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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: **MAY 16 2014**

OFFICE: TEXAS SERVICE CENTER

FILE:



IN RE: Petitioner:
Beneficiary:



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:

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

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed that decision and the director rejected it as untimely filed on April 7, 2009. The Administrative Appeals Office (AAO) subsequently reopened the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) and allowed the petitioner 30 days to submit a brief and additional evidence. The petitioner responded to this request and on March 29, 2013, the AAO dismissed the appeal. The petitioner filed a motion to reopen and a motion to reconsider the matter and the AAO dismissed these motions on February 28, 2014. The petitioner has now filed another motion to reopen and motion to reconsider the AAO's decision. The AAO's February 28, 2014 decision will be reopened based upon the evidence submitted on motion, and the prior decision of the AAO will be affirmed. The motion to reconsider is not properly filed and will be dismissed. The petition will remain denied.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a head cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). In its February 28, 2014 decision, the AAO found that the petitioner had established that the beneficiary met the experience requirements of the labor certification but that it had not established its ability to pay the beneficiary's proffered wage in 2007, 2008, and 2011.

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 or motion.

The petitioner has filed a proper motion to reopen. The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." On motion, counsel to the petitioner stated:

With this motion to reopen/reconsider, the employer submits an update to the 2011 Tax Return which after review was found to contain a calculation error. A copy of the correction and IRS Form 4605, Examination Changes, is enclosed with this motion.

The motion was accompanied by an IRS Form 4605, stating a corrected amount of "ordinary, distributable net, or taxable income." Because the petitioner asserts new facts with supporting documentation, the motion qualifies as a motion to reopen. Therefore, our February 28, 2014 decision will be reopened.¹

¹ On the Form I-290B, Notice of Appeal or Motion, counsel states, "Additional documentation will be provided to USCIS TSC within a 30 day period." A motion must meet the regulatory requirements of a motion to reopen or reconsider at the time it is filed. No provision exists for USCIS to grant an extension to the petitioner to file evidence or arguments in the future. Nothing in the regulations allows the petitioner to submit evidence beyond the 30 day period allowed for motions to reopen. 8 C.F.R. § 103.5(a)(1)(i). Therefore, we will only consider the evidence submitted with the instant motion.

The petitioner has not filed a proper motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that “[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider ... must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.” The motion was not accompanied by arguments based on precedent decisions to establish that the decision was based on an incorrect application of law or policy. Therefore, the petitioner’s motion to reconsider will be dismissed.

At issue in the instant motion to reopen is whether the petitioner had the ability to pay the proffered wage to the beneficiary in 2007, 2008, and 2011.

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.

The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Here, the ETA Form 9089 was accepted on October 22, 2007. The proffered wage as stated on the ETA Form 9089 is \$15.50 per hour (\$32,240.00 per year based on 40 hours per week).

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the petitioner’s net income or net current assets is not sufficient to demonstrate the petitioner’s 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 (Reg’l Comm’r 1967).

² *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff’d*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

The record does not establish that the petitioner paid the beneficiary the full proffered wage, or any wages, in 2007, 2008, or 2011. As detailed in our February 28, 2014 decision dismissing the appeal, the petitioner's tax returns in the record demonstrate that it had the following amounts of net income and net current assets for 2007, 2008, and 2011, as shown in the table below.

Year	Net income ³	Net current assets ⁴
2007	\$291.00	\$(8,142.00)
2008	\$(4,449.00)	\$(973.00)
2011	\$(7,131.00)	\$(90,632)

Therefore, for the years 2007, 2008, and 2011, the petitioner did not have sufficient net income to pay the proffered wage.

As stated above, the instant motion contains an IRS Form 4605, stating a corrected amount of "ordinary, distributable net, or taxable income" for the petitioner's 2011 tax return. The adjustment is handwritten on the copy of the Form 1120S. Both the Form 1120S and the Form 4605 are unsigned. Further, the Form 4605 shows no evidence of submission to the Internal Revenue Service (IRS) or its receipt or acceptance by the IRS. No evidence was submitted demonstrating that the petitioner amended its 2011 tax return. USCIS requires IRS-certified copies of the amended return to establish that the amended return was actually received and processed by the IRS. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel for the petitioner has not demonstrated why the petitioner made this adjustment and why it was not made previously when the Form 1120S was originally filed on May 30, 2012. The fact that this adjustment was made on March 7, 2014, nearly two years after the Form 1120S was filed, and shortly after our February 28, 2014 decision, calls into question the validity of this adjustment. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

³ The evidence in the record shows that in 2007 and 2008, the petitioner was structured as a C corporation, and in 2011, the petitioner was structured as an S corporation. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120. For an S corporation, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S.

⁴ 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 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18.

Even if we were to accept this IRS Form 4605 as demonstrating that the petitioner had the ability to pay the proffered wage in 2011, the record would still not establish that the petitioner had the ability to pay the proffered wage in 2007 and 2008. Counsel indicated on the Form I-290B that the years 2007 and 2008 were “just after its acquisition of the business” and that additional evidence to demonstrate why the net income and net current assets were below “the usual level of the restaurant’s business” would be provided within a 30-day period. As noted above, a motion to reopen must provide new facts and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Accordingly, any evidence relating to the petitioner’s ability to pay the proffered wage in 2007 and 2008 must have been submitted with the instant motion for us to consider this evidence on motion.

Therefore, the petitioner has failed to establish its continuing ability to pay the proffered wage for 2007, 2008, and 2011.

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 movant has not met that burden. The motion will be dismissed.

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 sustained that burden.

ORDER: The motion to reconsider is dismissed. The motion to reopen is granted, the previous decision of the AAO, dated February 28, 2014 is affirmed, and the petition remains denied.