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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

[redacted]

B6

DATE: APR 25 2011

Office: TEXAS SERVICE CENTER

FILE: [redacted]
SRC 07 257 50828

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion but affirm the previous decision of the director and the dismissal of the appeal. The petition remains denied.

The petitioner is a golf course. It sought to employ the beneficiary permanently in the United States as a greenskeeper ("gardener-triplex operator").[1] As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage[2] and denied the petition accordingly on September 24, 2008.

On October 17, 2008, former counsel filed an appeal[3] asserting that the director had miscalculated the proffered wage and erred in his determination of the petitioner's continuing ability to pay the proposed wage offer of $23,940.80 as of the priority date of February 25, 2002.[4] On Form I-290B,

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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), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. 20 C.F.R. § 656.3(1) states: *"Employment* means: (1) Permanent, full-time work by an employee for an employer other than oneself. For purposes of this definition, an investor is not an employee." It is noted that full-time employment must be year-round. Nothing shows that the golf course herein operates year-round.

[2] The regulation at 8 C.F.R. § 204.5(g) (2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

[3] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[4] 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

Notice of Appeal or Motion, a brief and/or additional evidence was to be submitted within 30 days of the filing of the appeal. It was not submitted. The AAO, however, issued a Notice of Intent to Deny (NOID) on October 29, 2009. In the NOID, the AAO stated:

> It is additionally noted that on Part B of the ETA 750, initially signed by the beneficiary on February 21, 2002, and subsequently signed on September 15, 2003, the beneficiary claims that he has been employed full-time by the petitioner since February 1992.
>
> Pursuant to 8 C.F.R. § 204.5(g)(2), evidence of the petitioner's ability to pay a certified wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. Additional evidence may be submitted but it is not an acceptable substitute for the documentation required by the regulation. It is noted that the petitioner has provided copies of its Form 1120, U.S. Corporation Income Tax Returns for 2002, 2003, 2004, 2005, 2006, and 2007, as well as *unaudited* financial statements covering 2002 to 2007.
>
> It is noted that as that as the record stands, the federal tax returns do not demonstrate that the petitioner has established the continuing financial ability to pay the proffered wage through either its net income or net current assets in all of the pertinent years. However, it is additionally noted that the petitioner may have employed and paid wages to the beneficiary during the period from 2002 onward. A petitioner's payment of wages to a beneficiary may be used in reviewing a petitioner's continuing ability to pay a certified wage. If a petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during a given period. To the extent that a petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. As noted above, the record indicates that the petitioner has employed the beneficiary. However, such evidence was not requested by the director or provided by the petitioner. Therefore, the petitioner is given this opportunity to submit such evidence as well as any other additional evidence and arguments in rebuttal to this notice of intent to deny. (footnotes omitted)

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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.

In the NOID, the AAO requested that the petitioner submit:

1) Copies of federal tax returns, *audited* financial statements, or annual reports (based on audited financials) of the corporate petitioner as of the priority date to the present. It is noted that the record already contains federal income tax returns for 2002 through 2007 and unaudited financial statements from 2002 to 2007. Therefore, such submission should include documentation for 2008 and 2009.

2) Copies of all Wage and Tax Statements (W-2s), Form 1099s and/or other credible evidence of wages or compensation paid by the petitioner to the beneficiary from 2002 to the present. Any payroll records submitted must indicate wages paid, hours worked and year-to-date wages, and must be accompanied by copies of negotiated checks issued to the beneficiary.

The petitioner was afforded 30 days to respond to the NOID. The petitioner, through former counsel, submitted a response to the NOID, dated November 30, 2009, which was received on December 9, 2009.

The AAO dismissed the appeal[5] on February 2, 2010. Although concurring with former counsel that the director had miscalculated the annual proffered wage and the petitioner's net income in 2002 and 2005 through 2007, the AAO noted that the director had correctly presented the petitioner's net current assets as losses but misstated the figures for 2003, 2004, 2005, and 2007. The correct figures for these amounts as presented in the corporate tax returns were:

Year	2002	2003	2004	2005
Net Income	$ 6,540	-$133,941	-$100,975	$ 85,266
Current Assets	$480,463	$563,097	$388,974	$412,478
Current Liabilities	$489,727	$751,767	$585,521	$552,583
Net Current Assets	-$ 9,264	-$188,670	-$196,547	-$140,105

Year	2006	2007
Net Income	$109,874	$38,866
Current Assets	$525,799	$439,526
Current Liabilities	$714,038	$722,251
Net Current Assets	-$188,239	-$282,725

