U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 19 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (Director), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before us on another "appeal" by the petitioner. We will treat the filing as a motion to reconsider. The motion will be granted, our prior decision will be withdrawn, and the petition will be remanded.

The petitioner is a corporation that owns and operates a restaurant.[1] It seeks to permanently employ the beneficiary in the United States as a cook specializing in Filipino cuisine. The petition requests classification of the beneficiary as a professional or skilled worker under 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. The petition's priority date is December 19, 2005, which is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The Director concluded that the marriage fraud bar of section 204(c) of the Act, 8 U.S.C. § 1154(c), prohibits the petition's approval. He also found that the petitioner did not demonstrate its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on April 2, 2009.

We withdrew the Director's finding regarding the petitioner's ability to pay the proffered wage. However, we affirmed the application of section 204(c) of the Act to the petition. Accordingly, we dismissed the petitioner's appeal on September 6, 2012.

On October 9, 2012, the petitioner submitted another Form I-290B, Notice of Appeal or Motion, seeking to "appeal" our decision. We lack authority to review our own decisions on appeal. *See* U.S. Dep't of Homeland Sec. Delegation No. 0150.1, para. (2)(U) (Mar. 1, 2003), *available at*, https://www. (accessed June 2, 2015) (delegating appellate review authority to us over the matters stated in the former regulation at 8 C.F.R. § 103.1(f)(3)(iii) (2002)). However, we may treat a petitioner's filing as a motion to reopen and/or a motion to reconsider. *See* 8 C.F.R. § 103.3(a)(2)(iii).

Because the petitioner's most recent filing alleges errors in our application of law or policy, we will consider it as a motion to reconsider. *See* 8 C.F.R. § 103.5(a)(3) (requiring a motion to reconsider to allege an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy).

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[1] The record indicates that the petitioner's legal name is However, the petitioner does business under the name stated on the petition.

[2] Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing permanent skilled labor (requiring at least two years of training or experience), for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

We conduct review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

Application of Section 204(c) of the Act

Section 204(c) of the Act bars a petition's approval if its beneficiary previously attempted or conspired "to enter into a marriage for the purpose of evading the immigration laws." A beneficiary's file must contain "substantial and probative" evidence of such an attempt or conspiracy. 8 C.F.R. § 204.2(a)(1); *Matter of Tawfik*, 20 I&N Dec. 166, 167 (BIA 1990). The submission of false documents representing a nonexistent marriage does not establish an alien's attempt or conspiracy to enter into a marriage for purposes of section 204(c) of the Act. *Matter of Christos, Inc.*, 26 I&N Dec. 537, 540 (AAO 2015).

In our appellate decision, we found that the beneficiary, in 2002, submitted, or conspired to submit, documentation of a nonexistent marriage in support of an immigrant visa petition for him and his accompanying application for adjustment of status. The record contains an April 30, 2007 letter from the Registrar-Recorder/County Clerk's Office stating that it has no record of a marriage between the beneficiary and a purported United States citizen on November 25, 2001, as alleged in the petition and the adjustment application.

As the petitioner argues, because the record indicates that the beneficiary did not attempt or conspire to enter into an actual marriage, the marriage fraud bar of section 204(c) of the Act does not apply.[3] We will therefore withdraw our prior decision.

Ability to Pay the Proffered Wage

Although section 204(c) of the Act does not bar the petition's approval, the record does not otherwise support the petition's approval.

A petitioner must establish its ability to pay a beneficiary's proffered wage from a petition's priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining a petitioner's ability to pay, we first examine whether the petitioner paid a beneficiary

[3] In other proceedings, USCIS could determine that the beneficiary engaged in fraud or misrepresentation of a material fact by submitting false documentation or information regarding the nonexistent marriage. *See Christos*, 26 I&N Dec. at 541 (holding that misrepresentations regarding a nonexistent marriage may render a beneficiary inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), in adjustment of status proceedings). We express no opinion on whether the beneficiary engaged in fraud or misrepresentation of a material fact. *See INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (stating that, like courts, federal agencies are not generally required to make findings and decisions unnecessary to the results they reach).

the full proffered wage each year, beginning with the year of the priority date. If a petitioner has not paid a beneficiary the full proffered wage each year, we next examine whether it had sufficient net income or net current assets to pay the difference between the wages paid, if any, and the proffered wage.[4] If a petitioner's net income or net current assets are insufficient to demonstrate its ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614 (Reg'l Comm'r 1967).

