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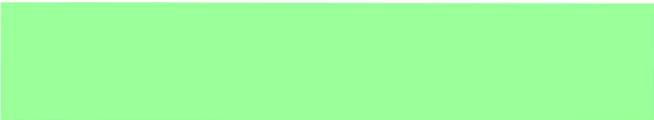
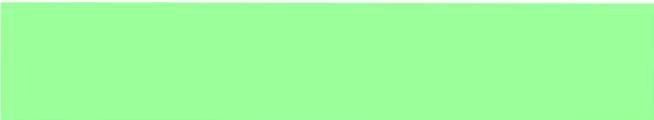
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **AUG 09 2013** OFFICE: NEBRASKA 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
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center on February 27, 2009. The petitioner filed an appeal to the Administrative Appeals Office (AAO) on March 31, 2009. On October 31, 2012, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted; the previous decision of the AAO will be withdrawn in part and affirmed in part, and the petition will remain denied.

The petitioner is a motel. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

In its October 31, 2012 decision, the AAO found that the petitioner failed to establish that it had the continuing ability to pay the proffered wage. Beyond the decision of the director, the AAO also found that the petitioner failed to establish that the beneficiary qualified for the position offered.

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service policy. A motion to reconsider a decision on an application or petition 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 to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

On motion, counsel acknowledges that the petitioner's "net income and net current assets as reported on its tax returns did not fully cover the proffered wage." However, counsel asserts that "the AAO failed to consider the totality of the circumstances, including the company's overall financial picture for the years in question." Counsel contends that the petitioner's bank records, the sole shareholder's financial records, and the overall magnitude of the petitioner's business activities should be considered in a totality of the circumstances analysis. Counsel resubmits copies of the sole shareholder's tax returns for the years 2001 through 2007. Counsel also submits a copy of the sole shareholder's tax return for 2008, which was not previously submitted.

Upon review of its prior decision, the AAO did assess the totality of the circumstances in this individual case and concluded that the petitioner had not established that it had the continuing ability to pay the proffered wage. The AAO found that the petitioner had only shown marginal growth in gross receipts, and failed to establish the petitioner's historical growth, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. The AAO also

found it more likely than not that the petitioner could not support the beneficiary and its existing employees if its existing employees were paid an average combined wages and salaries of \$48,457 since 2001 (less than "\$75,000 in wages and salaries to its eight employees").

On motion, counsel contends that the petitioner's bank records, the sole shareholder's financial records, and the overall magnitude of the petitioner's business activities should be considered in a totality of the circumstances analysis. In its decision, the AAO explained that counsel's reliance on the balances in the petitioner's bank account and the assets of the petitioner's shareholder was misplaced. The AAO stated the following:

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner's net current assets.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On motion, the petitioner did not submit evidence to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns. The petitioner also did not provide evidence or case law that would permit piercing of the corporate veil in this instance. 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)). Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has failed to demonstrate a basis by which the AAO could consider those bank statements to be evidence of the petitioner's ability to pay.

Counsel asserts that the sole owner has significant ownership stakes in 14 other hotels and is willing to forgo compensation to meet the petitioner's ability to pay the proffered wage. Counsel asserts that the sole shareholder's compensation is discretionary and could have been used to pay the proffered wage. The record contains a letter from the sole shareholder stating that he would provide the funds to the petitioner to pay the proffered wage. The petitioner's IRS Forms 1120S for 2001 through 2007 reflect that the petitioner paid the sole shareholder compensation in the amount of net income received for that year (ranging from a high of \$28,475 to a low of -\$11,176). As the AAO determined in its prior decision, the petitioner's net income in every year failed to establish its ability to pay the proffered wage of \$43,800; similarly, the amount of shareholder compensation fails to establish the petitioner's ability to pay the proffered wage in all years.

Further, the petitioner failed to address the AAO's finding that it could not support the beneficiary and existing employees as the existing employees were paid an average combined wages and salaries of \$48,457 since 2001. The petitioner did not submit evidence to establish its historical growth, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service.

Counsel also submits an unpublished AAO decision in support of his claim that the petitioner's totality of the circumstances demonstrates its ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In the instant case, for the reasons stated above, the petitioner has not established that it had the continuing ability to pay the proffered wage under a totality of the circumstances analysis.

Counsel asserts that the "courts and AAO have recognized that a company's tax returns are not always a reliable indicator of whether the company can afford to hire another worker because tax considerations drive a wedge between accounting income and economic income." *Construction and Design Co. v. U.S. C.I.S.*, 563 F.3d 593, 596 (7th Cir. 2009). Counsel's reliance on *Construction and Design* is misplaced. The petitioner's business is not located in the same jurisdiction as the cited case. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a U.S. circuit court case outside of that circuit. See *Matter of Anselmo*, 20 I&N Dec. 25, 30-32 (BIA 1989). Further, the cited case is distinguishable because it relates to a petitioner's employment of the beneficiary as a contractor, which is not the issue in the instant case, and therefore, it is not applicable.

Therefore, the AAO affirms its previous decision finding that the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage.

In its prior decision, beyond the decision of the director, the AAO found that the petitioner failed to establish that the beneficiary qualified for the position offered. The AAO noted an inconsistency with the beneficiary's experience letter from the [REDACTED] and the beneficiary's Form G-325A in the record. In his Form G-325A, the beneficiary failed to indicate any employment

abroad. The AAO stated that 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).

On motion, counsel asserts that the AAO should have issued Request for Evidence (RFE) to provide the petitioner an opportunity to address the additional ground for denial. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). In the present case, the evidence indicated a discrepancy in the record regarding the beneficiary's experience for the position offered. Accordingly, the additional ground for denial was appropriate.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A).

On motion, counsel submits an affidavit from the beneficiary, stating that the omission on his G-325A was an error on the part of his prior attorney. Counsel also submits an updated, notarized employment letter to address the discrepancy. The record contains a November 10, 2012 letter from the general manager/owner of [REDACTED]. The affiant states that the beneficiary was employed as a full-time manager from February 16, 1995 to June 30, 1999. The letter lists the duties performed by the beneficiary. Therefore, the petitioner has established that the beneficiary is qualified for the position offered. The AAO's prior decision is withdrawn as to that finding.

However, as stated in the AAO's prior decision, the petitioner has failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner did not overcome this ground for denial on motion, and the AAO's previous finding that the petitioner has not established its ability to pay the proffered wage is affirmed.

The petition will remain denied for the above stated reason. 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 met that burden. Accordingly, the motions will be granted; the previous decision of the AAO will be withdrawn in part, and affirmed in part, as discussed above.

ORDER: The motions are granted. The previous decision of the AAO, dated October 31, 2012, is withdrawn in part and affirmed in part. The petition remains denied.