[5]The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

The AAO additionally noted in its dismissal of the appeal that pursuant to the regulation at 8 C.F.R. § 204.5(g)(2), which requires that a petitioner establish its continuing ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence, the AAO's NOID had instructed the petitioner to provide copies of federal tax returns, *audited* financial statements, or annual reports (based on audited financials) as of the priority date to the present. The petitioner had also been advised that while the record contained copies of federal tax returns for 2002 through 2007 and unaudited financial statements covering the same period, it should submit evidence for 2008 and 2009. Although copies of the 2002 through 2007 *unaudited* financial statements and copies of the 2002 through 2007 corporate tax returns had been resubmitted in response to the NOID, the AAO noted that no evidence of the petitioner's ability to pay in 2008 and 2009 had been provided as directed and no other W-2s or Form 1099s issued to the beneficiary had been provided as requested. Only the beneficiary's 2007 W-2 was provided. It was found that in 2002, 2003, and 2004, neither the petitioner's net income nor net current assets was sufficient to pay the proffered wage and could not demonstrate its continuing ability to pay as of the priority date onward. It was also observed that certain inconsistencies appeared in the record such as the beneficiary's statement on Part B of the ETA 750 that his employment with the petitioner began in 1992, but his last date of arrival in the United States was claimed to be March 16, 1999 on Part 3 of the Form I-140, Immigrant Petition for Alien Worker.[6] Additionally, the AAO concluded that the evidence did not warrant approval of the petition based on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).[7]

On March 5, 2010, the petitioner, through current counsel, filed a motion to reopen and reconsider but designated as an appeal on Form I-290B. Additional material was subsequently submitted with no designation as to the type of filing on Part 2 of the Form I-290B. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for

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[6] Current counsel did not address this inconsistency on motion.

[7] The AAO considered but rejected former counsel's claim that the petitioner collectively employed 176 workers at three locations and that since the petitioner employed over 100 workers, the financial statements should be accepted and that the director should have approved the petition based on the petitioner's reasonable expectations of future profit, longevity and historical growth. The AAO considered these arguments but found them unpersuasive and additionally observed that the petitioner claimed that it had 38 employees on Part 5 of the Form I-140, not 175. This discrepancy was not addressed on motion. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Additionally, no further information was submitted on motion to address the potential applicability of *Sonegawa*.

reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits evidence related to the petitioner's ability to pay the proffered wage and asserts the applicability of *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009).

With the motion, current counsel submits copies of the beneficiary's W-2s issued by the petitioner for 2002 through 2009. She also provides a copy of the petitioner's 2008 corporate tax return and a copy of a February 22, 2010, letter from one of the petitioner's four shareholders stating that the 2009 tax return has not been completed. Current counsel states that former counsel's failure to submit these documents cannot be explained but requests their review by the AAO.

As noted above, evidence of payment of wages to the beneficiary was specifically requested by the AAO prior to rendering a decision on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not consider evidence offered for the first time on motion when it could have been submitted earlier. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the AAO's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on motion.[8]

Further, it is noted that an appeal or motion based upon a claim of ineffective assistance of counsel requires:

(1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,

(2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

[8] Even if all the W-2s were considered, which based on *Soriano* they would not be, the petitioner still would be unable to establish its ability to pay in all of the relevant years from the priority date onward.

(3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In this case, there is no evidence that any of the three requirements have been fulfilled.

Finally, the AAO does not find the court's decision in *Construction and Design* to be particularly supportive or persuasive of the petitioner's position in this case. The petitioner in this case is not located in the seventh circuit. Further, the court's holding in that case affirmed the district court's decision in denying the work visa sought by the petitioner.[9] Additionally, the court in *Construction and Design* noted that the "proffered wage" actually understates the cost to the employer in hiring an employee, as the employer must pay the salary "plus employment taxes (plus employee benefits, if any)." As applied to this matter, the petitioner would have to show that it has the ability to pay the proffered wage plus compensation expenses for the employee which may include legally required benefits (social security, Medicare, federal and state unemployment insurance, and worker's compensation), employer costs for providing insurance benefits (life, health, disability), paid leave benefits (vacations, holidays, sick and personal leave), retirement and savings (defined benefit and defined contribution), and supplemental pay (overtime and premium, shift differentials, and nonproduction bonuses). The costs of such benefits are significant. The Office of Management and Budget (OMB) has determined that, in order to calculate the "fully burdened" wage rate (i.e., the base wage rate plus an adjustment for the cost of benefits) the wage rate may be multiplied by 1.4.[10] In this case, as noted above, the proffered wage as stated on the Form ETA 750 is $23,940.80 per year. Using the OMB-approved formula, the "fully burdened" wage rate in this case would equate to $33,517.12 per year. Therefore, pursuant to the seventh circuit decision in *Construction and Design*, the petitioner in this case would have to establish its ability to pay a proffered salary of $33,517.12 per year. The petitioner's tax returns do not establish the petitioner's continuing ability to pay the wage as stated on the labor certification, or the wage considering the additional required benefits based on *Construction and Design.*

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Based on the foregoing and for the reasons set forth above and in the AAO's prior decision, the AAO does not conclude that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

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[9]Additionally, it is observed that the employer in that case was a construction company which was organized as a Subchapter S corporation, which is not the case in this matter.

[10] The 1.4 multiplier is from the Bureau of Labor Statistics 2009: http://www.bls.gov/news.release/ecec.t01.htm

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 and motion to reopen is granted. The prior decision of the AAO, dated February 2, 2010, is affirmed. The petition remains denied.