(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: MAY 3 1 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, 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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be granted, the appeal will be dismissed, and the petition will remain denied.

In the director's September 28, 2008 denial, the director determined that the petitioner failed to establish its ability to pay the proffered wage for the beneficiary, and failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. The petitioner appealed the director's denial to the AAO. On July 30, 2012, the AAO dismissed the appeal, finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage, and it failed to establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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]

In the instant case, the petitioner submits with the motion the following evidence not previously submitted: a letter from the petitioner's CPA confirming the IRS extension, the petitioner's Schedule C tax returns for 2008 through 2010, the beneficiary's Forms 1099-MISC for 2009 and 2011, the beneficiary's tax return transcripts for 2010, and a credential evaluation from

The petitioner resubmits the following evidence on motion: the petitioner's Schedule C tax returns for 2007, the beneficiary's Forms 1099-MISC for 2006 through 2008, the beneficiary's tax return transcripts for 2008, the beneficiary's diploma and school transcripts,[2] a declaration from Prof. Dr. and two experience letters.

In this matter, the petitioner presented facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen.

On motion, counsel asserts that the petitioner filed an extension of its 2008 tax return with the Internal Revenue Service (IRS), and the extension afforded the petitioner until October 15, 2009 to file its 2008 tax return, which was after the appeal deadline.

Counsel further asserts that the beneficiary possesses the requisite education and experience for the proffered position. The credential evaluation, the beneficiary's school records and the experience letters are not new facts, in that they were available and could have been discovered or presented in the previous proceedings, and cannot be considered a proper basis for a motion to reopen. However, as the

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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).

[2] Counsel attaches translations, not previously submitted, for these documents.

petitioner's 2008 tax returns were not yet available, the newly submitted 2008 tax return does qualify and the evidence submitted on motion will be considered a proper basis for a motion to reopen.

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 also qualifies for consideration under 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts that the AAO's dismissal, finding that the petitioner did not demonstrate the ability to pay the proffered wage, is erroneous in fact and in law. Counsel contends that the 2008 taxes were not available at the time that the appeal was submitted due to an extension request and the petitioner submitted all available evidence to establish the ability to pay the proffered wage.

The proffered wage as stated on the ETA Form 9089 is $30.25 per hour, which is $62,920 per year based on forty hours of work per week. The record contains the beneficiary's Forms 1099 issued by the petitioner for 2007 through 2009, and 2011. The beneficiary's Forms 1099 and tax return transcripts reflect the following information for the following years:

> In 2007, the beneficiary's Form 1099 stated wages of $43,210.
> In 2008, the beneficiary's Form 1099 stated wages of $43,700.
> In 2009, the beneficiary's Form 1099 stated wages of $42,697.50.
> In 2010, the beneficiary's Form 1099 was not provided.
> In 2011, the beneficiary's Form 1099 stated wages of $39,330.

For 2007 through 2011, the petitioner must show its ability to pay the difference between what it paid to the beneficiary and the proffered wage. It is noted that the beneficiary's tax return transcripts for 2010 do not reflect any income or wages paid by the petitioner and the beneficiary's Form 1099 for 2010 was not provided.

The petitioner is a single-member limited liability company (LLC). A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Maryland law, is considered to be a sole proprietorship for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and

obligations of the company generally are not the debts and obligations of the owners or anyone else.[3] An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

The record contains the petitioner's Schedule C tax returns for 2007 through 2010. The petitioner's tax returns reflect the following information for the following years:

In 2007, the petitioner's net income[4] was $60,277.
In 2008, the petitioner's net income was $59,615.
In 2009, the petitioner's net income was $32,031.
In 2010, the petitioner's net income was $27,451.
In 2011, the petitioner's net income was not provided.

Therefore, in 2010 and 2011 the petitioner's net income fails to cover the proffered wage.

The petitioner failed to provide any evidence of its net current assets for any of the relevant years.

Therefore, the petitioner has failed to demonstrate its ability to pay the proffered wage from the priority date continuing to the present based on wages paid to the beneficiary, or the petitioner's net income or net current assets.

On motion, counsel asserts that the AAO erred in finding that the beneficiary did not possess the requisite qualifications for the proffered job. On motion, counsel submits a credential evaluation from , as well as previously submitted documents.

In the instant case, the labor certification states that the offered position requires a Bachelor's degree in engineering studies or chemical engineering and 36 months of experience in the job offered as a security and alarm installer, or in the alternate occupation of a manger or technical director of security and alarm systems company. Part H.14 of ETA Form 9089 specifies that the beneficiary must have three years of experience in security alarm installation and engineering combined with professional experience as a manager or technical director in security systems and alarm wiring industry, and should be fluent in English and Spanish.

On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor's degree in Chemical Engineering from in Brazil, completed in 1975. The record contains a copy of a declaration dated June 30, 2006 and signed by Coordinator of Chemical Engineering with the

[3] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.
[4] The net income of a single member LLC taxed as a sole proprietorship is taken from Schedule C of Form 1040, Line 31.

in Brazil, attesting to the beneficiary's graduation in Chemical Engineering on December 12, 1975, and an untranslated copy of the beneficiary's transcripts. On motion, counsel asserts that this declaration written in her official capacity is a "university record" as within the plain meaning of the regulations for EB3 I-140 petitions initial evidence requirements. Counsel contends that this letter alone is sufficient to establish the beneficiary's attainment of the necessary education in order to qualify for the position.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Counsel asserts that the AAO erred in finding that the experience letter from was deficient of information regarding the employer, duties performed, job title and whether the beneficiary was full-time or part-time. The AAO also noted that the translator failed to certify that the translation is complete and accurate, and that he or she is competent to translate from the foreign language into English. Counsel contends that letter is on the employer's letterhead with address, and states the duties performed and job title. Counsel further asserts that the letter is written in both English and Portuguese and no translation is needed. The AAO withdraws this portion of its decision, but notes the letter fails to indicate whether the job was full-time or part-time.

The record also contains an experience letter from The AAO noted that the letter from did not include the name or title of the individual who signed it, nor does it state the job title or whether the employment was full-time or part-time, as well as contained inconsistencies regarding the dates of employment listed by the beneficiary on Form 9089, Section K. Counsel concedes that the experience letter from does contain typos, but they are harmless as the beneficiary's employment at the company was more than 36 months. The AAO does not agree as the missing information directly relates to the credibility of the experience letter, and thus whether the beneficiary's qualifies for the proffered position. Furthermore, while counsel addressed the inconsistencies, he failed to submit a revised experience letter or additional evidence in support of his assertions. 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).

Notwithstanding, the evidence in the record tends to demonstrate more likely than not that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has established that the beneficiary is qualified for the offered position.

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 motions will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The appeal is dismissed. The petition remains denied.