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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: JUN 12 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 that reads "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. We dismissed the petitioner's appeal and two subsequent motions to reopen and reconsider. The matter is once again before us on the petitioner's third motion to reopen. The motion will be granted, our decisions will be affirmed, 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).<sup>1</sup>

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition.<sup>2</sup> The petition's priority 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, we dismissed the petitioner's appeal. We found that the petitioner failed to demonstrate its ability to pay the beneficiary's proffered wage in 2006 and 2007. We 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.

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<sup>1</sup> 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.

<sup>2</sup> 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).

On August 7, 2013, we accepted the petitioner's motion to reconsider; however, we affirmed our 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.

On February 4, 2014, we accepted the petitioner's motion to reopen; we withdrew our previous decisions in part, finding that the record established the beneficiary's qualifications. We affirmed our previous decisions, in part, finding that the petitioner still had not established its ability to pay the proffered wage in 2006 and 2007.

The petitioner's instant filing includes new evidence of its ability to pay the beneficiary's proffered wage. We will therefore accept the 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. We will elaborate on the procedural history only as necessary.

We conduct review on a *de novo* basis. *See Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted on appeal and motion.<sup>3</sup>

On motion, the petitioner requests oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. USCIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, the petitioner identified no unique factors or issues of law to be resolved, and sets forth no specific reason for oral argument. The written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

#### **Ability to Pay the Proffered Wage**

On motion, the petitioner submits additional evidence of its ability to pay the beneficiary's proffered wage, including a spreadsheet of all of its sponsored beneficiaries for 2006 and 2007 with information about proffered wages and wages paid, and status of petitions; copies of these beneficiaries' approved labor certifications; and Forms W-2 issued to its beneficiaries for 2006 and 2007.

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.

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<sup>3</sup> 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).

§ 204.5(g)(2). Further, 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). In the instant case the petitioner must account for at least 29 additional beneficiaries. Its job offers to each beneficiary must be realistic; the petitioner must establish 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).

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.<sup>4</sup> 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 we stated in our previous decisions, 2006 and 2007 were the years for which the petitioner has not demonstrated its ability to pay the proffered wage. We have previously found that the petitioner established its ability to pay the proffered wage in 2008 and 2009. We therefore confine our analysis to 2006 and 2007. The petitioner has not submitted financial information for the year of 2010 or thereafter.<sup>5</sup>

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

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<sup>4</sup> *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).

<sup>5</sup> The director initially approved the petition in May 2009. The AAO will limit its analysis of the petitioner's ability to pay from the priority date to the date of the petition's approval. As noted above, the director may revoke a petition's approval if the petition was approved in error. *See Matter of Ho*. If the petitioner could not pay the proffered wage to its sponsored beneficiaries as of the date of the petition's approval in 2009, the director had good and sufficient cause to institute revocation proceedings.

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.

The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income of<sup>6</sup> \$102,251.
- In 2007, the Form 1120S stated net income of \$107,068.

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 we explained in our 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.

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<sup>6</sup> 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.

If we were to consider solely the figures provided by the petitioner for the shortfall between the wage paid and the total wage obligation for immigrant visa beneficiaries in 2006, the petitioner has not established its ability to pay the proffered wage in that year. On motion, the petitioner submitted a chart entitled, "Complete Workforce for the Year 2006," and concluded that its aggregate wage deficit is \$362,032.45. As noted below, this deficit exceeds the net income and net current assets of the petitioner from 2006 by \$34,975.45.

The petitioner argues on motion that we should credit the petitioner with the gap in employment between [REDACTED] who the beneficiary was substituted for on the labor certification, and the beneficiary's start date, in the amount of \$7,727. This gap has been figured into the net shortfall in 2006 of \$34,975.45 noted in the preceding paragraph. Nevertheless, the petitioner's argument is inaccurate, as the regulation requires that it establish the ability to pay from the priority date through to the time the beneficiary receives legal permanent residence. There is no gap in its obligation to pay the wage, even though Ms. [REDACTED] may not have worked continuously from the priority date until the beneficiary's hire. Thus, the \$7,727 must be added to the 2006 shortfall, totaling \$42,702.45 that the petitioner did not pay or show the ability to pay the proffered wage in 2006.

Similarly, the petitioner shows a wage deficit between the proffered wages offered to its workers and the amounts paid in 2007, in the amount of \$362,561.00. Using these figures the petitioner would have established the ability to pay the proffered wage from its net current assets, which as shown below totaled \$429,129 in 2007.

Nevertheless, the petitioner's figures are not correct. After a review of the entire record, including the previously unconsidered evidence and the documentation submitted with the instant motion shows that the petitioner must establish its ability to pay the proffered wages of \$2,106,269.72 for all of its beneficiaries. The record reflects that the petitioner paid \$1,302,127.71 in wages to its beneficiaries which are \$804,142.01 less than the total proffered wages of \$2,106,269.72; and in 2007 the petitioner paid \$1,472,688.40 in wages to its beneficiaries which are \$633,581.32 less than the total proffered wages of \$2,106,269.72. Therefore in comparing the petitioner's net income for 2006 (\$102,251) and 2007 (\$107,068) to wages already paid to its beneficiaries, the petitioner's net income is insufficient to cover the deficient amounts for 2006 (-\$804,142.01) and 2007 (-\$633,581.32). Thus the petitioner has not established its ability to pay the proffered wage of all its beneficiaries through an examination of wages paid and its net income.

USCIS may also review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of \$327,054.

- In 2007, the Form 1120S stated net current assets of \$429,149.

Therefore, the difference between the proffered wage and wages paid to its beneficiaries is \$804,142.01 in 2006 and \$633,581.32 in 2007. Based on this information, the petitioner did not have sufficient net current assets to pay the proffered wage to all of its beneficiaries through an examination of its net current assets and wages paid.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay all of its beneficiaries the proffered wage as of the priority date through an examination of wages paid to the beneficiaries, or its net income or net current assets.

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 Sonogawa*, 12 I&N Dec. at 614. The petitioner in *Sonogawa* 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 *Sonogawa* 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 *Sonogawa* in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 *Sonogawa*, 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 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 support the president's statements. But, unlike the petitioner in *Sonegawa*, the petitioner's tax records do not reflect continuing growth of the business. The record also lacks evidence that the petitioner enjoys a good business or industry reputation. Further, while the petitioner's president points to the large officer compensation the petitioner has not established that its officers would have been willing to forego their compensation in 2006 and 2007. 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.

### **Conclusion**

In summary, we accept the petitioner's motion to reopen and grant the motion. After careful review of the record and the petitioner's evidence and arguments on motion, we find that the petitioner has failed to establish its continuing ability to pay all of its beneficiaries' proffered wages from the petition's priority date onward. Accordingly, we affirm our previous decisions dismissing the appeal.

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 appeal is dismissed and the petition's approval remains revoked.