



U.S. Citizenship  
and Immigration  
Services

(b)(6)



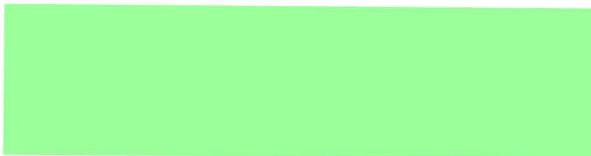
DATE: JUN 24 2013 OFFICE: TEXAS SERVICE CENTER

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 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 preference visa petition was denied by the Director, Texas Service Center (director), and the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on May 3, 2012. Counsel to the petitioner filed a motion to reopen and a motion to reconsider the AAO's decision on June 7, 2012, in accordance with 8 C.F.R. § 103.5. The motion will be dismissed 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).

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). 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.* Three additional days are added to the prescribed period, for a total of 33 days, when a decision is served by mail. In this matter, the motion was filed on June 7, 2012, or 35 days after the AAO's May 3, 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. As the record does 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 motion is untimely and must be dismissed for that reason.<sup>1</sup>

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 motion will be dismissed.

However, the AAO notes that even if the motion were timely filed, the petition would not be approvable based on the record of proceeding, including evidence submitted on motion.

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<sup>1</sup> The AAO notes that while Form I-290B bears an original signature by counsel, in blue ink, the Form I-290B appears to have been photocopied such that additional blank space appears at the top of the form. In this space, two sentences are typewritten in mostly capital characters, which read: "THIS MOTION WAS TAKEN USCIS OFFICE WAS FOR PAYMENT ON 6-5-2012 at 3:30 P.M. BUT DUE TO NATURALIZATION CEREMONIES NO CASHIER OR OTHER PERSON WAS AVAILABLE TO ACCEPT PAYMENT. HOWEVER IT IS DATE STAMPED ON 06-5-2012 ON PAGE 2." Page 2 of Form I-290B is inscribed with largely the same statement, except the final sentence, which states "HOWEVER IT IS DATE STAMPED 06-5-2012." The statement is not signed, and the writer of the statement is not identified as a USCIS officer. The second page of Form I-290B does bear a lightly stamped date, which has been highlighted and reads "JUN 5 4:04PM." Again, the date is not signed or initialed, and bears no indicia that the stamp originated at a USCIS office. There is no indicia that the filing was received by USCIS prior to June 7, 2012, pursuant to 8 C.F.R. § 103.2(a)(7)(i). Further, the instructions to Form I-290B do not permit filing of an appeal or motion at a local USCIS office, but rather indicate that any appeal or motion from a Service Center decision must be made by sending the appeal or motion to the Phoenix Lockbox facility. The AAO notes that June 5, 2012, would have been 33 days after the AAO's decision.

The petitioner is a tax and accounting services company. It seeks to employ the beneficiary permanently in the United States as an office secretary. As required by statute, the petition is accompanied by a 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 failed to submit sufficient evidence to establish that it had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The petitioner submitted additional documents on appeal. The AAO dismissed the appeal, affirming the director's decision that the petitioner had not established an ability to pay the proffered wage, and also finding, beyond the decision of the director, that the petitioner did not demonstrate that the beneficiary possessed the qualifications required for the position offered.

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.

If the motion to reopen were timely, it may qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. The petitioner indicates that the beneficiary does in fact have the requisite qualifications as described in the job requirements for labor certification, and has submitted supporting evidence.

As set forth in the AAO's decision, dated May 3, 2012, one of the issues in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Specifically, the AAO determined that petitioner did not demonstrate the ability to pay the proffered wage in the years 2000 and 2001.

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.

The regulation at 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.

