from 2004 through 2012 because none of the amounts equal or exceed the annual proffered wage of \$20,020. However, the petitioner need only demonstrate its ability to pay the following differences between the amounts paid and the proffered wage in those years: \$12,220 in 2004; \$1,363 in 2005; \$232 in 2006; \$2,992 in 2007; \$3,004 in 2008; \$4,576 in 2009; \$2,200 in 2010; \$8,152 in 2011; and \$12,496 in 2012. The petitioner must also demonstrate its ability to pay the full annual proffered wage in 2001 through 2003.

Copies of the petitioner's federal tax returns report the following annual amounts of net income:⁵

Year	Annual Net Income	Needed to Pay
2001	\$(21,066) ⁶	\$20,020
2002	\$240,370	\$20,020
2003	\$129,003	\$20,020
2004	\$(26,711)	\$12,220
2005	\$23,970	\$1,363
2006	\$(47,443)	\$232
2007	\$682,964	\$2,992
2008	\$(39,410)	\$3,004
2009	\$91,117	\$4,576
2010	\$(263,749)	\$2,200
2011	\$(120,285)	\$8,152
2012	\$78,482	\$12,496

⁵ The record shows that the petitioner has filed its taxes since at least 2001 as an S corporation. Where an S corporation generates income exclusively from a trade or business, USCIS considers its annual net income to be the ordinary income amount on line 21 of its IRS Form 1120S. However, where an S corporation earns income, credits, deductions, or adjustments from sources other than a trade or business, it reports those amounts on Schedule K, specifically on line 23 (1997-2003), line 17e (2004-2005), and/or line 18 (2006-2012) of the Schedule K. See Instructions for Form 1120S, IRS, available at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed Dec. 22, 2013) (indicating that Schedule K is a summary schedule of shareholders' stakes in a corporation's income, deductions, credits, etc.). Because the instant petitioner reported income adjustments for 2001 through 2012, its Schedules K contain its annual net income amounts for all relevant years.

⁶ Numbers in parentheses reflect negative amounts.

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Because the annual net income amounts exceed the annual proffered wage in 2002 and 2003 and the differences between the proffered wage and the amounts the petitioner paid the beneficiary in 2005, 2007, 2009, and 2012, the record demonstrates the petitioner's ability to pay the proffered wage in 2002, 2003, 2005, 2007, 2009, and 2012.

The petitioner's tax returns state the following annual amounts of net current assets in the remaining years:

Year	Net Current Assets	Needed to Pay
2001	\$(83,180)	\$20,020
2004	\$5,707	\$12,220
2006	\$(272,972)	\$232
2008	\$(112,894)	\$3,004
2010	\$(420,108)	\$2,200
2011	\$(542,543)	\$8,152

Because the petitioner's annual net current asset amounts do not equal or exceed the annual proffered wage in 2001 or the difference between the annual proffered wage and the amounts paid to the beneficiary in 2004, 2006, 2008, 2010, and 2011, the record does not demonstrate the petitioner's ability to pay the proffered wage in 2001, 2004, 2006, 2008, 2010, and 2011.

Under *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may also consider the overall magnitude of a petitioner's business activities in determining its ability to pay the proffered wage. In *Sonogawa*, the petitioner had conducted business for more than 11 years and routinely earned significant gross annual income amounts. The year it filed its petition, the petitioner relocated and paid rent on both its old and new locations for five months. The petitioner incurred large moving expenses and could not conduct regular business for a time. The Regional Commissioner, however, determined that the petitioner established its likely resumption of successful business operations. The petitioner was a fashion designer whose work had been featured in national magazines. Her clients included a former Miss Universe, movie actresses, and society matrons. Lists of best-dressed women in California included her clients. She also lectured on fashion design at design and fashion shows throughout the United States, and at California colleges and universities.

As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability to pay the proffered wage beyond its net income, net current assets, and the amounts it paid the beneficiary. USCIS may also consider such factors as: the number of years a petitioner has conducted business; the established historical growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether the beneficiary is replacing a former employee or an outsourced service; or any other evidence that USCIS finds relevant to a petitioner's ability to pay the proffered wage.

In the instant case, the record shows that the petitioner established itself in 1998 and has since remained active. Although the petitioner's number of years in business constitutes a favorable factor

in determining its ability to pay the beneficiary's proffered wage, and the petitioner's tax returns report generally steady revenues and wages paid from 2001 through 2009, the tax records show that the petitioner's revenues and wages paid have generally declined since 2009. Also, unlike in *Sonegawa*, the record does not contain any evidence of uncharacteristic losses or expenses that affected the petitioner's ability to pay, or of its reputation in its industry. The petitioner previously claimed that the beneficiary would replace employees and submitted evidence in support of the claim. However, the evidence did not establish that the employees to be replaced performed the same job duties as the offered position. Nothing in the record demonstrates that the petitioner's tax returns paint an inaccurate financial picture. Thus, assessing the totality of the circumstances in this individual case, the AAO concludes that the petitioner has not established its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward.

Conclusion

The AAO will treat the petitioner's filing as a motion to reconsider, and grant the motion. After careful review of the record and the petitioner's arguments on motion, the AAO finds that the petitioner has not established the beneficiary's qualifying experience for the offered position and its continuing ability to pay the beneficiary's proffered wage. The AAO will therefore affirm its decision of October 2, 2013.

The petitioner's appeal will be dismissed for the reasons stated above. In revocation proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Cheung*, 12 I&N Dec. at 719. Here, the petitioner has not met that burden.

ORDER: The motion is granted, the AAO's decision of October 2, 2013 dismissing the petitioner's appeal is affirmed, and the petition's approval remains revoked.