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

(b)(6)

[redacted]

DATE: SEP 2 7 2013 OFFICE: TEXAS SERVICE CENTER [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:

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 preference visa petition was denied by the Director, Texas Service Center on May 12, 2010. The petitioner filed a motion to reopen on June 15, 2010. The director granted the motion to reopen and reaffirmed the decision to deny the petition on September 28, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO), which was dismissed by the AAO on February 28, 2013. The petitioner filed a subsequent motion with the AAO.[1] On June 27, 2013, the AAO granted the motion, withdrew in part and affirmed in part its prior decision, and denied the petition. The matter is now before the AAO on another motion to reopen and motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a thoroughbred horse racing stable. It seeks to permanently employ the beneficiary in the United States as a thoroughbred racehorse groom. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL).[2] On June 27, 2013, the AAO determined that the petitioner failed to establish that the beneficiary met the minimum requirements for the position offered, and that the petitioner failed to demonstrate its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Accordingly, the petition remained denied.

The record shows that the motion to reopen and motion to reconsider is properly filed and timely. However, as set forth below, following consideration of the record on motion, the petition remains denied and the AAO's decision of June 27, 2013 is affirmed.

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 appeal.[3]

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[1] On the Form I-290B, Notice of Appeal or Motion, submitted on April 2, 2013, the petitioner checked Box B, which states "I am filing an appeal." However, because the petitioner characterized its filing as a motion on the Form I-290B, the AAO accepted it as one despite the incorrect box being checked on the form.

[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). As the filing of the instant petition, March 16, 2007, predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

[3] The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

As set forth in the AAO's prior decision, an issue in this case is whether or not the petitioner has established that the beneficiary is qualified for the offered position as of the priority date, November 14, 1997. In the instant case, the labor certification states that the position offered requires six (6) years of grade school, two (2) years of experience in the job offered, and eligibility for a state groom license. On the Form ETA 750B, signed by the beneficiary on December 22, 2006, the beneficiary claims to be qualified for the position offered based on experience as a thoroughbred race horse groom for: in Mexico from August 1997 through February 2000; from March 2000 through June 2000; in California from June 2000 through September 2000; and Stables in California from January 2001 through September 2004[4] and from July 2005 through present (December 2006). No other experience is listed.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Acting Reg'l Comm'r 1977). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Here, the Form ETA 750 was accepted for processing on November 14, 1997.[5] Therefore, only the beneficiary's experience acquired before the priority date will be considered. According to the labor certification, Form ETA 750B, the beneficiary was employed full-time by from August 1997 to February 2000. No other experience on the labor certification predates the priority date.

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

> 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.

In its June 27, 2013 decision, the AAO found numerous discrepancies in the two affidavits submitted to establish the beneficiary's claimed experience. The AAO noted that one translated affidavit was submitted without a translator's certification; therefore, it lacked probative value and will not be accorded any weight in this proceeding. The second certified, translated affidavit was from the same

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[4] It is noted that in Form ETA 750B, 15.b., the beneficiary indicates he "only worked 6 to 7 months a year."

[5] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

affiant. The AAO noted that while the two affidavits have the same date and time of writing, as well as the same certification number, they contain differing content. While the uncertified translation states dates of employment, the certified translation does not. The AAO also noted that the certified translation does not state the dates of the beneficiary's employment, preventing the AAO from determing whether the beneficiary would have possessed the required work experience by the priority date. Further, the AAO noted that the properly translated affidavit was provided in conjunction with the petitioner's motion to reopen the director's decision in an attempt to correct the inconsistencies noted by the director; however, the affidavit predates the date of director's decision.

The discrepancies cast doubt on the authenticity of the affidavits. Doubt cast on any aspect of the applicant's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the application or visa petition. *Id.* On motion, the petitioner fails to address these inconsistencies; therefore, the petitioner has failed to overcome the AAO's findings. In any future filings, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

