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: OCT 2 1 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

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,

Josh for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual operating a farm and ranch. She seeks to permanently employ the beneficiary in the United States as a farm worker. The petitioner requests classification of the beneficiary as any other worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 21, 2012. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum 12 months' experience required to perform the duties of the offered position as of the priority date.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. 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).

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[1] Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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 appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer's claimed intent.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: None required.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Use of tools and equipment such as tractors, welding machine, mowers, chain saws, tree trimmers, post hole[] diggers, drills, electric power saws.

The labor certification states that the beneficiary qualifies for the offered position based on experience as a General Manager of his own farm and ranch in [redacted] Mexico, from June 1, 2001 until August 21, 2012. The labor certification also states that the beneficiary was self-employed as a farm worker from May 31, 2001 until August 21, 2012. No other experience is listed. The petitioner and the beneficiary each signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.[3]

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.

[3] While Section M of the ETA 9089, Declaration of Preparer, is completed, the preparer failed to sign the requested declaration.

The petitioner did not submit evidence with the petition that the beneficiary had 12 months of qualifying experience as of the priority date of August 21, 2012. The director issued a Request for Evidence (RFE) dated August 19, 2013 requesting such evidence. In response, the petitioner submitted a letter from the petitioner dated October 15, 2013 listing the skills required for the successful operation of her ranch, and implying that the beneficiary gained experience in those skills working with her from July 1, 2012. The letter states:

> The skills, along with the necessary experience (since July 1, 2012 to current), are consistent with those of

The director found in his decision dated April 7, 2014 that the letter did not establish the 12 months of qualifying experience as of the priority date. On appeal, the petitioner submits a second letter from the petitioner dated April 21, 2014 stating that the date the beneficiary began employment with her was 1994, not July 1, 2012 as indicated in her October 15, 2013 letter.[4] The petitioner states in the April 21, 2014 letter:

> I am the owner of located at Texas.[5]
>
> I wish to state that my previous letter regarding skills, along with necessary experience incorrectly stated that Mr. had been employed by me since July 1, 2012. I indicated the date I employed an attorney in prepartion [sic] of this peition [sic] rather than the initiation date of my employment of Mr. has been employed by me since 1994.

The petitioner's letter on appeal does not overcome the concerns of the director. The petitioner does not state in what capacity she employed the beneficiary, and does not describe the duties he performed while working for her as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). The letters do not indicate that the beneficiary gained experienced in the use of tools and equipment such as tractors, welding machines, mowers, chain saws, tree trimmers, post hole diggers, drills, and electric power saws, skills required by the labor certification, while working for the petitioner. The letter does not state whether the employment was full-time or part-time. Further, the letter is inconsistent with the attestations of the beneficiary on the Form ETA 9089, where the beneficiary stated that he was self-employed for 50 hours per week as a farm worker in , Mexico from May 31, 2001 until August 21, 2012, and during the same time period worked for 40 hours per week on his own farm and ranch as a General Manager.[6] The record does not indicate how the beneficiary has been employed in , TX for the petitioner since 1994 and at the same

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[4] This information conflicts with the Form ETA 9089 at part J.23. indicating that the beneficiary is not currently employed by the petitioner.

[5] This letter is the first indication that the name of the petitioner's ranch is

[6] The beneficiary's date of birth is February 16, 1985. He would have been 16 years old when he claims to have been a full-time general manager of his own ranch. The record does not contain any evidence of the beneficiary's employment as a farm worker in Mexico.

time worked as a self-employed farm worker and General Manager of a ranch in 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No evidence of record resolves these inconsistencies.

The beneficiary did not list any work experience with the petitioner on the Form ETA 9089. 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 labor certification application, lessens the credibility of the evidence and facts asserted. The beneficiary would have been nine years old if, as claimed by the petitioner, he began working for her in 1994. When considered together with the inconsistencies between the beneficiary's statements on the Form ETA 9089 that he worked in Mexico at his ranch at the same time as the petitioner claims to have employed the beneficiary in the United States, the record does not establish that the beneficiary has 12 months experience as a farm worker as of the priority date.

Further, the Form ETA 9089 indicates that in response to the question at Part J.21. asking whether the beneficiary gained any qualifying experience with the petitioner in a position substantially comparable to the job opportunity, the petitioner checked "NA," not applicable. The record does not explain the inconsistency between the petitioner's indication that she employed the beneficiary as a farm worker, a substantially comparable position to the current position, and the answer to question J.21. on the petition. Moreover, the DOL does not allow the employer on the Form ETA 9089 to count any experience gained with the employer in a substantially comparable position toward any of the qualifying experience. The regulation at 20 C.F.R. § 656.17 states:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation
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> . . . . .
>
> (i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).
>
> (1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.
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> (2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.
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> (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual

minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

Pursuant to 20 C.F.R. § 656.17(i)(3), the employer cannot require job applicants to possess training and/or experience beyond what the beneficiary possessed at the time of hire. As noted above, the beneficiary was nine years old when the petitioner claims to have first employed him in 1994. The record does not demonstrate that the beneficiary had the qualifying 12 months experience as a farm hand prior to beginning work with the petitioner at nine years old. Therefore, the record does not establish that the beneficiary was qualified for the position as of the priority date.

