

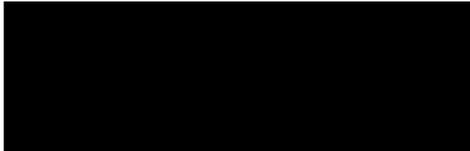
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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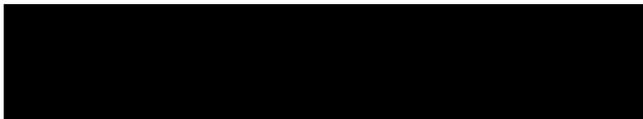
DATE: **JUL 18 2011** Office: NEBRASKA SERVICE CENTER

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 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 preference visa petition filed by the petitioner in this case 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 a motion to reopen and reconsider. The motion will be granted. The petition will remain denied.

The petitioner is an auto repair company. It seeks to employ the beneficiary permanently in the United States as an auto mechanic. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750), approved by the 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, and the petitioner had not established that the beneficiary was a vocational school graduate as stipulated on the Form ETA 750. The director denied the petition accordingly.

On August 23, 2010, the AAO dismissed the subsequent appeal affirming the director's denial. The AAO specifically reviewed the petitioner's ability to pay the proffered wage from the priority date in 2001 to June 28, 2007, when the director issued the decision, and the beneficiary's educational and experience qualifications. The AAO also noted the familial relationship between the owner of the petitioner and the beneficiary. The AAO determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary and its net income or net current assets for years 2001 through 2006, that the petitioner failed to establish that the beneficiary possessed educational and experience qualifications for the proffered position as set forth on the Form ETA 750, and that the evidence in the record shows that the Abdalla Adbussayed, the petitioner's owner, is the beneficiary's uncle and such relationship raises questions whether there was a bona fide job offer in this matter.

The record shows that the motion is properly filed and timely. Counsel also submits a brief, medical records of the beneficiary, a letter from the Minnesota Department of Economic Security (MNDES) and prevailing wage information. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 United States Citizenship and Immigration Services (USCIS) 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). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In this matter, the petitioner presented new facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. Therefore, the motion will be considered as a motion to reopen.

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 on motion.

On motion, counsel contends that the prevailing wage obtained in 2001 was set by the Service Contract Act (SCA). As such wage determinations are no longer required for PERM¹ cases, counsel maintains that this requirement from 2001 is obsolete. Counsel's assertion is misplaced. The immigrant petition in the instant case is supported by Form ETA 750, not ETA Form 9089. Thus, the laws and regulations governing adjudication of Form ETA 750 continue to apply.² The wage is set by the local office based on a priority date. The proffered wage as stated on Form ETA 750 was amended to \$19.73 per hour. The petitioner initialed the amendment to the wage and the DOL stamped corrected on the certified labor certification application. The time to challenge the wage was when the labor certification application was pending before DOL. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Since the petitioner remained in the pre-PERM process, the instant case must be processed under the regulations governing pre-PERM filings.

Under either process, a petitioner must establish its ability to pay the beneficiary the certified proffered wage from the priority date to the time when the beneficiary obtains lawful permanent resident status. This requirement applies to both the pre-PERM or PERM systems. *See* 20 C.F.R. §§ 656.10(c) and 656.40. The prospective regulatory changes to prevailing wage determinations do not release the petitioner from its obligation to pay the beneficiary the proffered wage set forth on the Form ETA 750 when the priority date was set.