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 must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on November 6, 2000. The proffered wage as stated on the Form ETA 750 is \$13.55 per hour for a 35 hour work week, or \$24,661 per year. The Form ETA 750 states that the position requires two years of experience in the position offered.<sup>2</sup>

The evidence in the record of proceeding shows that the current employer is a different entity from the company that filed the Form ETA 750, and the I-140 petition. The labor certification and the petition were filed by Accounting Associates, a sole proprietor having a Federal Employer Identification Number (FEIN) beginning with "54." [REDACTED], an S corporation having a FEIN beginning with a "13," claims to have acquired all the assets, rights, duties, and obligations of [REDACTED].<sup>3</sup> The director did not address a successor-in-interest issue in his decision. On appeal, the AAO did discuss the successor-in-interest issue.

The AAO previously rendered its decision indicating that the petitioner had not established a successor-in-interest relationship for immigration purposes, because the transfer agreement in the record was not dated, notarized, or filed with the District of Columbia, and is not contemporaneously identified with the claimed date of transfer in 2002, lessening its credibility. 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)). However, as the director did not address this issue, the AAO in its previous decision found the matter to not be determinative of its decision. Nevertheless, the AAO offered a full review of the matter, and found that the petitioner had not demonstrated a successor-in-interest in the instant case for immigration purposes, after an RFE was issued on November 7, 2011, but indicated that the petitioner should address this issue more directly in any future filings. The petitioner has not submitted any further evidence to address this issue in the instant motion to reopen and reconsider. Therefore, the petitioner has still not sufficiently demonstrated that a valid successor-in-interest relationship exists for immigration purposes. 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).

The decision of the petitioner's ability to pay by the AAO was determined based on [REDACTED] which was structured as a sole proprietorship, for the years 2000 through 2002, and the claimed successor-in-interest, [REDACTED] which was structured as an S Corporation from 2003 through 2010.

<sup>2</sup> The petitioner appears to have written on the Form ETA 750 that the alien must have a typing speed of 45 words per minute, and a shorthand speed of 70 words per minute. This insertion was not approved by the DOL.

<sup>3</sup> In the AAO's May 3, 2012 decision it was noted that the transfer agreement was not dated, notarized, or filed with the District of Columbia.

In the instant case, according to the evidence presented, the sole proprietor's personal expenses totaled \$3,700 per month, or \$44,400 per year. The sole proprietor supports a family of six. The AAO determined the sole proprietor's adjusted gross income for 2000 and 2001, as stated below.

- Proprietor's 2000 adjusted gross income Form 1040, line 33: \$41,986
- Proprietor's 2001 adjusted gross income Form 1040, line 33: \$51,967

As stated in the AAO's prior decision, taking the sole proprietor's expenses of \$44,400 per year, and the proffered wage of \$24,661, the sole proprietor would have needed an adjusted gross income of at least \$69,061. Therefore, the AAO found that in 2000, and 2001, the sole proprietor's adjusted gross income was insufficient to cover his personal expenses and the proffered wage to the beneficiary.

Counsel asserts upon motion that the petitioner would not have had to pay the proffered wage for the entire year of 2000 as the priority date is November 6, 2000. Counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income 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 or pay stubs, the petitioner has not submitted such evidence. Further, the AAO notes that the sole proprietor's expenses in 2000, by themselves exceeded the sole proprietor's adjusted gross income in that year. Therefore, the petitioner has not established its ability to pay the proffered wage in 2000.

On motion, counsel states that the petitioner's bank accounts, as well as the sole owner's spouse's Combined Asset Program investment account (CAP account), and payments on a promissory note should also be considered as evidence of the petitioner's ability to pay the proffered wage. As previously discussed in the AAO's prior decision, the bank statements in 2000 do not show sufficient funds to pay the proffered wage. In addition, the AAO found that if the funds were reduced from the CAP account in 2000 by the proffered wage amount, there would not be sufficient funds to pay the proffered wage in 2001 from that account. The AAO also found that there was also no evidence submitted that the funds in this CAP account were readily available to pay the proffered wage during the relevant years.

