(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUL 2 2 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The petitioner then filed an appeal to the Administrative Appeals Office (AAO) which was dismissed. Counsel to the petitioner filed a motion to reconsider the AAO's decision which was dismissed by the AAO. Counsel to the petitioner has subsequently filed a second motion to reconsider (MTR) the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed pursuant to 8 C.F.R. § 103.5(a)(3), and § 103.5(a)(4).

United States Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. § 103.5(a)(3) state, 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."

In this matter, the petitioner's assertions are not supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law or USCIS policy. Furthermore, the petitioner has failed to establish that the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The motion must be dismissed. 8 C.F.R. § 103.5(a)(4).

Regardless, neither the documents submitted on appeal, nor any evidence in the record of proceeding overcomes the bases for the director's denial and the AAO's dismissal of the appeal in that the evidence submitted fails to establish that the Form I-140 petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker, or that the labor certification supports a filing under the skilled worker category.[1] The director determined that the ETA Form 9089 failed to demonstrate that the job requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker and, therefore, the beneficiary cannot be found qualified for classification as a skilled worker. 8 C.F.R. § 204.5(l). The director denied the petition accordingly. The AAO affirmed the director's decision and dismissed the appeal. The AAO also found that the beneficiary was not qualified for the position.

Counsel requests on motion that the AAO take a closer look at the arguments that were raised concerning the petitioner's intend to seek classification as a skilled worker and the beneficiary's qualifications. Counsel reiterates the arguments that were made on appeal.

The petitioner is a financial service provider. The petitioner seeks to classify the beneficiary as an office clerk, a position requiring a minimum of a high school diploma and six months work experience as an office clerk, or twelve months experience as a file clerk. In the alternative, an

[1] It is noted that the record of proceeding shows that the AAO accurately addressed all issues raised by counsel concerning the lack of evidence to demonstrate that the labor certification supports a filing under the skilled worker category, and correctly dismissed the appeal, affirming the director's decision.

associate's degree in secretarial studies is acceptable to the petitioner, pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).

The record of proceeding shows that the Form I-140 petition was filed by the petitioner on August 15, 2007. The petitioner indicated on the Form I-140 that it was established in 1987, and that it currently employed two workers. The priority date as indicated on the ETA Form 9089 is June 8, 2007. On the Form I-140, the petitioner checked Part 2.e, indicating that the petition was being filed for: "a professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)."

The petitioner's motion does not overcome the bases for the AAO's decision in that the evidence in the record of proceeding fails to establish that the minimum requirements for the position meet the definition of a skilled worker or professional. As noted in the previous decision, a skilled worker classification requires, at a minimum, two years of training or experience; a professional requires at a minimum, a four-year bachelor's degree or the equivalent. As the petitioner would accept someone in the proffered position with six months experience as an office clerk, the position can only be classified as an unskilled worker (requiring less than two years of training or experience). As such, the motion must be dismissed.

Further, on motion, the petitioner does not establish that the beneficiary possessed the required experience set forth on the labor certification as of the priority date.[2] For this additional reason, the petition must be denied and the motion dismissed.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful

[2] The AAO correctly found that the petitioner had submitted a copy of a letter of experience containing an illegible signature, no contact information, and no description of the beneficiary's job duties; and therefore, was insufficient to demonstrate that the beneficiary possessed the required experience as set forth on the labor certification. The petitioner submitted on motion a letter dated June 18, 2012 from the business unit director of who stated that the company employed the beneficiary as a media planner from July 14, 2003 to November 25, 2004, and described the beneficiary's job duties. However, the beneficiary stated, under penalty of perjury, on the Form G-352A, Biographic Information, that she was employed by the company as a "media trainee." In addition, there is no indication from the record that she was employed on a full-time basis. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, the record does not indicate that work as a media planner is the same as the job offered or as a file clerk.

permanent residence. *See* 8 C.F.R. § 204.5(g)(2). 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 the petitioner's adjusted gross income to determine the petitioner's ability to pay the difference between the wage paid, if any, and the proffered wage.

In this matter, the petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). If the petitioner's adjusted gross income minus his reoccurring household expenses 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 Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant matter, the petitioner did not submit evidence of its ability to pay the proffered wage in 2009, 2010, 2011, and 2012. Although the petitioner submitted a copy of Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement for 2007 ($31,944.40) and 2008 ($38,700.00) indicating that the beneficiary was paid in excess of the proffered wage; the petitioner indicated on his Form I-140 that he employed two workers. On the petitioner's Schedule C – Two-Year Comparison Worksheet, he indicated that he paid a total of $31,944.00 in wages in 2007.[3] In addition, the wages paid by the petitioner to the beneficiary in 2007 account for nearly ½ of the petitioner's total income for that year. Furthermore, when subtracting the petitioner's reoccurring household expenses ($4,701.00 per month, $56,412.00 per year) from the adjusted gross income amount for 2007 ($58,742.00) the petitioner is left with $2,330.00 to sustain himself and five dependents, who he reported on his income tax return, for an entire year. There has been no explanation given for these inconsistencies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho* at 591.

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[3] The petitioner did not submit his IRS Form 1040 for the 2008 tax year.

Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary and its adjusted gross income. Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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. Accordingly, the motion will be dismissed, the proceedings will not be reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.