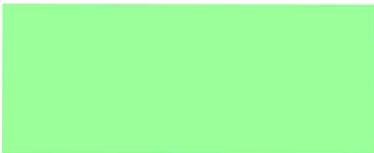




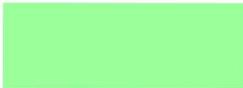
U.S. Citizenship
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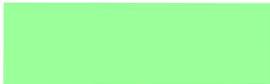


DATE: JUL 26 2013

OFFICE: TEXAS 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 (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, Texas Service Center on April 20, 2010. The petitioner filed an appeal to the Administrative Appeals Office (AAO) on May 24, 2010. On February 21, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed in part and withdrawn in part, and the petition will remain denied.

On the instant Form I-140, the petitioner describes itself as a retail and wholesale business. It seeks to employ the beneficiary permanently in the United States as an automotive service technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL), accompanied the petition.

In the director's April 20, 2010 decision, he concluded that the petitioner had failed to provide the requested documentation relevant to the beneficiary's qualifying experience and the petitioner's continuing ability to pay the proffered wage as of the visa priority date, and denied the petition accordingly. In its February 21, 2013 dismissal, the AAO affirmed the director's decision that the petitioner failed to establish that the beneficiary possessed the requisite work experience as of the priority date, and the petitioner failed to establish its continuing ability to pay the proffered wage.

The ETA Form 9089 underlying this Immigrant Petition for Alien Worker (Form I-140) is a duplicate of the original which was submitted in support of the first Form I-140 filed by the petitioner on November 14, 2006.¹

Here, the Form ETA 9089 was accepted on September 19, 2006. The labor certification states that the position offered requires two years of experience in the job offered as an automotive service technician. The proffered wage is stated to be \$14.20 per hour, which amounts to \$29,536 per year.²

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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 Service policy. A motion to reconsider a decision on

¹ The petition filed on November 14, 2006 was denied on March 20, 2007, based on abandonment. The petitioner was represented by [REDACTED] on this application. It is noted that [REDACTED], a former [REDACTED], pled guilty on July 10, 2009, to accepting a bribe as a public official. He conspired with an individual from "the [REDACTED] (co-conspirator) to manipulate priority dates and other information on ETA applications." *Semiannual Report to Congress, Volume 62* (Office of Inspector General for U.S. Dept. of Labor, April 1-September 30, 2009).

² It is noted that on appeal counsel represented the calculation of the full-time wage at 35 hours per week instead of 40 hours per week. As counsel submitted no documentary evidence that the petitioner actually recruited the job based on a 35-hour per week wage, in its prior decision the AAO considered the proffered wage calculation to be based on 40 hours per week.

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.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy.

In its February 21, 2013 dismissal, the AAO stated that the petitioner failed to establish that the beneficiary possessed the requisite work experience. The AAO noted that one experience letter, undated, in the record appeared to be misrepresented because of the inconsistency of the body of the letter appearing in English contrasted with the use of a closing phrase in Spanish. The AAO found the letter lacked credibility. The AAO also noted that the only other experience letter submitted referred to a "[REDACTED]", was a translation unaccompanied by the original document in Spanish, failed to specify the alien's job, and failed to describe his duties. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). On motion, counsel submits the original Spanish letter, dated August 14, 2006, with an accompanying new translation, dated March 3, 2010. As previously noted by the AAO, this letter does not meet the regulatory requirements because it fails to state the beneficiary's position or job duties. *Id.* Also, the letter does not state whether the beneficiary's employment was full- or part-time, preventing the AAO from determining the extent of the beneficiary's purported employment. Further, a portion of the content of new translation differs from the previously submitted translation, casting further doubt on the credibility of the experience letter. Therefore, the August 14, 2006 letter is insufficient to document the beneficiary's claimed experience.

The AAO also noted that the director requested the claim of prior experience be accompanied by evidence of payroll records, pay receipts or similar documentation to confirm the beneficiary's employment with the previous employer. The petitioner failed to submit such evidence. The petitioner failed to address this deficiency on appeal and again on motion.

Further, the AAO noted that the petitioner failed to reconcile the discrepancy regarding the petitioner's employment records indicating that it employed two different individuals with extremely similar names: "[REDACTED]" listed as an employee in 2006 and 2007, and "[REDACTED]" identified on the Form I-140 as the beneficiary. In the last quarter of 2007, the petitioner's state quarterly wage reports indicate that the petitioner employed both these individuals.³ On appeal, counsel addressed the discrepancy asserting that both persons were the same; however, the AAO found counsel's assertion to be unsupported by the record as both persons were employed by the petitioner with each using a different social security number.

On motion, counsel asserts that this was an error in the payroll system, and that it is common in Latin America for individuals to have and use both a paternal and a maternal last name. Counsel submits a copy of the beneficiary's birth certificate with accompanying translation, a copy of the beneficiary's passport, and an affidavit from the beneficiary. The beneficiary states that he used two versions of his name in the United States, one of which included his maternal last name. While the

³ The petitioner's state quarterly wage reports also indicate the employment of "[REDACTED]"

AAO acknowledges that it may be common in Latin America for individuals to have and use both a paternal and maternal last name, it fails to explain why the petitioner's state quarterly wage reports indicate that both individuals, with different social security numbers, were employed by the petitioner in 2007.⁴ No other evidence was submitted in support of counsel's assertion, such as an accountant statement or letter from the payroll company. 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)). Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has failed to reconcile the discrepancy.

