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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



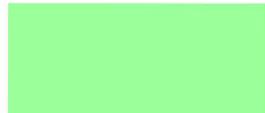
U.S. Citizenship  
and Immigration  
Services



DATE: JUN 16 2014

OFFICE: NEBRASKA SERVICE CENTER

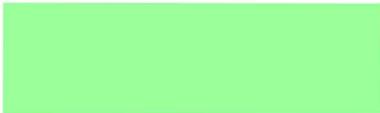
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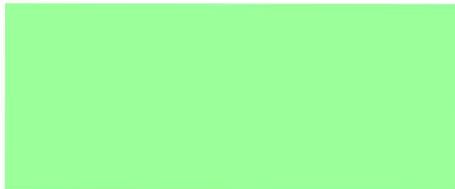
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or a 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,

A handwritten signature in black ink, enclosed in a large, hand-drawn oval.

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was originally approved by the Director, Texas Service Center (TSC Director). The approval was subsequently revoked by the Director, Nebraska Service Center (NSC Director). The petitioner appealed from the revocation, which this office dismissed. The petitioner then filed four motions to reopen and reconsider with us, all of which were denied. The petitioner has now filed a fifth motion to reopen and reconsider.<sup>1</sup> The motion will be granted and our earlier decision will be withdrawn in part and affirmed in part.

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.

The petitioner is a travel agency. It seeks to employ the beneficiary permanently in the United States as a “manager, travel & tours” and to classify him as a skilled worker under section 203(b)(3)(A)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(3)(A)(i).

The petitioner filed an immigrant visa petition (Form I-140) on behalf of the beneficiary on April 7, 2006. As required by statute, the petition was accompanied by an ETA Form 9089, “Application for Permanent Employment Certification” (labor certification), approved by the United States Department of Labor (DOL).<sup>2</sup> On May 10, 2006, the TSC Director approved the petition.

On November 30, 2009, however, the NSC Director issued a decision revoking the prior approval of the petition on two grounds: (1) the petitioner had engaged in fraud or a willful misrepresentation of material facts in its labor certification; and (2) the petitioner failed to establish its continuing ability to pay the proffered wage of the subject position. Based on the finding of fraud or willful misrepresentation on the ETA Form 9089, the NSC Director also invalidated the labor certification.

The petitioner filed an appeal, which we dismissed in a decision issued on September 28, 2010, agreeing with the NSC Director’s findings and affirming both his decision to revoke the approval of the petition and invalidate the underlying labor certification. In a further order at the close of its decision, we stated that both the petitioner and the beneficiary had knowingly misrepresented the petitioner’s business operation, concealed their familial relationship, and concealed the beneficiary’s ownership interest in the petitioner with the intention of misleading the government on material elements of the beneficiary’s eligibility for the immigrant classification sought. In this regard, we noted that the petitioner had supplied a false address for the primary worksite<sup>3</sup> of the proffered

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<sup>1</sup> While styled as a motion to reopen and reconsider, we note that the petitioner’s motion is properly only to reconsider our earlier decisions. *Compare* 8 C.F.R. § 103.5(a)(2) *with* 8 C.F.R. § 103.5(a)(3).

<sup>2</sup> The ETA Form 9089 had been filed with the DOL on November 2, 2005, and was certified by the DOL on February 17, 2006.

<sup>3</sup> The false address was ascertained in a site inspection by U.S. Citizenship and Immigration Services and brought to the petitioner's attention in the NSC Director's Notice of Intent to Revoke the approved petition, dated September 4, 2009.

position and had falsely denied that there was a familial relationship between the petitioner's owners and the beneficiary.

