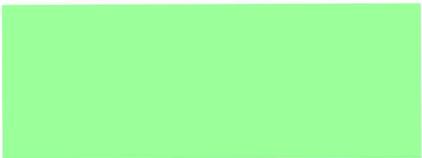




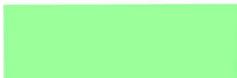
U.S. Citizenship  
and Immigration  
Services

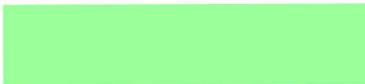
(b)(6)



DATE: JUL 25 2013

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:

SELF-REPRESENTED

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  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on April 4, 2012. The petitioner filed a motion to reopen on May 8, 2012.<sup>1</sup> The AAO dismissed the motion on March 28, 2013 as untimely filed. The matter is now before the AAO on a subsequent motion to reopen and a motion to reconsider. The motions will be granted; however the April 4, 2012 decision of the AAO will be affirmed and the petition will remain denied.

In the director's January 27, 2009 denial, the director determined that the petitioner failed to submit the required initial evidence demonstrating that the petitioner had the ability to pay the beneficiary the proffered wage or that the beneficiary met the education and experience requirements of the labor certification. Accordingly, the director denied the petition. The petitioner appealed the director's denial to the AAO. On April 4, 2012, the AAO affirmed the director's decision and dismissed the appeal. The AAO found that the petitioner failed to establish its ability to pay the beneficiary the proffered wage in 2006 and 2007. The AAO also found that the petitioner failed to establish that the beneficiary met the educational and experience requirements for the position offered. On May 8, 2012, the petitioner filed a motion to reopen the AAO's April 4, 2012 decision, which was subsequently dismissed by the AAO on March 28, 2013, as untimely pursuant to 8 C.F.R. §§ 103.5(a)(1)(i), 103.5(a)(1)(iii)(C), 103.5(a)(3), and 103.5(a)(4). On April 30, 2013, the petitioner filed the instant motions.

The AAO's March 28, 2013 decision found the petitioner's prior motion to be untimely. United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). If the unfavorable decision was mailed, the appeal must be filed within 33 days. 8 C.F.R. § 103.8(b). Similarly, USCIS regulations require that motions to reopen be filed within 30 days of the underlying decision, except that failure to timely file a motion to reopen may be excused in the discretion of USCIS where it is demonstrated that the delay was reasonable and was beyond the affected party's control. *Id.* As stated in the AAO's March 28, 2013 decision, the petitioner's motion was filed on May 8, 2012, 34 days after the AAO's April 4, 2012 decision. The record indicates that the AAO's decision was mailed to both the petitioner at its business address and to its counsel of record.<sup>2</sup> As the record did not establish that the failure to file the motion within 30 days of the decision was reasonable and beyond the affected party's control, the AAO dismissed the motion on March 28, 2013. The AAO's

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<sup>1</sup> On the Form I-290B submitted on May 8, 2012, the petitioner checked Box B, which states "I am filing an appeal," however, the accompanying narrative states that "additional evidence [was submitted] in support of a motion to reopen." It is noted that the AAO does not exercise appellate jurisdiction over its own decisions. The AAO exercises appellate jurisdiction over only the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1 (effective March 1, 2003). An appeal of an AAO appeal is not properly within the AAO's jurisdiction. However, because the petitioner characterized its filing as a motion to reopen on the Form I-290B, it was accepted as one, despite the incorrect box being checked on the form.

<sup>2</sup> On July 11, 2012, the AAO received a letter from the petitioner indicating that its counsel of record was no longer representing the petitioner.

decision notified the petitioner that, absent a showing that the late filing was reasonable and beyond the petitioner's control, the motion would not be accepted.

In the instant motion, the petitioner provides a statement from the petitioner's president, stating that previous counsel mailed the prior motion overnight on May 3, 2012. U.S. Postal Service records confirm that the prior motion was delivered to the Nebraska Service Center on May 4, 2012, which was 31 days after the AAO's April 4, 2012 decision. Therefore, the AAO will withdraw its previous finding that the prior motion was untimely. However, the petitioner would still not have been able to overcome the director and AAO's grounds for denial.