The AAO also noted that the affidvit from the manager at [redacted] the affiant suggests that the beneficiary worked part-time after he finished school, prior to the priority date in 1997. The AAO noted that the beneficiary qualifications must be established before the priority date in 1997, and as the beneficiary turned 15 years old in 1997, it appears unlikely that the benenficiary would have had two years of full-time work experience in the position offered from the ages of 13 to 14 years old. On motion, counsel submits a copy of an updated translation of an affidavit from same manager at [redacted] with a certified translation prepared by counsel. The affiant states that beneficiary worked for [redacted] since he was about nine years old; counsel asserts that children start working at a very young age in Mexico, especially on ranches. The affidavit fails to state the dates of employment and to reconcile the inconsistencies noted in the AAO's prior decision. Further, this "new" affidavit is also dated on April 7, 2010, however, no explanation is provided as to how each affidavit bears the same date. As the labor certification affirmatively states that the beneficiary commenced employment with [redacted] in August 1997, which is only three months prior to the priority date, the evidence in the record of proceeding does not support the conclusion that the beneficiary was qualified for the position as of the priority date. The petitioner's later assertion that the beneficiary commenced employment with [redacted] prior to the date attested to on the Form ETA 750B by the beneficiary has not been established. Therefore, the petitioner has failed to overcome the AAO's findings in its prior decision. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

On motion, counsel asserts that the beneficiary's experience does not have to be paid experience and references an unpublished AAO decision in support of her claim. However, counsel fails to submit a copy of the decision. Without documentary evidence to support the claim, 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). Further, while the regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). In the instant case, for the reasons stated above, the petitioner has failed to overcome the findings in the AAO's June 27, 2013 decision and establish that the beneficiary has the requisite experience for the position offered.

Further, the AAO noted that the record failed to contain evidence that the beneficiary has the requisite license or eligibility for a California State groom's license as of the priority date on November 14, 1997. On motion, counsel submits copies of the beneficiary's racetrack licenses issued to the beneficiary in 2002 through 2004. While the AAO acknowledges that the beneficiary was licensed in these years, the beneficiary qualifications must be established before the priority date in 1997. Here, the record fails to contain evidence that the beneficiary was licensed or eligible to be licensed before 1997. Therefore, the petitioner has failed to overcome this finding in the AAO's prior decision.

On motion, counsel submits a copy of beneficiary's certificate from primary school with a certified translation. The petitioner has established that the beneficiary completed six years of grade school as required by the labor certification.

Counsel also submits three additional affidavits with certified translations. The affidavits are not from the beneficiary's previous employers and provide no dates of employment. The affidavits appear to provide a character reference and general statements about the beneficiary's experience with horses. As the affidavits do not meet the regulatory requirements at 8 C.F.R. § 204.5(l)(3)(ii)(A), the affidavits fail to establish that the beneficiary meets the requisite requirements in the labor certification. Further, the affidavits are tertiary evidence and only acceptable if the petitioner establishes that primary and secondary evidence is unavailable. *See* 8 C.F.R. § 103.2(b)(2)(i). Here, the petitioner has failed to explain why letters from employers are unavailable to reconcile any discrepancies, and why tertiary evidence is necessary.

Based on the above, the petitioner has failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Even if the petitioner had demonstrated the beneficiary met the minimum qualifications for the position offered, the petition could not be approved. As stated in the AAO's previous decision, the petitioner has not established its continuing ability to pay the beneficiary the proffered wage as of the priority date onwards. The AAO determined that the petitioner failed to establish its ability to pay the proffered wage in 2004 and 2005. The AAO also found that the record failed to contain the petitioner's complete tax returns for 1997 and 2003, as well as an accounting of the sole proprietor's

monthly expenses.[6] Accordingly, the AAO was prevented from properly analyzing whether the sole proprietor's adjusted gross income covered the difference between the proffered wage and the wage paid and left enough to support his household for the year 1997, as well as 1998 through 2005. Therefore, the AAO determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage from the priority date onwards.

On motion, counsel submits copies of the beneficiary's Forms W-2 for 2010 through 2012, and previously submitted copies of the beneficiary's Forms W-2 for 2002 through 2009. This evidence establishes the petitioner's ability to pay the proffered wage in 2010 through 2012; however, it fails to overcome the AAO's previous findings and address the years 1997, 2003, 2004 and 2005. On motion, the petitioner submits a letter from the sole proprietor, stating that he agrees to pay the beneficiary the prevailing wage. However, although specifically requested and the lack therefore noted in prior decisions, the petitioner did not submit a list of the sole proprietor's household expenses, preventing the AAO from properly analyzing whether the sole proprietor's adjusted gross income would be enough to cover any difference between the proffered wage and wages paid, and leave enough to support his household in all years. It is noted that, on motion, counsel asserts that the "majority" of the sole proprietor's expenses are reflected on his tax returns; however, no evidence was submitted to support this claim. Without documentary evidence to support the claim, 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). Therefore, the record of proceedings is insufficient to demonstrate the petitioner's ability to pay the proffered wage.

