**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: NOV 2 6 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
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion to reopen and motion to reconsider. The motion to reconsider is granted. The previous decision of the AAO will be affirmed. The petition will remain denied.

The petitioner describes itself as a commercial, corporate and individual travel agency. It seeks to employ the beneficiary permanently in the United States as an assistant 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. The AAO affirmed the director's decision.

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]

In this matter, the petitioner presented no evidence on motion that may be considered a proper basis for a motion to reopen.

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.8 C.F.R. § 103.5(a)(3).

Counsel states on motion that the AAO erred by not giving weight to bank statements and other evidence submitted by the petitioner. Therefore, the motion qualifies for reconsideration and will be granted.

Counsel asserts that the AAO failed to consider the petitioner's 2005 bank statements as evidence of its ability to pay the proffered wage. However, 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 by the AAO in determining the petitioner's net current assets. Counsel asserts that the AAO should consider assets such as balances in bank accounts without weighing such assets against current liabilities; however, counsel cited no

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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).

authority for such consideration.[2] The assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *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).

Counsel also cited certificates of deposit (CDs) owned by the petitioner as evidence of its ability to pay the proffered wage. Documentation submitted by counsel shows that one CD was opened in 1997 and closed in 2008; one CD was opened in 2006; one CD was opened on August 19, 2008, with maturity on November 20, 2009; and, one CD was opened July 2, 2004, with maturity on May 2, 2010. However, counsel submitted no evidence that the petitioner was willing to withdraw funds from these CDs before maturity to pay proffered wages, which would likely subject the petitioner to substantial penalties. Moreover, as with the bank statements discussed above, counsel has failed to establish how these assets somehow reflect additional available funds that were not reflected on its tax return(s) that were considered by the AAO in determining the petitioner's net current assets. Counsel asserts that the AAO should consider the assets available in these CDs without weighing such assets against current liabilities; however, counsel cited no authority for such consideration.

Counsel states that the AAO failed to address information that had been submitted regarding the United States Department of Commerce's forecasts that predicted likely increases in revenue and profits in the travel industry during the next decade. However, this information relates to the industry, in general, and does not necessarily apply directly to this petitioner. Furthermore, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Speculation regarding future increases in business cannot retroactively establish the petitioner's ability to pay the proffered wage since the 2003 priority date, which is at issue in this case.

Also in support of the motion, counsel cites statements from the previous and current owners of the petitioner, who stated that they "would be willing to adjust their officer compensation as needed to insure payment of the proffered salary." However, the record reveals that the AAO did consider these offers on page 6 of its June 27, 2013, decision. The AAO concluded that "[e]ven if the petitioner's income tax returns were reliable, and the AAO accepted the petitioner's argument regarding officer compensation, the petitioner still failed to show the ability to pay the proffered wage in 2005." Counsel did not contest the AAO's conclusion.

Counsel's final assertion in support of the motion is that the AAO should have considered "[e]vidence of funds paid to independent contractors and service providers, which could otherwise have been paid to the beneficiary." Counsel submitted copies of numerous checks showing payments from the petitioner to [redacted] The record does not, however, contain evidence that the petitioner has replaced or will replace the services of [redacted]

[2] 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.

with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the service provided by involves the same duties as those of the offered job of assistant manager as set forth in the Form ETA 750.

Accordingly, after considering the totality of the circumstances, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

It must be noted that the AAO's June 27, 2013, decision drew attention to significant inconsistencies in the evidence submitted by the petitioner. Specifically, the AAO noted that the petitioner submitted copies of Internal Revenue Service (I.R.S.) Forms 1099 and W-2 purportedly issued to the beneficiary in 2009 and 2010. The AAO also noted that the petitioner claimed eight employees. However, the petitioner's submitted income tax returns for those years reflected no wages paid.

The AAO advised the petitioner that 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). However, the petitioner has not addressed these noted discrepancies and has submitted no evidence to reconcile the inconsistencies.

Beyond the decision of the director and noted in the AAO's previous decision, discrepancies in the record also call into question whether the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. United States Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

On the labor certification the beneficiary claimed to have worked full-time from January 1997 through February 1998 as sales manager for Bangladesh. However, the beneficiary also claimed to have worked full-time as travel director for in Bangladesh, from November 1991 through October 1997. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the petition. It is incumbent upon 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 lies, will not suffice. *Matter of Ho,* 19 I&N Dec. 582 (BIA 1988).

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 met that burden.

**ORDER:** The motion to reconsider is granted. The previous decision of the AAO is affirmed. The appeal is dismissed. The petition remains denied.