On October 26, 2010, the petitioner filed a motion to reopen and reconsider that decision, accompanied by supporting documentation. In denying the motion on December 21, 2011, we concluded that the petitioner had presented no new facts or documentation, as required in a motion to reopen, to cause us to disturb our prior determination that the petitioner made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. We also determined that the petitioner had failed to meet the requirements for a motion to reconsider, because it had not shown that our initial decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. We also concluded that the petitioner had not provided any new facts or documentation demonstrating its ability to pay the beneficiary proffered wage, and had not established that we incorrectly applied *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), or any other case law, statutory law, or USCIS policy, in our previous decision. We accordingly reaffirmed our finding that the documentation of record did not establish the petitioner's ability to pay the proffered wage in any year from 2006 up to the present.

The petitioner then filed a second motion to reopen and reconsider on January 19, 2012. In its motion, the petitioner argued that we did not properly consider all of its previously submitted evidence, but failed to cite any specific piece of evidence, however, that we did not consider in our prior decision. The petitioner also reiterated the claim made in the first motion to reopen and reconsider that the two items of false information entered by the petitioner on the labor certification were actually typographical errors, not deliberate misrepresentations of fact. The petitioner pointed out that it filed motions with the DOL to reopen the certified labor certification for the expressed purpose of correcting the "typographical errors" and that these motions remained outstanding. The petitioner requested that we should stay our decision on the motion until the DOL ruled on the motions to before it. We, however, had already considered and rejected this line of argument in our prior decision, and the petitioner had submitted no new factual or legal grounds for altering our decision. The petitioner claimed that we had misinterpreted a ruling of the Board of Alien Labor Certification Appeals (BALCA) in another case involving "typographical errors" on a labor certification – *Matter of Healthamerica*, 2006-PER-1 (BALCA July 18, 2006) – but did not explain how we had allegedly misinterpreted that decision. The petitioner also stated that our decision could have "serious adverse consequences" for the petitioner and the beneficiary in future immigration proceedings. We found no basis in that statement, true or not, to stay or alter our earlier decision.

As for the petitioner's ability to pay the proffered wage, the petitioner claimed that we had misinterpreted the ruling in *Matter of Sonegawa*, but did not explain the basis for the claim. Also submitted was certain evidence of the petitioner's ability to pay the proffered wage – \$45,843.20 per year – in the form of Wage and Tax Statements (Forms W-2), issued to the beneficiary for the years 2009 and 2010, showing that the beneficiary was paid \$50,400.00 each of those years. However, no documentation was submitted showing the petitioner's ability to pay the proffered wage in any of the

years 2006-2008,<sup>4</sup> or in 2011. Thus, the petitioner still failed to establish its continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present. The motion was dismissed on April 24, 2012.

In its third motion to reopen and reconsider, filed on May 29, 2012, the petitioner reiterated its previous arguments and submitted copies of several documents that were already in the record. The petitioner indicated that some new documentation was being submitted – including income tax returns for 2002-2007, bank statements and returned checks from 2005-2006, tour package contracts with clients, and other materials – but no such documentation accompanied the motion. With no new arguments or documentation to consider, the AAO denied the motion on September 25, 2012.

In its fourth motion, filed on October 26, 2012, the petitioner advised that it had hired a new attorney. In its brief filed on December 6, 2012, the petitioner reiterated the claims made on appeal and in prior motions that neither it nor the beneficiary committed any fraud or willful misrepresentation of material fact(s), and that the petitioner has had the continuing ability to pay the proffered wage from the priority date up to the present.

With regard to the fraud and misrepresentation issue, the petitioner states that it was misled by its previous counsel, who it claims filled out all documents on behalf of the petitioner and asserts that the petitioner should not be held responsible for any misrepresentations or fraud existing in those documents. Once again, the petitioner requested that we stay the instant proceedings until the DOL ruled on the motions the petitioner filed in 2009 to reopen the certified ETA Form 9089 for the purpose of correcting the "typographical errors" on the labor certification. Regarding the ability to pay issue, the petitioner submitted copies of its federal income tax returns (Forms 1120) and the beneficiary's wage and tax statements (Forms W-2) that were already in the record (supplemented by complete tax returns for the years 2006 and 2007), and asserted that the petitioner's historical growth from 2005 to 2011 demonstrated its continuing ability to pay the proffered wage over the years.