As previously noted, the AAO found that one experience letter in the record appeared to be misrepresented because of the inconsistency of the body of the letter appearing in English contrasted with the use of a closing phrase in Spanish. On motion, counsel submits an affidavit from the beneficiary, who states that the declarant "used both Spanish and English in the letter, which happens often when both languages are used." The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)). The AAO notes that the body of the letter utilizes one font face and size, while the word "Atentamente" and the signor's name appear in a different font face and size. These fonts, however, match the signature block on the original Spanish language letter, dated August 14, 2006. This suggests that the signature block from the undated letter may be photocopied from a different letter. Doubt cast on any aspect of the petitioner's evidence may 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, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* In his April 20, 2010 decision, the director requested such evidence, however, the petitioner never provided any independent, objective evidence to resolve the discrepancy. The record does not contain any pay statements, payroll or other business records, or government records to corroborate the beneficiary's claimed employment experience. Based on the above, the letter is insufficient to document the beneficiary's claimed experience.

⁴ It is noted that the beneficiary claimed no social security number on Part 3 of the First Form I-140 filed on November 14, 2006 and similarly claimed no social security number on the second Form I-140 filed on June 7, 2007.

Therefore, the petitioner has failed to establish that the beneficiary possesses the minimum qualifications for the position offered as stated in the labor certification.

In its February 21, 2013 dismissal, the AAO also stated that the petitioner submitted copies of its Form 1120S tax returns filed with the IRS and copies of what appear to be IRS transcripts of its employer's quarterly returns (Form 941). The AAO noted that that the director requested in his February 13, 2008 Notice of Intent to Deny (NOID) that the petitioner submit a certified IRS tax return transcript for 2006 in an unopened envelope. The petitioner failed to provide this documentation and subsequently provided only the petitioner's 2008 income tax transcript from the IRS. Thus, because the petitioner failed to provide regulatory required evidence and due to the questions that emerged relevant to the employment verification documentation, the AAO declined to consider the petitioner's copies of federal income tax returns without corroborative evidence such as requested by the director. The AAO found that the petitioner had not established its continuing ability to pay the proffered wage.

On motion, counsel requests that the AAO re-evaluate the petitioner's ability to pay the proffered wage. Counsel asserts that the beneficiary's Form W-2 for 2007 indicates the petitioner paid wages of only \$2,250 because the beneficiary's employment did not begin until late 2007.⁵ Counsel resubmits copies of the petitioner's Form 1120S tax returns for 2006 through 2008. Counsel also submits copies of the beneficiary's Form W-2s for 2008 through 2012, IRS letters to the petitioner indicating that the petitioner's tax transcripts are unavailable for the years 2005 through 2008,⁶ and the petitioner's IRS tax transcripts for the years 2009 through 2011.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989, but fails to indicate the number of employees. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on October 29, 2006, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances

⁵ The record contains the beneficiary's Form W-2 for 2006, suggesting the petitioner employed the beneficiary prior to 2007.

⁶ The IRS letters indicate that the petitioner did not request tax transcripts until March 5, 2013, despite the director's earlier request. Further, the IRS letters indicate that while the tax "return transcripts" are not available, "account transcripts are available for older years."

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 petitioner demonstrated that it paid the beneficiary the following wages:

<u>Year</u>	<u>Wages Paid</u>	<u>Difference between the proffered wage and wages paid</u>
2006	\$12,150	\$17,386
2007	\$2,250	\$27,286
2008	\$22,925	\$6,611
2009	\$25,060	\$4,476
2010	\$24,255	\$5,281
2011	\$28,780	\$756

The petitioner has not established that it paid the beneficiary the full proffered wage for any year in question. Therefore, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage in all the years.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate its net income⁷ for 2006 through 2011, as shown in the table below.

⁷ 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

<u>Year</u>	<u>Net Income</u>	<u>Difference between the proffered wage and wages paid</u>
2006	\$122,410	\$17,386
2007	\$179,761	\$27,286
2008	\$151,399	\$6,611
2009	\$128,274	\$4,476
2010	\$141,213	\$5,281
2011	\$89,458	\$756

Therefore, for all of the years, the petitioner did have sufficient net income to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has established 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 and its net income. The AAO withdraws this portion of its prior decision.

It is noted that the record contains Forms W-2 issued to the beneficiary and [REDACTED] in 2007. The record reflects that both individuals, with different social security numbers, were employed by the petitioner in 2007. This discrepancy was noted in the AAO's prior decision, however, the petitioner failed to reconcile the discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On motion, counsel asserts that this was an error in the payroll system; however, as previously noted, the petitioner has not overcome this inconsistency with independent, objective evidence. Counsel failed to submit evidence in support of his assertion, such as an accountant statement or letter from the payroll company. 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)). Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In any future filings, the petitioner must resolve the inconsistency in the record with independent objective evidence.

for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed July 22, 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 income, deductions, and other adjustments shown on its Schedule K for 2006 through 2011, the petitioner's net income is found on Schedule K of its tax returns.

(b)(6)

NON-PRECEDENT DECISION

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Therefore, while the petitioner has established its ability to pay the proffered wage, it has not established that the beneficiary possessed the requisite work experience as of the priority date.

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 met that burden. Accordingly, the motions will be granted; however, the petition will remain denied for the above stated reasons.

ORDER: The motions are granted. The AAO's decision, dated February 21, 2013, is withdrawn in part, a new decision is entered, and the petition remains denied.