In the director's decision, the director found that the petitioner failed to submit any initial evidence demonstrating that the beneficiary met the education and experience requirements of the labor certification. Accordingly, the director denied the petition. In its April 4, 2012 decision, the AAO affirmed the director's decision finding that no initial evidence was submitted with the petition. The AAO also found that the petitioner failed to demonstrate that the beneficiary possessed the minimum requirements as stated in the labor certification. Specifically, the AAO found that the petitioner submitted no evidence that the beneficiary possessed a high school education, and that the beneficiary's experience letters were insufficient to demonstrate that the beneficiary possessed the required experience for the position offered, 24 months of experience in the position offered.

In the instant motion, the petitioner states that he is now submitting "substantial evidence of the beneficiary's education, training and/or experience requested." On motion, the petitioner submits copies of the following evidence regarding the beneficiary's qualifications, all of which was carefully analyzed by the AAO in its April 4, 2012 decision: the beneficiary's diploma with a certified translation; the beneficiary's school records; a letter from the academic secretary at [REDACTED] with a certified translation; a letter from payroll at [REDACTED]; a letter from the master electrician at [REDACTED]; a letter from [REDACTED] the beneficiary's driver license card and record; the beneficiary's apprentice electrician license; the beneficiary's identification cards; and the beneficiary's CPR certificates of completion. The petitioner submits no new evidence regarding the beneficiary's qualifications for the position offered. Nor does the petitioner address the discrepancies or insufficiencies in the beneficiary's experience letters noted by the AAO's April 4, 2012 decision. Therefore, on motion, the petitioner has failed to establish that the beneficiary possessed the required qualifications and experience as stated in the labor certification.

The petitioner also states that he is now submitting "evidence of the employer's ability to pay in complete federal tax returns from 2006, 2007, 2009, 2010, [and] 2011, that demonstrates financial resources sufficient to pay the beneficiary[']s wages."

In the director's decision, the director found that the petitioner failed to submit any initial evidence demonstrating its ability to pay the beneficiary the proffered wage. On appeal, the petitioner submitted its tax returns for 2006 and 2007 only. In its April 4, 2012 decision, the AAO found that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage, specifically in 2006 and 2007.

In the instant case, the proffered wage is \$48,027 per year. On motion, the petitioner submits copies of its Form 1120S tax returns from 2009 through 2012 in support of its assertion that it had the ability to pay the beneficiary the proffered wage.<sup>3</sup> It is noted that the record fails to contain the petitioner's tax returns for 2008, thus preventing the AAO from analyzing the petitioner's net income in that year.<sup>4</sup>

The AAO found in its April 4, 2012 decision that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage in years 2006 and 2007.<sup>5</sup> The petitioner must demonstrate its ability to pay the proffered wage from the priority date onward. The petitioner failed to submit any new evidence on motion to address these years. Therefore, the petitioner has failed to overcome the grounds for denial from the AAO's dismissal. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d).

The petitioner's tax returns demonstrate its net income for 2008 through 2012, as shown in the table below.

- In 2008, the Form 1120S was not provided.
- In 2009, the Form 1120S stated net income<sup>6</sup> of \$(42,297).

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<sup>3</sup> It is noted that record contains an inconsistency regarding the petitioner's Employer Identification Number (EIN). On the instant Form I-140, the petitioner lists EIN [REDACTED] whereas, the petitioner lists EIN [REDACTED] on its Forms 1120S for 2006 through 2012. The record contains no explanation for the different EINs. In any future filings, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

<sup>4</sup> The record contains a copy of the petitioner's unaudited financial statements from a certified public accountant for 2008. The petitioner's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

<sup>5</sup> In its April 4, 2012 decision, the AAO determined that the petitioner's Form 1120S stated net income of \$6,944 in 2006 and \$47,064 in 2007; and net current assets of \$(204,343) in 2006 and \$(208,501) in 2007. On the ETA Form 9089, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

<sup>6</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries

- In 2010, the Form 1120S stated net income of \$(166,527).
- In 2011, the Form 1120S stated net income of \$13,498.
- In 2012, the Form 1120S stated net income of \$56,719.

