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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 18 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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on August 10, 2012, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reopen and reconsider will be granted.

The AAO's prior decision found that the petitioner failed to establish: that it possessed the continued ability to pay the proffered wage; that it was the actual employer; and, that the beneficiary possessed the minimum qualifications for the proffered job.

Beneficiary's Experience

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

We find that the petitioner provided new evidence relating to the beneficiary's experience, and grant the motion to reopen.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

According to the ETA Form 9089, Part H, the proffered job requires twenty-four months experience in the proffered job as a building maintenance associate.

With the instant motion, the petitioner provided a letter from [redacted] what appears to be a pay stub showing [redacted] employed and paid the beneficiary for 31.5 hours for the pay period ending March 31, 2000, and paid the beneficiary year-to-date $10,548.13; and, an affidavit from the beneficiary. However, none of this evidence establishes that the beneficiary possessed the minimum required experience as of the priority date.

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[1] The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

The letter from states only that the beneficiary was employed by that firm in 2000. The letter does not give any details about the beneficiary's job duties, training or experience. It fails to provide beginning and ending dates for the beneficiary's employment. It also does not state if the beneficiary was employed full- or part-time. It does not establish that the beneficiary had two years experience in the proffered job. The letter does not comply with the regulations.

The pay stub from is similarly lacking in that it does not describe the beneficiary's job duties, training, or experience. Neither does the pay stub show when the beneficiary began employment.

The beneficiary's affidavit alleges that she was a housekeeper employed by from November 24, 1997 to July 2, 2000. The affidavit states that periodically purges employment records, and as a result had no records of her past employment. We note that in the letter provided by that employer, no mention was made of destruction or purges of employment records. Thus the affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)). Additionally, the affidavit does not establish that the beneficiary has the experience required by the labor certification. Part H.11 of ETA Form 9089 has an extensive list of job duties, including "…care of extensive art, including special treatment for outdoor sculpture collection, ensuring solar light is properly controlled, humidity levels are monitored and sculptures are properly treated; maintain indoor and outdoor swimming pools and hot tubs; and, maintain household records…" Nothing in the beneficiary's affidavit suggests she has the above experience. Therefore, the petitioner failed to demonstrate the beneficiary possessed the required minimum qualifications as of the priority date.

Petitioner's Ability to Pay the Proffered Wage

The petitioner filed the motion asserting that the AAO erred: in analyzing its ability to pay the proffered wage; by stating was a Colorado entity; and, by noting the beneficiary used fraudulent Social Security Numbers (SSN).

The regulations at 8 C.F.R. § 103.5(a)(3) state 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 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." As the petitioner has alleged an incorrect application of law, the motion qualifies for reconsideration.

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

> *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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The AAO analyzes a petitioner ability to pay the proffered wage by looking at the petitioner's net income or net current assets as listed on its Federal income tax returns. In the instant case, the named petitioner is a wholly owned subsidiary of Forms 1065, U.S. Return for Partnership Income, for 2006 and 2007 is in the record. According to those forms, the petitioner has no revenue, no gross receipts or sales, no rents, and no taxable income for either year. net income reported for both 2006 and 2007 is $0. Schedule L show no net current assets for either year. Thus, the petitioner cannot establish an ability to pay the proffered wage through taxable income.

The petitioner asserts that *Construction and Design Co. v. USCIS,* 563 F.3d 593 (Cir. 7 2009) supports its case. However, that case is binding only on cases in the Seventh Circuit, and the instant case arises out of the Tenth Circuit. In *Construction and Design* the court said noncash expenses, such as depreciation, which are reflected on income tax returns can be added to income and revenue when calculating the petitioner's ability to pay the proffered wage. However, in the instant case, as noted above, the petitioner does not generate revenue and has no sales or income.

With the motion, the petitioner asserts that the AAO should base its decision on ability to pay solely on the petitioner's assets, as opposed to current assets.[2] The petitioner does not provide citations to statutes, regulations, or precedent decisions to support its assertion that net assets alone can be used to establish a petitioner's ability to pay.

The petitioner does provide a letter from an accountant describing the value of regular assets owned by the petitioner. However, this is not an audited annual statement, and lacks details about current assets. Although counsel asserts that the amounts listed on Schedule L, Line 8 of tax returns is the amount invested by in the petitioner, no evidence in the record supports

[2]According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

this assertion. 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).

The petitioner also provides a copy of Form W-2 for 2011, showing it employed and paid the beneficiary in that year. Although the petitioner paid the beneficiary in excess of the proffered wage in 2011, it has the burden of proving the ability to pay the proffered wage from the priority date from August 2006 onward.

Furthermore, the beneficiary's 2011 Form W-2 raises additional questions. Counsel asserts that the petitioner was created to "maintain, clean and care for luxury vacation home..." and that "the responsibility for business operations, including paying salaries rests with ." A review of the operating agreement between the petitioner and reveals that "[t]he purposes of the Company are to acquire own, hold, manage, develop, lease and sell or otherwise dispose of property, including real property for investment purposes or other purposes...." Further, although the scope of authority of the manager includes "operating the Company's business on a day-to-day basis," the operating agreement makes no mention of hiring employees and paying salaries. The record includes no management agreement between the petitioner and any other entity and there is no indication that management fees are paid. 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).

Counsel alleges that as a holding company, the petitioner does not operate as a traditional business. Instead of paying the beneficiary from proceeds of the business, expenses are paid from the partner's infusions of capital. The AAO notes that the petitioner is a limited liability corporation. 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." Thus the many references in the record to partners' income do not bear on the analysis of whether the petitioner has the ability to pay the proffered wage from the priority date onward. This is an issue the petitioner conceded early on in the petition when counsel stated in his appeal brief "[t]he petitioner is not in any way asking that the USCIS examine personal assets of the partners of either or "

In establishing a petitioner's ability to pay, USCIS will look to a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. USCIS uses net current

assets, as opposed to net assets, because net current assets represent items that can easily be liquidated to pay the proffered wage. Non current assets, such as real estate, are more difficult to liquidate. Additionally, capital assets, which are needed for a business to create income are not considered because if they were liquidated to pay wages the business would not function. Thus, the petitioner's assertions of legal error in calculating its ability to pay the proffered wage is unfounded.

The AAO noted in its prior decision that the petitioner must address its corporate status in any further filings. The AAO's notation of the petitioner's corporate status is not a legal or factual error. As the AAO correctly noted, the petitioner was operating in good standing pursuant to the Colorado Secretary of State, but another entity was in delinquent status. The petitioner has addressed the matter of its corporate status in its motion and the AAO concludes that it continues to operate in good standing.

Finally, the petitioner misconstrues the AAO's comments on the beneficiary's use of fictitious SSNs. It has long been established that unresolved inconsistencies in the record can undermine the value of all the evidence in support of a petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO noted that the evidence pertaining to the beneficiary was under two different names and two different SSNs. Given that unresolved issue, these records could not be trusted or relied upon. Although the AAO alerted the petitioner to this issue, it did not provide any evidence with the motion such as a copy of the beneficiary's Social Security Card, to resolve this inconsistency.

Therefore, the petitioner has failed to demonstrate it possessed the continued ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motions are granted. The previous AAO decision is affirmed. The petition remains denied.