



U.S. Citizenship
and Immigration
Services

(b)(6)



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. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. On May 15, 2013, the AAO granted the motion, affirming its previous decision. The matter is now before the AAO on another motion to reopen and a motion to reconsider. The motions will be granted; the previous decisions of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a “gold manufacturer.” It seeks to employ the beneficiary permanently in the United States as a jewelry designer. As required by statute, the petition is accompanied by Form ETA 750, Application for Alien Employment Certification (labor 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.¹ The director denied the petition accordingly.

On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and that it further had failed to show that the beneficiary satisfied the minimum work experience requirements for the proffered position as set forth in the labor certification. Accordingly, the AAO, in a decision dated September 25, 2012, dismissed the petitioner’s appeal.

On October 24, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO’s decision. In its May 15, 2013 decision, the AAO found that the petitioner has not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; (2) whether a *bona fide* successor-in-interest exists, or that the petitioner has undergone a corporate name change; and (3) that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). On motion, counsel requests an extension of 30 days to submit a brief and all supporting evidence. A motion must be complete when filed, including any applicable brief and supporting evidence, as stated in the instructions to Form I-290B. The regulations at 8 C.F.R. § 103.5(a)(1)(iii) also state that a brief and evidence must be submitted when the Form I-290B is filed. As of the date of this decision, the record reflects that no evidence has been received.

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. 8 C.F.R. § 103.5(a)(3). On motion, counsel asserts that the AAO “did not consider ‘current asset’ as the employer’s ability [t]o pay the proffered wages from year 2001~2004.” The record shows that the motion to reconsider is properly filed and timely. The motion to reconsider

¹ The director’s decision also noted that the tax returns in the record did not reflect the name of the petitioning business identified in the labor certification and Form I-140, Immigrant Petition for Alien Worker.

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. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of May 15, 2013 is affirmed. The remaining 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.

Here, the Form ETA 750 was accepted on September 21, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year. The Form ETA 750 states that the position requires four years of high school education, a bachelor's degree in art or design, and two years of experience as a jewelry designer.

The petitioner claims to be structured as a sole proprietorship.² On the petition, the petitioner claimed to have been established in 1998 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on September 21, 2001, the beneficiary claimed to work for the petitioner since January 2001.

As set forth in the AAO's May 15, 2013 decision, an issue in this case is that the petitioner failed to establish that the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. On motion, counsel contends that the AAO did not consider the petitioner's current assets in analyzing its ability to pay the proffered wage in 2001 through 2004.

In considering the petitioner's net current assets, the AAO will review the sole proprietor's audited balance sheets, not the sole proprietor's individual income tax forms which do not record any information on an individual's assets or liabilities. The record does not contain the sole proprietor's audited balance sheets for any year, thus the AAO is prevented from analyzing the petitioner's ability to pay the proffered wage through an examination of net current assets. On motion, no evidence was submitted to support counsel's claim that the petitioner can establish its ability to pay through an analysis of the sole proprietor's net current assets. 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)). Therefore, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage based on net current assets.

The AAO noted previously that the petitioner had failed to show that [REDACTED] and [REDACTED] are the same business as [REDACTED], the petitioner listed on the labor certification and Form I-140, or that they are its *bona fide* successors-in-interest.

² In its prior decision, the AAO noted that this assertion appears to be contradicted by the name of the petitioning business itself, which indicates that the petitioner is holding itself out to be an incorporated entity rather than a sole proprietorship as counsel claims. Counsel failed to address this issue on the instant motion.

The AAO, therefore, determined that the petitioner had failed to establish that the tax returns in the record relate to its business, such that they may be used to establish its ability to pay.

The petitioner, on appeal and on motions, fails to address this issue entirely, although it was raised by both the director and the AAO. The petitioner must overcome inconsistencies in the record by competent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the AAO observed that the beneficiary's IRS W-2 forms for the years 2001 through 2008 list his employer as [REDACTED] located at the same address originally set forth on the labor certification ([REDACTED] Houston, Texas) and the same federal EIN as indicated for the petitioner on the Form I-140. However, the record is unclear whether [REDACTED] and [REDACTED] are the same entity. The sole proprietor's tax returns do not indicate that the business possesses an EIN, changed its name, or underwent a corporate change. Additionally, even if the record demonstrated that [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the petitioner still failed to establish its ability to pay as the record contains no corresponding tax returns for that business from 2003 onwards.³

As stated in its May 15, 2013 decision, the AAO concludes that the petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for [REDACTED] or any successor-in-interest, for each year from the priority date onwards, as required by regulation at 8 C.F.R. § 204.5(g)(2), is sufficient cause to dismiss this motion.

In its September 25, 2012 decision, the AAO set forth in detail, which will not be replicated here, its analysis of the petitioner's ability to pay, under the assumption that the tax returns in the record related to the petitioner. The AAO concluded that, if this assumption was accurate, the record may be sufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage for the tax years 2005 through 2008, however, it still failed to show the petitioner's ability to pay for the years 2001 through 2004.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Accordingly, the AAO concludes that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, in its September 2012 decision, the AAO noted that beyond the decision of the director, the petitioner had failed to meet its burden of proof to show that the beneficiary satisfied the minimum

³ If in fact [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the existence of Forms W-2 it issued to the beneficiary from 2003 to 2008 would suggest that [REDACTED] and [REDACTED] are separate, unrelated businesses, such that their corresponding tax returns may not be used to satisfy the requirements of 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the beneficiary the proffered wage from 2003 through 2008.

requirements of the proffered job as of the September 21, 2001 priority date. The petitioner failed to provide any evidence documenting the beneficiary's purported experience with its previous motion and again with the instant motion.

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). Accordingly, the AAO concluded that the petitioner had failed to establish that the beneficiary was qualified for the proffered position.

On motion, counsel indicates that the beneficiary "has requested his previous employer in Korea to verified [*sic*] his previous work experience." However, no evidence of the beneficiary's purported work experience was provided on motion. 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)). Thus, even if the petitioner had established its ability to pay the proffered wage to the beneficiary, the petition must still be denied as the petitioner has not demonstrated that the beneficiary meets the minimum requirements of the proffered job.

The petition will remain denied for the above stated reason. 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 and the previous decisions of the AAO will be affirmed.

ORDER: The motions are granted. The previous decisions of the AAO, dated September 25, 2012 and May 15, 2013, are affirmed. The petition remains denied.