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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: **JAN 14 2014** Office: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 Director of the Nebraska Service Center denied the immigrant visa petition on November 2, 2009 and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on May 11, 2012. The petitioner then filed a motion to reopen and a motion to reconsider, which was granted and the AAO's prior decision affirmed on May 23, 2013. The petitioner filed a second motion to reopen and a motion to reconsider, which were dismissed and the previous AAO decisions affirmed on October 30, 2013. The petitioner has now filed an additional motion to reopen. The petition remains denied.

The petitioner is an ornamental plant nursery. It seeks to employ the beneficiary permanently in the United States as a horticulturist/soil and plant scientist. 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 finding that the petitioner had not established its continuing ability to pay the proffered wage.¹ The AAO additionally noted that the beneficiary may be related to the petitioner's owner and that the petitioner must address this issue in any further filings.² Each of the AAO's three prior decisions noted both issues. The petitioner failed to address the relationship issue in the current motion, as it failed to address the relationship issue in its prior motions. 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).

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.

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." A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner presented the following documentation with its motion:

¹ 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. See <http://www.irs.gov/publications/p225/ch03.html> (accessed October 28, 2013). 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. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

² The petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

- A customer records: retention schedule from Bank of America found on its website
- A BSA record retention guidelines from the Federal Financial Institutions Examination Council Bank Secrecy Act/Anti-Money Laundering InfoBase website
- A Bank of America CD statement for account number ending in xxxxx- [REDACTED] covering the time period of July 1, 2001 through September 7, 2001. The CD was in the name of the petitioner. The statement showed a beginning balance of \$50,000 and an ending balance of \$0.³
- A Bank of America Certificate of Deposit (CD) receipt dated November 13, 2000 for account number ending in xxxxx- [REDACTED] belonging to the petitioner. The receipt was in the amount of \$107,024.50, and showed a maturity date of August 1, 2001.⁴
- A Bank of America CD statement for account number ending in xxxxx [REDACTED], covering the time period of January 1, 2002 through March 31, 2002. The CD was in the name of the petitioner. The statement showed a beginning balance of \$151,340.75 and an ending balance of \$152,716.35.⁵

The petitioner also submitted a letter from its owner dated November 11, 2013. The letter states that the documents from the financial institutions listed above were previously thought to be destroyed pursuant to the record retention schedules of the financial institutions. [REDACTED] states in the November 11, 2013 letter that the financial documents were discovered while organizing a storage facility in "late spring 2013." He states that the documents should have been "shredded and incinerated as per the Company's standard operating procedure" and that the evidence contained therein should be considered new and previously unavailable. As stated in the previous AAO decision dated October 30, 2013, the evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding as Mr. [REDACTED] states that they were in the petitioner's possession, in a facility maintained and operated by the petitioner, at all times. The motion to reopen does not, therefore, meet applicable requirements and shall be dismissed.

Even if we were to consider the documents submitted, they are insufficient to demonstrate the petitioner's ability to pay the proffered wage.

As stated in the prior AAO decision dated May 23, 2013, the sole proprietor's Adjusted Gross Income (AGI)⁶ was negative in all years from 2001 to 2010. To establish the ability to pay the

³ This printout was previously submitted to the record.

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⁵ This printout was previously submitted to the record.

⁶ The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show

proffered wage through personal bank statements, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. The bank statements submitted here do not span an entire year nor the entire time from 2001 to 2010 to establish the ability to pay the proffered wage in each year. Because the records are incomplete and the petitioner did not submit a monthly statement to establish an initial balance in 2001 or monthly documents with which to compile an annual average balance, they are insufficient to establish the petitioner's ability to pay the proffered wage for any year from 2001 to 2010.

Furthermore, as noted in the AAO's prior decision dated October 30, 2013, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion will be dismissed.

ORDER: The motion to reopen is dismissed. The AAO's decisions of October 30, 2013, May 23, 2013, and May 11, 2012 are affirmed. The petition remains denied.

that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubuda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).