U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 29 2008

SRC-03-118-51912

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and the subsequent appeal was dismissed by the Administrative Appeals Office (AAO).[1] The matter is now before the AAO on a motion to reopen and/or reconsider. The motion will be dismissed.

The petitioner is a convenience store/service station. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had failed to establish the ability to pay the proffered wage and that the record did not warrant an immigrant classification to the beneficiary where a function of the beneficiary's job cannot be performed at the time of petitioning for the beneficiary because it did not appear that any employees exist for the beneficiary to manage and it also seemed questionable whether the petitioner is continuing in operation at all. Accordingly, the director denied the petition on November 10, 2004. The petitioner through its counsel filed an appeal to the AAO. On May 9, 2006 the AAO withdrew the portion of the director's decision that the petitioner had failed to establish the ability to pay the proffered wage, but dismissed the appeal finding that counsel's assertions cannot overcome the ground of the denial that the evidence submitted could not establish that any employees existed at the time of filing the labor certification application and has been existing since then for the beneficiary to manage.

Counsel filed the instant motion on June 9, 2006 with a brief and an affidavit dated June 6, 2006 of [redacted] June 6, 2006 affidavit) as new evidence. In the motion counsel claims that the Hossain June 6, 2006 affidavit indicates that there have been and will continue to be, at least one non-owner employee for the beneficiary to supervise, thereby satisfying the specific requirement as set forth in the labor certification. The [redacted] June 6, 2006 affidavit states impertinent part that:

> We are a family-run business, owned 50% by myself and 50% by my sister [redacted] In addition, three family members work in the store on three shifts. These family members require supervision, which I myself normally provide.
>
> We wish to hire a manager so that I do not have the full responsibility to personally manage the store and supervise the employees, 24 hours a day. The new manager will supervise at least one employee working on shift. All our cashiers require supervision and are not capable of managing the store.

The key issue on motion is whether the petitioner established that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not

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[1] The petitioner filed an identical petition (SRC-05-086-51056) on behalf of the same beneficiary under the name of Sheam, Inc. (the same Federal employer identification number and the same address) with the Texas Service Center on February 2, 2005 while the instant appeal is pending with the AAO. The petition SRC-05-086-51056 was denied by the director on June 28, 2006, no further action was taken for the petition.

mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak,* 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith,* 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey,* 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of retail store manager who will report to the president of the company and supervise one to three (1-3) employees and perform duties as follows:

> To manage and direct business operations – scheduling of workers, purchasing of supplies and merchandise, making and preparing deposits, ordering of gas loads, maintaining pumps, hoses and nozzles, customer relations, cashiering, stocking, inventory, lotto, general bookkeeping and accounting.

The certified ETA 750 indicates that the beneficiary will manage and direct the petitioner's business operations by supervising 1 to 3 employees. Therefore, the issue in the instant motion specifically is whether the petitioner submitted sufficient evidence to establish that it had at least one employee for the beneficiary to manager or supervise at the time of filing the labor certification application on April 18, 2001, and has been having at least one employee for the beneficiary to manage or supervise since then until the present. However, as discussed in both the director's and AAO's decisions, the submitted tax returns show that the petitioner paid salaries and wages of $78,000 in 2001, but the petitioner did not indicate how many employees were working for it that year. The petitioner did not pay any salaries and wages in 2002 and 2003. There was no compensation of officers paid in the years 2001 through 2003. This office also notes that the record of the petition SRC-05-086-51056 contains a copy of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2004 and 2004 Form W-2 Wage and Tax Statement for all employees, and Form 941 Employer's Quarterly Federal Tax Return for 2004. These documents show that in 2004, the petitioner had and paid only two employees, **[redacted] (the president of the petitioner) and [redacted]** (the instant beneficiary) and it paid the president and the beneficiary $23,040 and $13,440 respectively. Obviously the president was and could not be the employee to be supervised by the beneficiary since the ETA 750 indicates that the beneficiary will report to the president. Therefore, the petitioner did not establish that it had and has been hiring at least one employee for the beneficiary to supervise. Instead, the documentary evidence in the record shows that the petitioner did not have any employee to be supervised by the beneficiary at the time of filing and continuing since then. The director and this office correctly pointed out that the petitioner failed to submit any documentary evidence to establish that the job offer was and has been a realistic and bona fide one.

On motion, counsel submits the [redacted] June 6, 2006 affidavit asserting that three family members work in the store on three shifts and the new manager will supervise at least one employee working one shift. However, the affidavit does not name at least one employee other than [redacted] working for the petitioner to be supervised by the beneficiary in 2001 through 2004. Counsel does not submit any documentary evidence to support the affidavit's assertion. The record does not contain any evidence naming any employees to whom salaries and wages of $78,000 were paid by the petitioner in 2001; the record does not contain evidence showing any compensation paid to any employees or officers by the petitioner in 2002 and 2003; and the record does not contain any evidence that there was at least one employee other than the beneficiary and the president working for the petitioner in 2004. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Counsel's motion with the June 6, 2006 affidavit does not qualify for consideration as a motion to reopen under 8 C.F.R. § 103.5(a)(2) because the petitioner is not providing new facts not previously submitted, and the affidavit is not supported by any documentary evidence. In addition, the affidavit provides inconsistent information with the documentary evidence already in the record and the petitioner does not submit any independent objective evidence to resolve these inconsistencies in the record. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

The motion does not qualify for motion to reopen, and therefore, must be dismissed.

The AAO also notes that if the motion would not be dismissed because it did not qualify for consideration as a motion to reopen, it would otherwise be dismissed as moot based on the finding that the petitioner has dissolved.

During the adjudication of the motion, evidence came to light that the petitioner in this matter had been dissolved. The Florida Department of State, Division of Corporations official website indicates that Sheam Corporation with Federal employer identification number [redacted] was administratively dissolved for annual report on September 15, 2006. *See* http://www.sunbiz.org/search.html (accessed on August 4, 2008). If the petitioner was indeed no longer an active business, the petition and its motion to the AAO would have become moot.[2] In which case, the AAO would dismiss the instant motion as moot.

[2] Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Termination of the employer's business is grounds for automatic revocation of an approved without notice. 8 C.F.R. § 205.2(a)(3)(iii)(D).

ORDER: The motion is dismissed for not qualifying for consideration as a motion to reopen, the previous decision of the AAO dated May 9, 2006 is affirmed, and the petition remains denied.