Beyond the decision of the director, the record does not establish the identity of the petitioning employer.[7] The labor certification, ETA Form 9089 indicates at part C.1. that the employer is

[7] The DOL regulation at 20 C.F.R. § 656.3, defines a United States employer, in part, as:

(1) A person, association, firm or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an "authorized representative" means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A

[sic], at part C.7. that the Federal Employer Identification Number (FEIN) is and at part C.8. that the NAICS code of the petitioning employer is .[8] The petitioner indicates on the Form I-140 that the name of the employing individual is and the employing company is with both a social security number of and an Internal Revenue Service (IRS) number of [9] The record contains an IRS Form 1099-MISC issued by the petitioner individually to the beneficiary under the social security number which indicates that the petitioner employed the beneficiary in her individual capacity. The petitioner's 2012 individual tax return IRS Form 1040, however, does not contain a schedule C, the schedule for an individual's profit or loss from business,[10] or schedule F, the schedule used by self-employed farmers to report certain income and expenses from their farming business. As noted above, in her letter on appeal dated April 21, 2014, the petitioner indicated that the name of the ranch at the petitioner's address is There is no indication in the record that or any other entity with the FEIN of has employed or intends to employ the beneficiary.[11]

The petitioner's individual tax return indicates that she claimed expenses and losses from , with an FEIN of , only the last digit of this FEIN is different from the IRS number noted on the Form I-140 and the ETA Form 9089 for the petitioner. The record does not clearly identify the owner of the IRS number belonging to the petitioning entity The record does not explain the relationship between and the petitioning

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labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[8] U.S. Dep't of Commerce, U.S. Census Bureau, North American Industry Classification System, 2012 NAICS Definition, (last visited September 18, 2014).

[9] The instructions to part I of the Form I-140 state that if an individual is filing the form, he/she is supposed to use Part 1.a-1.c. If a company or organization is filing the form, it is supposed to use Part I.2. Both parts are completed on the Form I-140 in this case. Public records reveal that is a Texas corporation formed in but the record does not establish whether any individual or entity uses the trade name of The lack of clarity about the petitioner's identity is compounded by the fact that both a social security number and an FEIN are listed at Parts I.3 and I.4. Further, at Part 5, the Form I-140 indicates that the petitioner is both an "employer" and "individual." According to Part 5 of the Form I-140, the "company" was established on it has 0 employees and its type of business listed at part 5.2.a. is "farm and ranch." The occupation of the "individual" is listed at part.5.3.e. "retiree."

[10] Schedule C to IRS Form 1040 is used to report income or loss from a business operated by the individual taxpayer or a profession practiced as a sole proprietor. An activity qualifies as a business if the taxpayer's primary purpose for engaging in the activity is for income or profit and that he or she is involved in the activity with continuity and regularity. A sporadic activity or a hobby does not qualify as a business. *See,* http://www.irs.gov/instructions /i1040sc/ar01.html#d0e19 (accessed September 18, 2014).

[11] An internet search for reflects no information (September 24, 2014).

employer.[12] *See, Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). As the identity of the employer is not clear, the *bona fide* nature of the job opportunity is in question. In any further proceeding, the petitioner must address this issue.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The petitioner claims to individually own and operate a farm and ranch. Similar to a sole proprietorship, the petitioner's adjusted gross income (AGI), assets and personal liabilities are considered as part of the petitioner's ability to pay. Farm operators report annual income and expenses from their farms on their IRS Form 1040, U.S. Individual Income Tax Return. The farm-related income and expenses are reported on Schedule F, Profit or Loss From Farming, and are carried forward to the first page of the tax return.[13] *See* http://www.irs.gov/publications/p225/ch03.html (accessed September 17, 2014). Farm owners must show that they can cover their existing household expenses as well as pay the proffered wage out of their AGI or other available funds.[14] *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record before the director closed on November 4, 2013 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2012 federal income tax return was the most recent return available. However, the record only contains the petitioner's partial individual 1040 tax return for 2012 in that it does not contain a schedule C or schedule F, and refers to but does not contain Schedule K-1 detailing the losses and expenses of

According to USCIS records, the petitioner has filed a Form I-140 petition on behalf of another beneficiary. Accordingly, the petitioner must establish that it has had the continuing ability to pay the

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[12] According to the supplement to Ms. individual tax return and publicly available databases, it appears that is the 1% general partner of (a Texas limited partnership formed in) and is the 99% limited partner.

[13] Income from farming reported on Schedule F includes amounts a petitioner receives from cultivating, operating, or managing a farm for gain or profit, either as owner or tenant. This includes income from operating a stock, dairy, poultry, fish, fruit, or truck farm and income from operating a plantation, ranch, range, or orchard. It also includes income from the sale of crop shares if the petitioner materially participates in producing the crop. Income received from operating a nursery, which specializes in growing ornamental plants, is considered to be income from farming. Income reported on Schedule F *does not* include gains or losses from sales or other dispositions of the following farm assets: land; depreciable farm equipment; buildings and structures; livestock held for draft, breeding, sport, or dairy purposes. *See* http://www.irs.gov/pub/irs-pdf/p225.pdf.

[14] The petitioner's individual adjusted gross income in 2012 was $43,454. The petitioner claims that her individual annual expenses are $260,700. There is nothing left to pay the beneficiary after deducting her individual expenses.

combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether the other petition has been withdrawn, revoked, or denied, or whether the other beneficiary has obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to its other sponsored beneficiary.

Further, as noted above, the record does not clearly establish the identity of the petitioner. Thus, the relevance of the financial information in the record, e.g. the petitioner's individual IRS 2012 Form 1040; the petitioner's individual Form 1099 issued to the beneficiary in 2012; and September 2013 (four different accounts in the name of , and three accounts in the name of the petitioner individually) is not established. The petitioner states that most of her resources are in the name of The resources of however, may not be considered to establish the petitioner's individual ability to pay.[15] 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."

The petitioner's failure to establish her/its identity and to provide complete annual reports, federal tax returns, or audited financial statements for 2012 is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The AAO affirms the director's decision that the petitioner 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. Beyond the decision of the director, the record does not establish the *bona fides* of the visa petition or that the petitioner has the continuing ability to pay the proffered wage from the priority date. For these additional reasons, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.