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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: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional or a Skilled Worker 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:

SELF-REPRESENTED

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), approved the employment-based immigrant visa petition, but later revoked its approval. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal and affirmed the dismissal after granting the petitioner's motion to reconsider. The matter is now before the AAO on the petitioner's second motion to reopen.¹ The motion will be granted, the AAO's decision will be withdrawn in part and affirmed in part, and the petition's approval will remain revoked.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department 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, 8 U.S.C. § 1154]." A director's realization that U.S. Citizenship and Immigration Services (USCIS) approved the petition in error may constitute good and sufficient cause for revoking the petition's approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner provides information technology consulting services. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petition requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).²

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition.³ The petition's priority

¹ The petitioner states in Part 2 of the Form I-290B, Notice of Appeal or Motion, that it is filing an "appeal." The AAO, however, lacks authority to review its own decisions on appeal. *See* U.S. Dep't of Homeland Sec. Delegation No. 0150.1, par. (2)(U), Mar. 1, 2003 (authorizing U.S. Citizenship and Immigration Services (USCIS) to adjudicate only the appeals previously stated in the former regulation at 8 C.F.R. § 103.1(f)(3)(iii) (2002)). However, the letter accompanying the Form I-290B refers to the filing as a "motion to reopen." Because the petitioner's filing indicates its intention to reopen this matter and contains documentary evidence of new facts, the AAO will treat the filing as a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

² Section 203(b)(3)(A)(i) of the Act allows the granting of preference classification to qualified immigrants who are capable, at the time of petitioning, 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 affords the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

³ The record shows that the DOL certified the labor application for another foreign worker. Upon filing the petition on March 13, 2007, the petitioner requested substitution of the beneficiary into the labor certification. Because the petitioner requested substitution before July 16, 2007 and no other beneficiary obtained lawful permanent resident based on the labor certification, the director granted the substitution request. *See* 72 Fed. Reg. 27904, 27904 (the DOL's final rule prohibits the substitution of beneficiaries into labor certifications as of July 16, 2007).

date, which is the date the DOL accepted the labor certification for processing, is September 18, 2006. *See* 8 C.F.R. § 204.5(d).

The director's Notice of Revocation, dated June 14, 2010, concludes that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage.

On April 16, 2013, the AAO dismissed the petitioner's appeal. The AAO found that the petitioner failed to demonstrate its ability to pay the beneficiary's proffered wage in 2006 and 2007. The AAO also determined that the petitioner failed to establish the beneficiary's qualifying employment experience for the offered position as of the petition's priority date.

On August 7, 2013, the AAO accepted the petitioner's motion to reconsider; however, the AAO affirmed its initial decision, finding the petitioner's arguments regarding its ability to pay the proffered wage and the beneficiary's possession of qualifying experience to be unpersuasive.

The petitioner's instant filing includes new evidence of its ability to pay the beneficiary's proffered wage. The AAO will therefore treat the filing as a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2).

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 conducts review on a *de novo* basis. *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

On motion, the petitioner asserts that USCIS unfairly revoked the approval of the instant petition based on the petitioner's inability to pay the combined proffered wages of the beneficiary and its other beneficiaries of simultaneously pending petitions. The petitioner asserts that 13 of its other beneficiaries obtained lawful permanent resident status based on petitions with priority dates in 2006 or 2007. The petitioner argues that USCIS could have revoked the approvals of those petitions on the same grounds as the instant petition, but did not. The petitioner asserts that "it would not be fair" if USCIS revokes the instant petition's approval and indicates hardships that the beneficiary may face. As discussed above, the AAO's review is limited to the matter on appeal and is based on pertinent evidence in the record.

⁴ The instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Ability to Pay the Proffered Wage

On motion, the petitioner submits additional evidence of its ability to pay the beneficiary's proffered wage, including copies of: USCIS approval and receipt notices regarding the adjustment of status applications of eight of its beneficiaries; USCIS online case status printouts regarding the status of adjustment applications of six beneficiaries; and evidence of its compensation to the instant beneficiary from 2006 through July 2013.

