



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: JUN 06 2013 OFFICE: TEXAS SERVICE CENTER [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

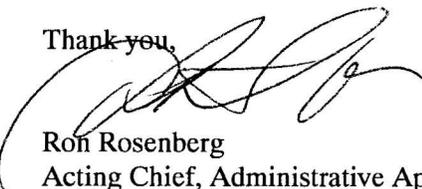
[Redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on November 15, 2012, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be approved as a motion to reconsider. The appeal remains dismissed and the petition remains denied. The AAO's decision of November 15, 2012 will be affirmed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently<sup>1</sup> in the United States as an assembler-helper. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director questioned the *bona fides* of the job offer and further determined that the petitioner had not established the continuing financial ability to pay the proffered wage and denied the petition accordingly on April 9, 2009. The director requested documentation from the petitioner that was never provided including a complete copy, not just page 1, of the 2005 tax return which covers the priority date of July 18, 2006, copies of quarterly wage reports from January 2006 to date and certified IRS transcripts of tax returns for 2005-2006.

The petitioner, through counsel, filed an appeal.<sup>2</sup> The AAO dismissed the appeal on November 15, 2012. Following an examination of the record, the AAO concluded that the petition could not be approved because the petitioner failed to establish that it has had the continuing ability to pay the proffered wage of \$14,622.40 per year from the July 18, 2006, priority date onward.

Through counsel, the petitioner submits a motion to reopen. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). As the motion is accompanied only by page one of the petitioner's 2005 federal income tax return, which was already submitted to the record, the motion is not qualified as a motion to reopen. However, the petitioner's motion may be accepted as a motion to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or United States Citizenship and Immigration Service (USCIS) policy. It must also demonstrate that the decision was incorrect

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

<sup>2</sup> The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. Additionally, it is noted that on January 3, 2013, the petitioner's former counsel, [REDACTED] pleaded guilty to charges brought against [REDACTED] him. [REDACTED] See [REDACTED]

[REDACTED] He has subsequently been disbarred.

based on the evidence contained in the record at the time of the initial decision. Although the petitioner's motion may be considered as a motion to reconsider, it does not overcome the basis of the AAO's dismissal of the appeal on November 15, 2012 based on the petitioner's failure to establish its continuing ability to pay the proffered wage.

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 discussed in the AAO's previous decision, a petitioner's continuing financial ability to pay the proffered wage includes a review of whether the petitioner has employed and paid compensation to the beneficiary, as well as an examination of the petitioner's net income and net current assets. Following an examination of the record, the AAO dismissed the appeal on November 15, 2012.

On motion, counsel attaches a letter dated December 13, 2012 from [REDACTED] the petitioner's president. [REDACTED] emphasizes that the company's tax return of fiscal year 2005 provides sufficient taxable income to cover the prorated portion of the proffered wage in that year. [REDACTED] also states that the company is unable to produce documentation of the seven other beneficiaries for whom it has petitioned because their identities are not known.

The AAO's previous decision noted that the petitioner had not provided documentation requested including a *complete* copy of a federal tax return, audited financial statement or annual report, which actually covered the priority date until the commencement of the period covered by the 2006 tax return. Nor has the petitioner ever provided copies of state wage reports or certified IRS transcripts of tax returns as originally requested by the director in June 2007. None of these documents have ever been provided, including information relevant to the petitioner's other seven beneficiaries for whom it has petitioned and the petitioner states that it is now unable to identify. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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). The obligation to establish the ability to pay each respective beneficiary runs from each priority date until the beneficiary obtains permanent resident status. It extends during any overlapping periods of time to denial, withdrawal or approval of permanent residency of the respective beneficiary.

Moreover, with respect to prorating the proffered wage, USCIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than 24 months

of income would be considered towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements, the petitioner has not submitted such 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish its *continuing* ability to pay the proffered wage. In this case, the petitioner has not demonstrated its continuing ability to pay from the priority date onward. Based on a review of the underlying record and the materials submitted on appeal and on motion, the AAO cannot conclude that the petitioner has established its continuing ability to pay the proffered wage.

**ORDER:** The prior decision of the AAO on November 15, 2012, dismissing the appeal is affirmed. The petition remains denied.