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$19.73 per hour or \$41,038.40 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

In determining the petitioner's ability to pay the proffered wage during a given period, United States Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by 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. In the instant case, the record contains the beneficiary's W-2 forms for 2003 through 2006. The beneficiary's 2000 W-2 form is not necessarily dispositive because the priority date is in 2001 and the petitioner is not responsible for demonstrating its ability to pay

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² *See* 69 Fed. Reg. 77326 (Dec. 27, 2004) (stating that the new regulation is effective on March 28, 2005 and applies prospectively to all labor certifications filed on or after that date).

the proffered wage for 2000. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$8,679 in 2003, \$40,239 in 2004, \$38,661 in 2005, and \$27,615 in 2006. On motion, counsel states that the beneficiary was not placed on the petitioner's payroll until September or October 2003, which explains why his W-2 for 2003 is so low. Counsel also states that the beneficiary burned himself while working for the petitioner in September 2003 and spent several days in the hospital. The petitioner submitted the beneficiary's medical treatment records to show that the beneficiary started medical treatment on September 6, 2003, and was released from the hospital on September 8, 2003, followed by several follow-up visits through September 26, 2003. Counsel did not provide documentation to show whether the beneficiary was taken off of the payroll during this time and, if so, the dates for which he was not paid.

Counsel's assertion and evidence do not demonstrate that the petitioner paid the beneficiary any compensation in 2001 and 2002, and any additional compensation other than the amount reflected on the beneficiary's W-2 form for 2003. Therefore, the petitioner failed to demonstrate that it employed and paid the beneficiary the full proffered wage from 2001 to 2006. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the beneficiary the full proffered wage of \$41,038.40 per year in 2001 and 2002, the difference of \$32,359.40 in 2003, \$799.40 in 2004, \$2,377.40 in 2005 and \$13,423.40 in 2006 between wages actually paid to the beneficiary and the proffered wage respectively. Accordingly, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary from the year of the priority date to 2006.

The evidence in the record shows that the petitioner is structured as an S corporation. The record contains the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, and 2004 through 2006. These tax returns show that the petitioner did not have sufficient net income or net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage except for 2005.³

The petitioner's tax return shows that in 2005 the petitioner demonstrated that it had sufficient net current assets to pay the difference of \$2,377.40 between wages actually paid to the instant beneficiary and the proffered wage. However, the AAO notes that the record and USCIS computer records indicate that the petitioner filed another I-140 immigrant petition for [REDACTED] on January 3, 2004 with a priority date of April 16, 2001. [REDACTED] Form I-485 application for adjustment of status was approved on October 15, 2010.⁵ If

³ The AAO conducted a full analysis of the petitioner's net income and net current assets in its August 23, 2010 decision. This is incorporated into the record of proceeding and therefore, will not be repeated here. Only new evidence submitted on motion will be assessed.

⁴ Counsel as well as other documentation in the record identify [REDACTED] as the beneficiary's brother.

⁵ [REDACTED] The Administrative Appeals Office is never bound by a decision of a service center or district director. *See Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51

the petitioner filed the additional petition close to the priority date of the instant petition and offering the same proffered wage, the petitioner must show that it had sufficient income to pay all wages from the priority date until the granting of lawful permanent resident status. In the instant matter, the record does not contain any documentary evidence showing that it paid the full proffered wage to ██████████ during the years from 2001 to 2010. If the petitioner paid similar wages to ██████████ the petitioner could only establish its ability to pay both the beneficiary and ██████████ the difference between their wages and the proffered wages in tax year 2005. Thus, the petitioner has not established its ability to pay the proffered wage for either the beneficiary, or the beneficiary and ██████████ during the relevant period of time.⁶

The record before the director closed on May 18, 2007 when the director denied the petition. As of that date the beneficiary's W-2 form for 2007 and the petitioner's federal tax return for 2007 were not available. The beneficiary's W-2 form and the petitioner's tax return for 2006 were the most recent ones available. The instant motion was filed on September 22, 2010 with this office. As of the date, the beneficiary's W-2 form and the petitioner's federal tax return for 2007 through 2009 should have been available. However, counsel did not submit the beneficiary's W-2 forms and the petitioner's tax returns for 2007 through 2009, nor did she explain why these documents were not submitted. 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 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The regulation at 8 C.F.R. § 204.5(g)(2) clearly requires the petitioner demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The beneficiary's W-2 forms and the petitioner's tax returns would have demonstrated the amount actually paid to the beneficiary and the net income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner also failed to establish its ability to pay the proffered wage for 2007 through 2009 because it failed to submit these documents. In its initial decision, the AAO addressed net current assets and net current income as well as the totality of the circumstances in determining that the petitioner failed to demonstrate the ability to pay the proffered wage. The evidence provided on motion fails to overcome the deficiencies noted with the AAO's initial decision as well as in the instant decision.