A petitioner must establish its ability to pay a 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 examines whether a petitioner has paid the beneficiary the full proffered wage each year, beginning with the year of the priority date. If a petitioner has not paid the beneficiary the full proffered wage each year, USCIS next examines whether a petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁵ If a petitioner's net income or net current assets is insufficient to demonstrate its ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612, 614 (Reg'l Comm'r 1967).

In the instant case, the labor certification accompanying the petition states the proffered wage of the offered position as \$75,000 per year. As the AAO stated in its previous decisions in this matter, 2006 and 2007 were the years for which the petitioner has not demonstrated its ability to pay the proffered wage. The AAO previously found that the petitioner established its ability to pay the proffered wage in 2008 and 2009. The AAO therefore confines its analysis to 2006 and 2007; the petitioner has not submitted financial information for the year of 2010 or thereafter.

Copies of the petitioner's Internal Revenue Service (IRS) Forms W-2 Tax and Wage Statements to the beneficiary show that the petitioner paid the beneficiary \$7,726.53 in 2006 and \$61,675.56 in 2007. Because the annual amounts that the petitioner paid the beneficiary do not equal or exceed the annual proffered wage of \$75,000, the petitioner has not demonstrated its ability to pay the proffered wage in 2006 and 2007 based solely on its compensation to the beneficiary. In analyzing its net income and net current assets, however, the petitioner need only show its ability to pay the annual differences between the beneficiary's compensation and the proffered wage. Those differences were \$67,273.47 in 2006 and \$13,324.44 in 2007.

⁵ See *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Texas 1989); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Copies of the petitioner's 2006 and 2007 federal income tax returns show that it earned annual net income amounts of \$102,251 in 2006 and \$107,068 in 2007.⁶ These annual amounts exceed the differences between the beneficiary's annual proffered wage and the amounts the petitioner paid him in both years. However, as the AAO explained in its previous decisions, a corporation that has filed immigrant petitions for multiple beneficiaries must demonstrate its continuing ability to pay the proffered wages of each beneficiary. See 8 C.F.R. § 204.5(g)(2); *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977). Therefore, the petitioner must demonstrate its ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries' of its other petitions that remained pending as of the priority date of the instant petition.

In determining whether a petitioner has established its ability to pay the proffered wages of multiple beneficiaries, USCIS adds the proffered wages of each beneficiary of a pending petition for each relevant year, starting with the year of the instant petition's priority date. USCIS then determines whether the petitioner had sufficient annual net income and/or net current asset amounts to pay the combined wages in the relevant years. USCIS, however, does not consider the proffered wages of the other beneficiaries for periods: prior to the priority dates of their respective petitions; after the dates they obtained lawful permanent resident status; and after the dates their petitions were withdrawn, revoked, or denied without a pending appeal.

USCIS electronic records and information provided by the petitioner show that it filed at least 46 immigrant visa petitions for other beneficiaries, including 30 petitions that were pending as of the 2006 priority date of the instant petition and/or in 2007.

In its April 16, 2013 appellate decision, the AAO found that, despite its request for the information in its Request for Evidence (RFE) of January 31, 2013, the petitioner failed to provide details of at least six of its other petitions pending in 2006 and/or 2007. For purposes of adjudicating that appeal only, the AAO analyzed the provided information and concluded that, even without the addition of the other proffered wages, the petitioner had not demonstrated its ability to pay the combined proffered wages. The AAO stated that the petitioner must submit the required details about the additional petitions in any future filings to establish its ability to pay the beneficiary's proffered wage.

⁶ The petitioner's tax returns show that it is taxed as an S corporation. Where an S corporation's income derives exclusively from a trade or business, USCIS considers line 21, ordinary income, of the corporation's IRS Form 1120S to reflect its annual net income. However, where an S corporation reports income, credits, deductions, or other adjustments to its income from sources other than a trade or business, line 18 (2006-2012) of Schedule K reflects the corporation's annual net income amount. See Instructions for Form 1120S, available at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 18, 2013) (Schedule K is a summary schedule of all shareholders' ownership of the entity's income, deductions, credits, etc.). Because the instant petitioner reported other adjustments to its income in 2006 and 2007, lines 18 of its Schedules K reflect its annual net income amounts for those years.