In the instant case, the accompanying labor certification states a proffered wage for the offered position of Specialty Cook of $12.79 per hour for a 40-hour work week, or $26,603.20 per year. The petitioner does not claim to have employed the beneficiary.

We previously found that the petitioner had sufficient net current assets to pay the proffered wage in 2005. As indicated in our appellate decision, we prorated the proffered wage to reflect the amount payable after the petition's priority date of December 19, 2005.

However, in our Notice of Derogatory Information and Request for Evidence (NDI), dated December 5, 2013, we informed the petitioner of our intention to reverse that finding. We will not consider net current assets or net income accrued by a petitioner over a 12-month period to demonstrate its ability to pay a proffered wage of less than one month.

A copy of the petitioner's 2005 federal income tax returns reflects net income of $2,103 and net current assets of $10,162. At the time of the NDI's issuance, the record did not contain evidence that the petitioner generated sufficient net income or net current asset amounts after the petition's priority date to pay the prorated proffered wage of $874.63.

In response to our NDI, the petitioner submits copies of its bank account statements from December 2005 and January 2006. The statements indicate balances of $5,906.40 and $1,646.17 in a business checking account as of December 8, 2005 and January 10, 2006, respectively, and $2,335.42 in a business savings account as of January 31, 2006. Because the account balances exceed the 2005 prorated proffered wage of $874.63, the petitioner argues that the statements establish its ability to pay in 2005 after the petition's priority date.

However, the record does not indicate that the bank statements reflect sufficient *net* income or *net* current asset amounts from the petition's December 19, 2005 priority date until December 31, 2005. The business checking account statement for the period of December 8, 2005 to January 10, 2006 reflects more withdrawals/debits than deposits/credits. The statement indicates $11,058.63 in

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[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *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 (9th Cir. 1984); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (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 (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).

deposits/credits, but $15,318.86 in withdrawals/credits over the period, a net loss of $4,260.23. The other account balances do not reflect the petitioner's assets during the relevant period, from the December 19, 2005 petition priority date to December 31, 2005. Thus, the record does not reflect sufficient net income or net current assets for 2005.

Despite reflecting net income losses for 2007 onward, the petitioner's tax returns from 2006 through 2012 reflect sufficient annual net current asset amounts to pay the annual proffered wage of $26,603.20. However, the record does not explain the source of the annual net current asset amounts.

The 2006 return reports an annual net current asset amount of $41,703. The return reflects cash balances of $11,117 at the year's beginning and $41,142 at the year's end, an increase of more than $30,000. However, the return reports gross annual revenues of $69,459, with $13,022 in costs of goods sold and $56,124 in other costs, including wages, rent, and taxes. Because the petitioner's total costs nearly equaled its revenues, the return does not explain how the petitioner generated more than $30,000 in cash in 2006.

An unaudited accountant's report indicates that the petitioner's year-end cash balance in 2006 included $28,961.20 in a certificate of deposit (CD). However, the record does not indicate the source of the CD funds or establish the CD as a short-term, current asset.

The annual net current asset amounts reflected on the petitioner's tax returns for the years after 2006 suggest that the petitioner carried over the CD funds from year to year as cash on hand. However, if part of the CD funds is earmarked to pay the annual proffered wage in 2006, the record does not establish the petitioner's generation of sufficient, additional net income or net current assets to pay the proffered wage in the following years.

