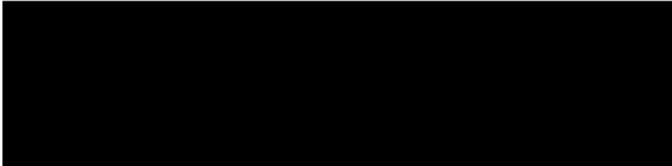


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

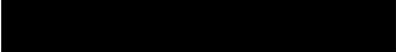


B6

Date: **FEB 27 2012**

Office: TEXAS SERVICE CENTER

File: 

IN RE: Petitioner: 
 Beneficiary: 

PETITION: Immigrant petition for Alien Worker as an Other Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF REPRESENTED

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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas 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 or reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is an assisted living facility. It seeks to employ the beneficiary permanently in the United States as a health care specialist. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent 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.

On March 10, 2011, the AAO dismissed the subsequent appeal, affirming the director's denial and noting further that the petitioner failed to demonstrate that the beneficiary had the experience required by the terms of the labor certification. The petitioner filed a motion to reopen and reconsider the AAO decision. The record shows that the motion is properly filed and timely and is accompanied by a signed statement from the owner. 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).

Here, we will accept the motion to reopen the matter based on the new information submitted. The instant motion is granted.¹

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.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for

¹ The motion to reopen and reconsider was submitted by [REDACTED] as the principal petitioner. He states on the Form G-28 that he is affiliated with [REDACTED]. This organization is not the petitioner in this matter. 8 C.F.R. § 103.3(a)(iii)(B) states "For purposes of this section and §§ 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition." The affected party in this matter is [REDACTED] the entity stated as the petitioner on the Form I-140 and discussed further below. [REDACTED] however, is the sole proprietor of the petitioner and, therefore, is an affected party. As [REDACTED] states that [REDACTED] is not in business as of August 2008, this decision will be addressed to [REDACTED].

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.

The regulation 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on August 22, 2006. The proffered wage as stated on the ETA Form 9089 is \$12.15 per hour (\$25,272 per year). The ETA Form 9089 states that the position requires a high school education and six months of experience as a health care specialist.

From the evidence in the record of proceeding, the petitioner appears to be structured as a sole proprietorship. The only evidence submitted with its motion to reopen is a statement from [REDACTED] dated April 7, 2011 setting out information concerning [REDACTED]

In the AAO's March 10, 2011 decision, the AAO specifically reviewed evidence of the relationship between [REDACTED]. The AAO decision contains a detailed discussion concerning the difference in Federal Employer Identification Numbers (FEIN) and addresses of the individual entities and notes that nothing in the record established that these entities are one entity and that they operate under the same tax identification number. With the motion, [REDACTED] states that [REDACTED] went out of business in August 2008 and [REDACTED] was dissolved in 2006. The ETA Form 9089 listing [REDACTED] as the petitioner was accepted by the DOL on August 22, 2006. The Form I-140 was filed on June 3, 2009 with [REDACTED] as the petitioner. From the information submitted, it is unclear why [REDACTED] would be listed as the petitioner if it had been dissolved the previous year or why [REDACTED] was listed on the ETA Form 9089 if it was dissolved in the same year. "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).

also states that both had no Tax Identification numbers. [His] Social Security Number was listed and used for both.” concludes that as his Social Security Number was used and he is the same person, that the businesses may be considered the same. As noted in our previous decision, no separate tax identification number was listed on the tax return for and has operated businesses as a sole proprietor. However, as states with his motion, the entity named on the labor certification as the employer, was a “family trust” and, therefore, he was not the sole proprietor of that entity. As a result, evidence must be provided to demonstrate that are related or that a successor relationship exists.² No such evidence was submitted on appeal or with the motion to reopen. While the identity of the entity that filed the labor certification application and the Form I-140 petition remains unclear, the AAO will accept for purposes of this adjudication that both the labor certification application and the Form I-140 petition were filed by as sole proprietors.

Concerning the petitioner’s ability to pay the proffered wage, also asserts that he is able to pay the proffered wage. He states that the petitioner submitted annual reports, tax returns, and financial statements previously; the petitioner submitted no new documents with its motion. The only financial documents previously submitted were the tax returns for which are not relevant for the adjudication,³ and the tax returns for its sole proprietor. No annual reports or financial statements were submitted.⁴ As stated in our previous decision, the tax returns submitted reflect that the sole proprietor has an Adjusted Gross Income (AGI) of \$81,499 in 2007 and a loss of (\$8,062) in 2006.⁵ Despite being specifically requested

specifically states in response to the motion that “There are No Successors-In-Interest to any prior entities:

³ 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.” Corporate assets may not be considered as assets of a sole proprietor.

⁴ The regulation at 8 C.F.R. § 204.5(g)(2) allows for the consideration of annual reports and makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited.

⁵ 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 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. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983).

to do so by the director's Request for Evidence ("RFE") and notified that the petitioner had not established the ability to pay in the AAO's prior decision, the petitioner submitted no evidence concerning the average monthly household expenses for its owners. 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). As such, the AAO cannot determine whether the petitioner had sufficient income in 2007, when the sole proprietors reported an AGI of \$81,499. After subtracting the wage of \$25,272, the sole proprietor had to support a family of three. Without the personal expenses of the sole proprietor, the AAO cannot determine whether this figure would have been sufficient in 2007. In 2006, the AGI would not be sufficient to pay either the household expenses or the proffered wage as the AGI amount was negative. In 2008, no tax return was submitted for the sole proprietors. Therefore, the petitioner on motion has not established its ability to pay the proffered wage.

states that he "ha[s] never paid \$12.15 an hour . . ." and that perhaps "minimum wage with room and board [could be interpreted] as equal to \$12.15 per hour." Although the petitioner is not required to pay the proffered wage until the time when the beneficiary may adjust status to that of a lawful permanent resident, statement creates doubt as to the petitioner's intention to pay the proffered wage at that time. "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).

In addition to the ability to pay, the petitioner did not submit evidence that the beneficiary has the experience required by the terms of the labor certification as set forth in the AAO's March 11, 2011 denial. As set forth in that decision, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that:

(A) *General.* 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.

The ETA Form 9089 requires six months experience as a health care specialist before the August 22, 2006 priority date. As noted by the AAO in the previous decision, the petitioner submitted no letters or other evidence to document any previous employment of the beneficiary. The petitioner submitted no evidence of any prior experience with the motion.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

We will consider a sole proprietor's total income or AGI, reflected on the Form 1040 as a whole. See *Ubeda*, 539 F.Supp. 647.

The petitioner's assertions and evidence submitted on motion do not overcome the grounds of denial in the director's August 12, 2009 decision and the AAO's March 10, 2011 decision. The petitioner failed to establish that it had the continuing ability to pay the proffered wage from the priority date through the present or that the beneficiary possesses the experience required by the terms of the labor certification. Therefore, the petition cannot 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. Here, that burden has not been met.

ORDER: The motion to reopen is granted and the decision of the AAO dated March 11, 2011 is affirmed. The petition remains denied.