In its August 7, 2013 decision on the petitioner's prior motion, the AAO found that the petitioner submitted evidence on motion that the AAO had previously requested in its RFE on appeal. Because the AAO previously notified the petitioner of the required evidence and afforded it a reasonable opportunity to submit the information on appeal, the AAO declined to consider the evidence on motion. *See* 8 C.F.R. § 103.5(a)(2) (a motion to reopen must state "new" facts supported by documentary evidence).

A review of the entire record, including the previously unconsidered evidence and the documentation submitted with the instant motion, shows that the petitioner has still failed to provide the proffered wage amounts of all of its other petitions pending in 2006 and/or 2007. Without proffered wage information for all of those pending petitions, the AAO cannot determine the combined proffered wages that the petitioner must pay in each relevant year. The petitioner has therefore failed to establish its continuing ability to pay the combined proffered wages of its beneficiaries in 2006 and 2007.

As indicated above, USCIS may also consider the magnitude of the petitioner's business activities in determining the petitioner's ability to pay the proffered wage. *See Sonegawa*, 12 I&N Dec. at 614. The petitioner in *Sonegawa* had been in business for more than 11 years and routinely earned a gross annual income of about \$100,000. In the year it filed its petition, the petitioner in *Sonegawa* relocated its business and paid rent on both its old and new locations for five months. The petitioner also incurred substantial moving expenses and could not conduct regular business for a period of time. The Regional Commissioner, however, determined that the petitioner's prospects to resume successful business operations were well-established. The petitioner was a fashion designer whose work had been featured in national magazines. Her clients included Miss Universe, movie actresses, and society matrons. Lists of the best-dressed California women included her clients. She also lectured on fashion design at design and fashion shows throughout the United States, and at California colleges and universities.

The Regional Commissioner based his determination in *Sonegawa* 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 a petitioner's financial ability beyond its net income and net current assets. USCIS may consider such factors as: the number of years the 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 will replace a former employee or an outsourcing service; and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record shows that the petitioner has conducted business since 1996. Thus, like the petitioner in *Sonegawa*, it was in business for about 11 years when it filed its petition. The petition states that the petitioner employed 45 people at that time, which copies of the petitioner's Forms W-2 and quarterly wage statements support. However, the wage statements indicate that the petitioner's number of employees decreased to about 25 by the third quarter of 2009.

In the petitioner's prior motion, its president stated that it experienced uncharacteristic business expenses in 2006 and 2007, including a 39-percent increase in salaries and officer compensation in 2006 and increased rent expenses because of its relocation in late 2005. Copies of the petitioner's federal tax transcripts supported the president's statements. But, unlike the petitioner in *Sonegawa*, the petitioner's tax records do not reflect continuing growth of the business. Copies of the petitioner's federal tax returns and tax transcripts show that its annual amounts of net income and wages paid in 2009 were less than the corresponding annual amounts for 2006. The record also lacks evidence that the petitioner enjoys a good business or industry reputation. 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.

In its previous decisions, the AAO found that the petitioner failed to demonstrate the beneficiary's qualifying experience for the offered position. However, the petitioner has submitted an updated letter from one of the beneficiary's previous employers that overcomes that ground of denial. The AAO therefore finds that the petitioner has established that the beneficiary possessed the experience specified on the labor certification for the offered position by the petition's priority date. The AAO's decision will be withdrawn in part to reflect this finding.

Conclusion

In summary, the AAO will treat the petitioner's filing as a motion to reopen and grant the motion. After careful review of the record and the petitioner's evidence and arguments on motion, the AAO finds that the petitioner has established the beneficiary's qualifying experience for the offered position by the petition's priority date. The AAO's prior decisions are withdrawn as to that ground only. But the AAO also finds that the petitioner has failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. Accordingly, the AAO will affirm its dismissal of the appeal on that ground.

The petition's approval will remain revoked for the reason 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 Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The motion is granted, the AAO's decision of April 16, 2013 is withdrawn in part and affirmed in part, and the petition's approval remains revoked.