The CD indicated in the 2006 accountant's report appears to be the source of the petitioner's annual net current asset amounts from 2006 through 2012 and the key to its ability to pay the proffered wage in those years. We thus require evidence of the CD's terms and the petitioner's possession of it from 2006 through 2012. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citation omitted) (finding that uncorroborated assertions are insufficient to meet the burden of proof in visa petition proceedings). The petitioner must also explain how it would pay the proffered wage in the years after depletion of the CD funds.

In addition, the petitioner indicated that it employed three people.[5] However, its tax returns for 2005 and for 2008 through 2012 do not reflect any salaries, wages, officer compensation, or costs of labor. The discrepancy casts doubt on the petitioner's ability to pay employees. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (holding that a petitioner must resolve inconsistencies of record by independent,

[5] The Form I-140, Petition for Alien Worker, states that the petitioner had no employees. However, in response to the Director's Request for Evidence, dated July 26, 2007, the petitioner asserted that it misstated its number of employees on the form and actually employed three people at that time.

objective evidence).

The petitioner's response to our NDI has raised additional questions about its ability to pay the proffered wage. We will therefore remand the petition to the Director to afford the petitioner an opportunity to respond to the questions.[6]

The Petitioner's Intent to Employ the Beneficiary

The record also does not support the petitioner's intention to employ the beneficiary in the offered position.

For labor certification purposes, an "employer" is an entity "that proposes to employ a full-time employee at a place within the United States." 20 C.F.R. § 656.3. Similarly, only a U.S. employer "desiring and intending to employ an alien" may file an immigrant visa petition. 8 C.F.R. § 204.5(c).

A petitioner must intend to employ a beneficiary pursuant to the terms and conditions of an accompanying labor certification. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg. Comm. 1966) (affirming a petition's denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the accompanying labor certification).

As previously indicated, the petitioner's tax returns for 2005 and for 2008 through 2012 do not reflect any salaries, wages, officer compensation, or costs of labor. Its returns for 2006 and 2007 indicate that it paid combined wages and officer compensation of $11,000 and $10,600, respectively.

The record does not indicate that the petitioner has ever employed a worker on a full-time basis. The record therefore casts doubt on the petitioner's intention to employ the beneficiary full-time in the offered position pursuant to the accompanying labor certification. For this additional reason, we will remand the petition to the Director to afford the petitioner an opportunity to respond.

Conclusion

We will treat the petitioner's filing as a motion to reconsider. Because the record indicates that the beneficiary did not attempt or conspire to enter into an actual marriage, section 204(c) of the Act does not bar the petition's approval. We will therefore grant the motion and withdraw our prior decision.

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[6] Our NDI also questioned the beneficiary's qualifying experience, the *bona fides* of the job opportunity, and the petitioner's alleged failure to disclose familial relationships between the beneficiary and its shareholders/officers on the accompanying labor certification. After consultation with the DOL and consideration of the petitioner's evidence and argument in response to our NDI, the record does not support the petition's denial or the labor certification's invalidation on the additional grounds stated in our NDI.

However, the record does not otherwise support the petition's approval. The petitioner's response to our NDI has raised additional questions regarding its ability to pay the proffered wage and its intention to employer the beneficiary in the offered position. We will therefore remand the petition to the Director for additional proceedings consistent with this decision.

The Director should advise the petitioner of the questions regarding its ability to pay and its intention to employ the beneficiary. The Director should also afford the petitioner a reasonable opportunity to submit additional evidence and argument in support of the petition. Pursuant to *Sonegawa*, the petitioner may also submit additional evidence of: how many years it has conducted business; its number of employees; the growth of its business; uncharacteristic losses or expenses; its reputation in its industry; the beneficiary's replacement of employees or outsourced services; or other evidence of its ability to pay. The Director may also advise the petitioner of any additional denial grounds he may find.

Upon receipt of all the evidence and argument, the Director should review the entire record and enter a new decision.

ORDER: The "appeal" is treated as a motion to reconsider and granted. Our appellate decision of September 6, 2012 is withdrawn, and the record is remanded to the Director for further proceedings consistent with the decision above.