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<sup>4</sup> Previously submitted, though incomplete, corporate income tax returns (Forms 1120) for the years 2006 and 2007 recorded gross receipts of only \$20,448 and \$4,500 for those two years – far below the proffered wage of \$45,843.20. It is unclear how the petitioner's gross receipts, which are less than the proffered wage, could substantiate its ability to pay the proffered wage under the regulation at 8 C.F.R. § 204.5(g)(2) or the ruling in *Matter of Sonogawa*. This disparity between gross receipts and the proffered wage in 2006 and 2007 reinforces our finding in our decision dismissing the appeal on September 28, 2010, that the petitioner's job offer was not a *bona fide* employment opportunity. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, *supra*.

We dismissed the motion, finding that the petitioner had presented no new facts or documentation, as required in a motion to reopen pursuant to 8 C.F.R. § 103.5(a)(3), to refute the prior determinations of the NSC Director and this office that the petitioner had made fraudulent or willful misrepresentations of material facts in the ETA Form 9089. The AAO found no merit in the claim that the petitioner should be exonerated because former counsel allegedly provided incompetent legal representation, indicating that the petitioner did not properly articulate a claim for ineffective assistance of counsel under the requirements of *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). The petitioner also failed to submit any new facts or documentation to refute USCIS' prior determinations that the petitioner had not established its continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present. Noting that the photocopied federal income tax returns for the years 2005-2008 bear no signature of the petitioner or an authorized representative, are not dated, and are not even signed by the tax and consulting service that allegedly prepared the returns, we determined that the documents were not reliable evidence of the petitioner's tax returns in those years. Moreover, as noted above, the information in the subject tax returns, even if they were judged to be reliable, did not demonstrate the petitioner's ability to pay the proffered wage in the years 2006-2008.

The petitioner also claimed that it did not receive notice from the DOL certifying officer that the labor certification was revoked, thus depriving the petitioner of its opportunity to file a timely appeal of the revocation to BALCA. We did not find this line of argument persuasive because it was not the DOL certifying officer who revoked the labor certification; rather, it was USCIS – specifically, the NSC Director – that invalidated the labor certification in accordance with its regulatory authority under 20 C.F.R. § 656.30(d). Since the NSC Director invalidated the certified ETA Form 9089, the petitioner's right to appeal lay with this office, not BALCA.

In addition, the petitioner requested that we stay this proceeding to preserve the beneficiary's right to port to a new employer under section 204(j) of the Act, 8 U.S.C. § 1154(j), as amended by the American Competitiveness in the 21<sup>st</sup> Century Act (AC-21), citing our decision in *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010). Although section 204(j) of the Act provides that an employment-based immigrant visa petition shall remain valid with respect to a new job if the beneficiary's application for adjustment of status has been filed and remained adjudicated for 180 days, we noted that the petition must have been "valid" to begin with if it is to "remain valid with respect to a new job," citing *Matter of Al Wazzan. Id.* The instant petition was not "valid" to begin with, however, because under section 205 of the Act a revocation has retroactive effect to the date the petition was approved – in this case, May 10, 2006.

In its current motion, filed on April 3, 2013, the petitioner points out that there was no fraudulent or willful misrepresentation of material facts involving the portion of the labor certification application signed by the beneficiary, referring to the beneficiary's signed declaration in Section L of the ETA Form 9089 to the effect that only Sections J and K are true and correct. The petitioner states that the beneficiary answered every question in these two sections truthfully, and that there are no questions in these two sections that ask about a familial relationship with the petitioner or an ownership interest in the petitioning company. After reviewing the entire record, we conclude that a

preponderance of the evidence shows that the beneficiary did not commit fraud or misrepresent a material fact in the preparation of the ETA Form 9089. Accordingly, our finding to the contrary in our initial decision dated September 28, 2010, will be withdrawn.