The petitioner's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL to the present. The AAO's August 23, 2010 decision will be affirmed and the petition remains denied on this ground.

(2001).

⁶ This issue was addressed in the AAO's initial decision in this matter. The petitioner provided no new evidence on motion to show payment to this second worker or to otherwise address this issue.

On motion, counsel asserts that the AAO has erred in its analysis of the beneficiary's education and work experience documents.

In support of the beneficiary's educational qualifications, the petitioner submitted two graduation certificates. On motion, counsel contends that the AAO erred in concluding on Page 18 of its August 23, 2010 decision that the first graduation and the second graduation certificate differ from each other and that the petitioner failed to resolve these inconsistencies. Counsel asserts that the conclusion assumes the petitioner noticed these inconsistencies when in fact the petitioner did not notice them until they were pointed out in the decision dated August 23, 2010. The regulation at 8 C.F.R. § 103.2(b)(16)(i) provides in pertinent part that:

Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered,

While the regulation requires that USCIS inform the petitioner of derogatory information on which an adverse decision will be based, the regulation limits such notices to information of which the petitioner is unaware. In this matter, both graduation certificates were provided by the petitioner and, on March 29, 2005, the petitioner provided an attorney-certified copy of the original transcripts and Certificate of Graduation from the Higher Industrial Technology Institute in response to the director's second request for evidence dated April 30, 2004. 8 C.F.R. § 103.2(b)(16)(i) does not apply to the instant matter because there is a preponderance of evidence in the record of proceeding to establish that the petitioner was most likely aware of the inconsistencies. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). Counsel's assertion that the petitioner did not know that the two certificates are different until the AAO's August 23, 2010 decision is not persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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)). Further, the director stated in his June 28, 2007 decision that the viability of the documents from the High Technical Industrial Institute is in question because of adverse information. The director provided specific detail with respect to this adverse data, thus the director's decision served as a notice of such derogatory information. If the petitioner had rebuttal evidence, it should have submitted it on appeal. However, the petitioner did not submit any rebuttal evidence.

On motion, counsel again fails to submit independent, objective evidence to resolve the inconsistencies. Rather, counsel just asserts that the difference in letterhead and stamps may merely be the result of the education institution changing their letterhead and stamps. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states: "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.” The record does not contain any documentary evidence to support counsel’s assertion that the education institution has changed their letterhead and stamps. “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.” *Id.*

Counsel also states that the AAO errs in concluding that the first certificate leaves the student registration number blank while the second certificate makes no reference to the registration number because English translations of both certificates do not reflect exactly the same as in the original Arabic language documents. The regulation at 8 C.F.R. § 103.2(b)(3) provides that:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

As the AAO’s August 23, 2010 decision indicates, the translations submitted do not comply with the regulation cited above. Therefore, the AAO will not accept the translations as evidence to support the petitioner’s claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

On motion, counsel claims that the AAO also erred in discounting the evaluation from World Education Services (WES) and that the AAO should rely on a WES evaluation from the company without requiring an individual signature. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The credential evaluation report dated October 21, 2002 from WES does not bear the evaluator’s name and signature, and does not refer to any documents (including the beneficiary’s graduation certificates from high school or the institute) that were examined to reach the report’s conclusion. The AAO will not accept this evaluation report as an advisory opinion from an expert. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner submitted a letter from the technical manager of [REDACTED] with its English translation as evidence to establish the beneficiary’s required two years of qualifying experience in the job offered. The English translation of the letter verifies that the beneficiary worked as an auto mechanic from April 1996 to April 1998 and provides a brief description of the duties the beneficiary performed. The AAO declined to give any weight to this letter because the letter does not provide the name or title of the person providing the information. On motion, counsel asserts that the AAO erred in discounting the work experience letter submitted by Bait Alkhebra. She alleges that the Arabic version of the letter includes the name/signature of the person who signed the letter. It