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[6] 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). The sole proprietor's monthly expenses are required to demonstrate the petitioner's ability to pay the proffered wage. In a March 17, 2010 Request for Evidence (RFE), the director requested that the petitioner submit evidence regarding the proprietor's monthly household expenses, including car loans, insurance, utility bills, food, clothing, house payments, etc. In an April 15, 2010 response, counsel stated that the sole proprietor's personal monthly expenses are approximately $5,000 ($60,000 per year) but submitted no evidence to verify the expenses claimed. 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). 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)). The AAO's February 28, 2013 decision notes that the proprietor's Schedule A to his IRS Forms 1040 show annual itemized expenses including medical expenses, taxes, home mortgage interest and gifts greater than $60,000 in 1999, 2000 and 2002. On the current motion and the prior motion, the petitioner failed to submit evidence to overcome the AAO's finding or to explain how the petitioner's expenses are limited to $60,000 annually when the petitioner's itemized deductions alone exceed that amount.

Counsel submits copies of the beneficiary's H-2B visas for 2002 through 2004. Counsel states that the beneficiary did not work in the United States for the whole year in 2002 through 2005 and, therefore, the petitioner cannot show a full year of wages paid. As stated in the AAO's previous decision, counsel provides no legal basis, or citations to relevant law or regulation, that would permit the AAO to extrapolate a seasonal income to an annual income in order to determine a petitioner's ability to pay. On motion, the petitioner has failed to overcome the findings in AAO's prior decision.

In its February 28, 2013 decision, the AAO considered the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The AAO acknowledged that the petitioner's tax returns established the historical growth of its business with the exception of 2003, as no tax return was provided for that year. The record also contained evidence of the sole proprietor's reputation as a horse trainer. However, unlike *Sonegawa,* the AAO noted that USCIS records indicate that the petitioner has filed immigrant visa petitions on behalf of at least 15 other beneficiaries.[7] The AAO stated that the petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

On motion, counsel asserts that "the Petitioner has been training horses since 1979 and for the year 2003 his earnings were $6,262,447 and in 1997 his earnings were $5,208,149. His earnings have been fairly consistent throughout the years he has been training." The petitioner provided a copy of the petitioner's trainer profile showing his statistics and earnings from 1979 through 2013 to support this assertion. Counsel further asserts that based on the petitioner's tax returns, the beneficiary's Forms W-2, "the number of horses owed [*sic*] by the Petitioner and his ranking of 8th in the United States that he would have the ability to pay the wages of the beneficiary." Counsel's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage continuing from the priority day onwards. While the petitioner's tax returns indicate both income and expenses, the evidence newly provided reports a purported "earnings" only. Therefore, the purported earnings represent an incomplete portrayal of the petitioner's finances because the petitioner's expenses are not reconciled. As discussed above, the petitioner has failed to provide expenses despite multiple RFEs and decisions requesting this information.

The AAO previously found that the petitioner had not demonstrated its ability to pay the multiple beneficiaries it has sponsored. On motion, counsel asserts that "it is very difficult for the Petitioner to demonstrate that prior individuals were paid the prevailing wage." Counsel submits Forms W-2 issued by the petitioner to three other beneficiaries, all of whom still work for petitioner. Counsel

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[7] Detailed information regarding the other beneficiaries was requested by the director's March 17, 2010 RFE. The petitioner did not provide evidence regarding these other beneficiaries on appeal or prior motion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

asserts that the petitioner will continue to look through its records, but it seems "overkill" for this petition. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, the petitioner's ability to pay the proffered wage for the instant beneficiary, and its other I-140 beneficiaries, from the priority date until the instant beneficiary, and its other beneficiaries, obtain permanent residence is must be established. On motion, the petitioner has not provided evidence sufficiently responsive to the AAO's finding; therefore, the petitioner has failed to overcome the AAO's prior decision.

Thus, based on the above, the petitioner has failed to demonstrate that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date onwards.

Therefore, the AAO concludes on motion that the petitioner has failed to establish that the beneficiary is qualified for the position offered, and that the petitioner has the continuing ability to pay the proffered wage to the beneficiary from the priority date onwards.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 met that burden. Accordingly, the motions will be granted and the previous decision of the AAO will be affirmed.

ORDER: The motion is granted. The AAO's decision, dated June 27, 2013, is affirmed. The petition remains denied.