There is no similar argument being made, however, contesting the fraud and misrepresentation finding with respect to the petitioner. Therefore, the previous findings of the NSC Director and the AAO that the petitioner engaged in fraud or a willful misrepresentation of material facts in the labor certification application will be affirmed. Those findings included representations regarding the primary worksite location for the position offered as described on the labor certification in Part H.1-2, and the business and family relationship between the petitioner and beneficiary as described in Part C.9 of the labor certification. Based on these findings there is no ground to reconsider the invalidation of the labor certification.

The petitioner also argues that we provided no legal authority for our determination that the photocopied tax returns for the years 2005-2008 are not reliable evidence because they lack dates and signatures. Even if we accepted counsel's argument that we have no authority to judge the authenticity of the tax returns, which is clearly misplaced, we have already determined in initially dismissing the petitioner's appeal that the financial information in the tax returns for 2006-2008 failed to establish its ability to pay the proffered wage of the subject position in those years. As discussed in that decision, the petitioner's corporate income tax returns (Forms 1120) for those three years recorded net losses of \$4,177 in 2006 and \$1,224 in 2007, followed by a modest net income of \$5,724 in 2008. The petitioner's net current assets in those three years were \$0 in 2006 and 2007,<sup>5</sup> and \$1,000 in 2008. The beneficiary did not become an employee of the petitioner until 2008, for which year he purportedly received compensation in the amount of \$10,500 as indicated on the petitioner's Form 1120 as well as the beneficiary's Form W-2, Wage and Tax Statement. As was discussed in our earlier decision, considering the proffered wage of the job offered is \$45,843.20, it is clear from the tax returns in the record that the petitioner could not have paid the proffered wage in the years 2006, 2007, or 2008 based on: (a) its net income; (b) its net current assets; and/or (c) the wages actually paid to the beneficiary in any of those years.<sup>6</sup> Thus, even if we were to accept the

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<sup>5</sup> The petitioner's net current assets figures for 2006 and 2007 were not in the record at the time of our 2010 decision because the complete tax returns for those years were not submitted until the petitioner's fourth motion to reopen/reconsider was filed in December 2012.

<sup>6</sup> If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.

pertinent tax returns as reliable, they do not establish the petitioner's continuing ability to pay the proffered wage from the priority date (November 2, 2005) up to the present.

As stated in our prior decisions, 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. In the current motion, the petitioner has met that burden with regard to the fraud or misrepresentation finding against the beneficiary, but not with regard to the petitioner's ability to pay the proffered wage.<sup>7</sup>

We note, as in our previous decisions, that if the DOL should rule favorably on the petitioner's motions to reopen and correct the alleged typographical mistakes on the certified labor certifications, the petitioner may so advise USCIS in any future proceedings.<sup>8</sup> However, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all of its employees in the administration of the Act, BALCA decisions are not similarly binding on USCIS employees.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Our September 28, 2010, decision will be withdrawn with regard to the finding of fraud or willful misrepresentation by the beneficiary. The remainder of that decision will be affirmed, because the petitioner has not shown that the earlier fraud or misrepresentation finding against the petitioner, and the conclusion that it was unable to pay the proffered wage, were made in error.

**ORDER:** The motion to reopen is denied. The motion to reconsider is granted. Our decision of September 28, 2010, to the effect that the beneficiary engaged in fraud or willful misrepresentation of material facts in the labor certification application, is withdrawn. The prior findings that the petitioner engaged in fraud or willful misrepresentation of material facts in the labor certification application remain intact. The prior findings that the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present are also reaffirmed.

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Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.

<sup>7</sup> As noted above, the current motion does not contest the prior fraud or misrepresentation finding against the petitioner.

<sup>8</sup> With respect to the motions it filed with the DOL in 2009, the petitioner has not submitted any recent documentation showing that the motions are still pending.