appears that the original Arabic language letter bears a signature, however, it is not clear whether the Arabic letter includes the name and title of the writer and date of the letter. Without this information, the letter does not meet the requirements set forth at 8 C.F.R. § 204.5(1)(3). As counsel claims, if the English translation of the letter omits the name of the writer and date of the letter in translating Arabic into English, then the English translation cannot be considered a complete and accurate translation which meets the requirements set forth at 8 C.F.R. § 103.2(b)(3). Since the letter was submitted without a complete and accurate English translation under the regulation at 8 C.F.R. § 103.2(b)(3), the AAO cannot accept this letter and its English translation as primary evidence to establish the beneficiary's qualifying experience.

The petitioner's assertions on motion cannot be concluded to outweigh the evidence presented in the record that the petitioner failed to submit sufficient evidence to establish the beneficiary's education, training and experience qualifications for the proffered position in this matter (i.e. eight years of grade school, four years of high school, two years of training in the form of vocational school graduate in auto mechanics or ASE certification in automobile diagnostics and repair, and two years of experience in the job offered). Therefore, the AAO's August 23, 2010 decision will be affirmed and the petition remains denied on this ground.

Beyond the decision of the director, the AAO's August 23, 2010 decision also discusses the AAO's finding regarding the family relationship between the owner of the petitioner and the beneficiary. The AAO found that the record contains extensive evidence as to the family relationship between the petitioner's owner and the beneficiary. Abdalla Abdussayed, the owner of the petitioner, is the beneficiary's uncle and the beneficiary is the owner's nephew. Accordingly, the AAO questioned whether the job offer was and continues to be a *bona fide* job offer since the priority date, as well as the petitioner's level of compliance and good faith in the labor certification application proceedings.

On motion, counsel submits a copy of a letter dated February 4, 2003 from MNDES notifying the employer/petitioner that MNDES completed processing the underlying labor certification application and forwarded it to the Chicago Regional U.S. Certifying Officer. Counsel asserts that DOL conducted supervised recruitment of the underlying labor certification from April 30, 2001 to February 4, 2003, and that there were never any doubts raised about the realistic nature of the underlying job offer. Counsel maintains that the AAO has gone too far in its zeal to deny this appeal by raising this issue at this point. Counsel's assertions are without merit. 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). The AAO is well within its authority to raise this fundamental legal question in deciding the appeal and motion. Although DOL never addressed the issue, the MNDES letter does not establish that DOL was notified of the family relationship between the petitioner and the beneficiary. If DOL had known the family relationship between the petitioner and the beneficiary, it may have raised this issue and reviewed the labor certification application more closely.

Under 20 C.F.R. § 626.20(c)(8) and §656.3, 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). The regulations do not limit the petitioner's burden to respond to DOL's inquiry or set forth a time limit to fulfill this responsibility. The petitioner is a small company that is owned by the beneficiary's uncle. The AAO requested that the petitioner show that a valid employment relationship between the petitioner and the beneficiary exists. The petitioner failed to submit documentary evidence to rebut the AAO's findings. After reviewing counsel's assertions and evidence submitted on motion, the AAO further finds that there is insufficient evidence in the record to determine whether a bona fide job offer exists because a family relationship exists between the petitioner and the beneficiary that was not revealed to DOL. Should this matter be pursued further, the question of whether a bona fide job opportunity exists must be resolved.

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. Here, that burden has not been met.

ORDER: The motion is granted. The AAO's August 23, 2010 decision is affirmed and the petition remains denied.