The record of proceeding contains monthly statements from the sole proprietor's personal checking and covering the period 2000 through 2001, with average annual balances of \$20,000 and \$25,000 for the years 2000, and 2001, respectively. As in the instant case, where the petitioner has not established its ability to pay the proffered wage to the beneficiary in the priority date year or in any subsequent year based on its adjusted gross income (AGI), the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage the difference between the proffered wage and the wages paid to the beneficiary. Subsequent statements must show annual average balances which increase each year after the priority date year by an

amount exceeding the full proffered wage the difference between the proffered wage and the wages paid to the beneficiary.

In this case, the average annual balances in the years 2000 and 2001 are not sufficient to cover the full proffered wage to the beneficiary. In 2000 the average balance of \$20,000 would be insufficient to pay the proffered wage of \$24,661. In 2001, the average balance would not be sufficient because the difference between the 2000 and 2001 average annual balances (\$5,000) does not exceed the proffered wage. Thus, the sole proprietor's cash assets as reflected in his checking accounts do not establish the petitioner's continuing ability to pay the proffered wage.

Therefore, if the motion were timely, the petitioner would not overcome this ground of denial as raised by the director and as affirmed by the AAO in its prior decision. The petitioner has not established its ability to pay the beneficiary's proffered wage from the priority date onward.

Beyond the decision of the director, the AAO found in its previous decision that the petitioner had also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience as a secretary. The beneficiary submitted an affidavit dated July 13, 2007, in which she claims to qualify for the offered position based on experience as "a free-lance secretary/stenographer/receptionist to fill in for absentee secretaries, stenographers, receptionists, filing clerks, etc. with different organizations, including professionals such as physicians and lawyers." The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of her prior work experience. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. 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 beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8

C.F.R. § 204.5(l)(3)(ii)(A). The record contains two letters. The first, dated December 1, 1989, from [REDACTED] is signed by an individual whose stamped name is unclear, but the letter lists their title as Medical Practitioner. This letter indicates that the beneficiary worked at the establishment as an Office Secretary, and Administrative Assistant, during the period March 1, 1986 to September 20, 1989. The letter indicates that the beneficiary handled duties such as routine correspondence, maintenance of attendance register, documentation of patient information, retrieval of medical records, cash management, and scheduling follow-up appointments. The author indicates the beneficiary performed these duties for eight hours per day for three days a week.

The second letter, dated April 14, 1990, is from [REDACTED] and is signed by an author whose signature is unclear, but the letter lists their title as Proprietor. This second letter indicates that the beneficiary worked from “3/4” days a week, five hours per day as a Secretary, during January 2, 1985 to March 4, 1990. However, it is unclear from the description in the letter exactly how many days per-week the author is indicating the beneficiary was employed. The author indicates that the beneficiary’s duties included: taking dictation from senior executives, and transcribing the same, typing letters, answering telephone calls, scheduling appointments, handling routine correspondence, receiving mail, and its sorting and distribution, maintaining registers, relating to employee attendance and leave, and doing other administrative duties as required.

Although the two experience letters submitted indicate that the beneficiary received part-time employment experience with each of their companies, the beneficiary indicated in a supporting affidavit, that she worked as a “free-lance” secretary for various entities and filled in for various absentee workers. The experience named in the letters also seems to overlap; and the specific days of the week she worked for these individual entities is not indicated. The letter from [REDACTED] also states that she worked as an administrative assistant during some portion of her employment with that company. The AAO is prevented from determining the full extent of experience the beneficiary possesses as a secretary, or administrative assistant, as the letters provided do not state specific dates for her employment in either position. Moreover, both authors names are not listed, and their signatures are illegible; therefore, these two letters do not conform to 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Further, in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B, lessens the credibility of the evidence and facts asserted.

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).

Therefore, the evidence in the record does not establish that the beneficiary possessed the required experience two years of experience as a secretary set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motion to reopen and motion reconsider is dismissed. The prior decision by the AAO dated May 3, 2012, will not be disturbed, and the petition remains denied.