(b)(6)

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: DEC 0 6 2013 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 (the Act), 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider.[1] The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a retail store. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).[2] The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 1, 2004. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to demonstrate that it has the continuing ability to pay the proffered wage as of the priority date onward and that the beneficiary meets the minimum requirements set forth on the labor certification. The director also concluded that the petitioner and the beneficiary made willful misrepresentations on the labor certification and submitted a fraudulent document in support of the beneficiary's claimed experience, and invalidated the labor certification.

On appeal, the AAO found that the petitioner does not have the continuing ability to pay the proffered wage and the beneficiary fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. The AAO affirmed the director's conclusion that the beneficiary misrepresented a material fact and the invalidation of the labor certification.

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.

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[1] The attorney who filed the Form I-290B, Notice of Appeal or Motion, submitted a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the beneficiary and not by the petitioner. Further, on November 5, 2013, Ms. license to practice law was suspended. As such, the AAO will accept all arguments made by counsel as if made by the petitioner, but will not provide a copy of this decision to counsel.

[2] This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). Since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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 motion.

On motion, the petitioner submits a brief, a letter of intent of sale for the beneficiary's dry cleaning business and copies of documentation already in the record.

8 C.F.R. § 103.5(a) provides, in pertinent part:

> (2) *Requirements for motion to reopen.*
> 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. . .
>
> (3) *Requirements for motion to reconsider.*
> 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.

On motion, the petitioner contends that nothing in the record reflected the petitioner's inability to pay the proffered wage, the petitioner has been in business for many years, has historical growth and has exhibited the overall financial ability to pay the proffered wage. The petitioner states that the beneficiary does have a true intent to work for the petitioner, which is supported by the beneficiary's letter of intent to sell his dry cleaning business. Finally, the petitioner contends that there was no misrepresentation made on the labor certification.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on October 1, 2004, the priority date, which is the date the Form ETA 750 was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is $40,857 per year.

The record before the director closed on January 18, 2012 with the receipt by the director of the petitioner's response to his notice of intent to deny (NOID). The petitioner's 2011 tax return was not yet due; therefore, the petitioner's 2010 tax return is the latest return available. On the petition, the petitioner claimed to have been established in 1999, to employ four employees, to have $2.2 million in gross annual income, and $19,007 in net annual income.

As advised in the AAO's decision, the record does not demonstrate that the beneficiary has ever been employed by the petitioner and the petitioner has still not submitted its 2006 and 2007 tax returns. As discussed in the AAO's decision, the petitioner's tax returns reflected the following information:[3]

Tax Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due to Instant Beneficiary
2004	$33,276.00	$24,002.00	$0.00	$40,857.00
2005	$19,007.00	$42,151.00	$0.00	$40,857.00
2006	UNKNOWN	UNKNOWN	$0.00	$40,857.00
2007	UNKNOWN	UNKNOWN	$0.00	$40,857.00
2008	$41,468.00	$83,463.00	$0.00	$40,857.00
2009	($19,184.00)	$57,211.00	$0.00	$40,857.00
2010	($80,090.00)	$17,987.00	$0.00	$40,857.00

Thus, with the exception of 2008, the petitioner did not have sufficient net income to pay the proffered wage of $40,857 and did not have sufficient net current assets to pay the proffered wage of $40,857 in 2004, 2006, 2007, and 2010.[4]

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[3] The AAO notes that it failed to provide the petitioner's net current assets for 2008 and includes those amounts in the current decision. Where an S corporation's income is exclusively from a trade or business, 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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed on November 20, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The AAO's previous decision listed the net income from page 1 of the tax returns for all relevant years. However, the AAO withdraws these findings for 2004 and 2010 and finds the net income for those years to be as reflected in the below table and on the relevant Schedule Ks.

[4] Because the petitioner failed to submit evidence establishing its ability to pay the proffered wage in 2006 and 2007, the AAO must conclude that the petitioner did not have the net income or net current assets to pay the proffered wage in 2006 and 2007.

However, on motion, the petitioner contends that the record does not reflect the petitioner's inability to pay the proffered wage, the petitioner has been in business for many years, has historical growth and has exhibited the overall financial ability to pay the proffered wage. As discussed in the AAO's decision, the petitioner in the instant case has failed to demonstrate its ability to pay the proffered wage for several years. Furthermore, the evidence in the record does not demonstrate the petitioner's historical growth since its inception, nor does it demonstrate its reputation in the industry. While the petitioner contends that it has the overall ability to pay the proffered wage, it failed to submit its 2006 and 2007 tax returns, thereby preventing the AAO from rendering a decision as to whether the petitioner had the ability to pay the proffered wages in those years. The petitioner was put on notice of this deficiency in the director's decision and the previous decision of the AAO, but the petitioner continues to fail to explain the absence of this required evidence. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The petitioner has failed to provide any evidence enumerated in 8 C.F.R. § 204.5(g)(2) to demonstrate its ability to pay the proffered wage in 2006 and 2007. While the 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. Additionally, the tax returns in the record reflect that the petitioner's gross receipts have steadily decreased from 2009 through 2010. Considering the totality of the circumstances, the petitioner fails to demonstrate that it had the continuing ability to pay the beneficiary from the priority date onward.

On motion, the petitioner states that the beneficiary has intent to work for the petitioner, which is supported by the beneficiary's letter of intent to sell his dry cleaning business; however, the AAO's decision does not question the beneficiary's intent to work for the petitioner and such intent has no bearing on whether the petitioner has established its ability to pay the proffered wage or the misrepresentation discussed in the AAO's decision regarding the labor certification.

The Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of a manager. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of two years of experience in the job offered. Item 13 of the Form ETA 750 lists the following duties: "Oversee retail operations. Provide customer service. Hire and train employees. Prepare deposit and cash reconciliation. Formulate pricing policies. Maintain inventory and equipment." On the Form 750B, the beneficiary and petitioner claimed that the beneficiary is qualified for the proffered position through his employment as a manager at [redacted] Texas from June 1993 to August 1995.

First, the petitioner did not provide and still does not provide on motion, evidence which meets the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) regarding letters from qualifying employers for the above-referenced experience. Second, as discussed in the AAO's decision, the petitioner and the beneficiary willfully misrepresented the beneficiary's experience on the From ETA 750 because the beneficiary's purported former employer, [redacted] was not in existence as a

company during the beneficiary's claimed employment dates. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). On appeal, counsel asserted that the fact that the company was not registered does not mean the company was not operating and employing the beneficiary. However, on motion the petitioner submits no evidence of existence or operation during the claimed period of employment. Without documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On motion, the petitioner contends that there was no misrepresentation made on the labor certification; however, the petitioner did not provide any independent, objective evidence to overcome the inconsistencies in the record regarding the beneficiary's qualifying experience. *See Matter of Ho*, 19 I&N Dec. at 591 and *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). The petitioner has also failed to cite any precedent, regulations or law to establish that the AAO erred in rendering its decision regarding the misrepresentation on the labor certification.

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). Here, that burden has not been met.

ORDER: The motions are granted. Upon reopening and reconsideration, the AAO's previous decision, dated June 24, 2013, is affirmed. The petition will remain denied. The labor certification remains invalidated.