Therefore, for the years 2006, 2007, 2008, 2009, 2010 and 2011, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner's net income in 2012 is sufficient to demonstrate its ability to pay the beneficiary the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>7</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2008 through 2011, as shown in the table below.

- In 2008, the Form 1120S was not provided.
- In 2009, the Form 1120S stated net current assets of \$(132,291).
- In 2010, the Form 1120S stated net current assets of \$(129,406).
- In 2011, the Form 1120S stated net current assets of \$(5,706).

Therefore, for the years 2006, 2007, 2008, 2009, 2010, and 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner submits a copy of a letter from the Vice-President of Finance at [REDACTED] stating that they provided payroll services to the petitioner since 2004 and that the petitioner "has had the ability to pay [the] beneficiary since the priority date by taxes filed by [the] beneficiary." The affiant failed to provide any documentation in support of his statement. 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 letter does not meet the

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for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2012) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 11, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2009 through 2012, the petitioner's net income is found on Schedule K of its tax returns.

<sup>7</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

regulatory required evidence and cannot stand in the place of regulatory required evidence. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That provides further provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.) The labor certification states that the petitioner employs only 25 workers. This is corroborated by the petitioner's statement on the Form I-140 that it employed only 25 workers as of April 2007. Based on the record, USCIS need not accept this letter pursuant to 8 C.F.R. § 204.5(g)(2). Further, the affiant's assertions on motion cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In its April 4, 2012 decision, the AAO considered the totality of the circumstances in the instant case. The AAO found that the petitioner had negative net current assets in 2006 and 2007, and minimal net income in 2006. The AAO now finds that the petitioner also had negative net current assets in 2009 through 2012. The AAO noted that despite claiming on the Form I-140 that the petitioner employs 25 workers, the total amount of salaries and wages paid in each year was less than \$100,000, which does not indicate a workforce of that size. The petitioner submitted no evidence of hardship, uncharacteristic expenses, or evidence that it experienced some other situation that would liken it to *Sonogawa*. The AAO also finds that the petitioner submitted no evidence of its reputation within its industry. Further, the AAO finds that while the petitioner's tax returns reflect high gross receipts, it is offset by the high cost of goods sold in the same year. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On motion, the petitioner also asserts that the case was improperly managed by prior counsel, and provides a copy of the beneficiary's Initial Complaint Form filed with the Utah Office of Professional Conduct.

Any 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
- (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 (1<sup>st</sup> Cir. 1988).

Although the petitioner claims that its counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1<sup>st</sup> Cir. 1988). There is no evidence in the record to demonstrate that counsel had been informed of the allegations leveled against him and was given an opportunity to respond. Therefore, the instant motion does not address these requirements. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel. The complaint, which was written and filed by the beneficiary, raises questions surrounding the nature of the representation.<sup>8</sup> However, even if the petitioner had properly documented a claim for ineffective assistance of counsel, it is unclear what remedy would be proper. In the instant matter, the petitioner's ability to pay the proffered wage and the beneficiary's qualifications for the position offered are at issue. The record before the AAO fails to evidence the petitioner's ability to pay, or the beneficiary's qualifications. The evidence reviewed was prepared independently of counsel, therefore it is unclear what impact, if any, counsel's purported ineffective representation had on these matters.

Motions for the reopening or reconsideration 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 petitioner has demonstrated that its prior motion was timely filed. The AAO's March 28, 2013 decision is withdrawn. However, the petition will remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not sustained that burden. Accordingly, the motions will be granted, and the previous decisions of the AAO will not be disturbed.

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<sup>8</sup> The record contains an Initial Complaint Form filed by the beneficiary, not the petitioner, with the Utah Office of Professional Conduct. In his complaint, the beneficiary states that he hired counsel to represent him before USCIS regarding the instant petition, and he "had all the dealings with" counsel. The beneficiary also indicates that he made all payments to counsel.

(b)(6)

*NON-PRECEDENT DECISION*

Page 8

**ORDER:** The motions are granted. The previous decision of the AAO, dated April 4, 2012, will not be disturbed. The petition remains denied.