



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: JUN 27 2013

OFFICE: TEXAS SERVICE CENTER

[Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

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:

[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,

*Josh K  
for*

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reopen and motion to reconsider. The AAO dismissed the motions. The matter is now before the AAO on a subsequent motion to reopen and motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

In the director's September 13, 2007 denial, the director determined that the petitioner failed to establish its ability to pay the beneficiary the proffered wage in 2003 and 2004. The petitioner appealed the director's denial to the AAO. On November 17, 2009, the AAO dismissed the appeal, finding that the petitioner failed to establish its ability to pay the beneficiary's proffered wage in 2003 and 2004. The petitioner filed a subsequent motion to reopen and reconsider. On February 19, 2013, the AAO dismissed the motions, finding that the petitioner failed to submit meet the requirements of the regulation at 8 C.F.R. §§ 103.5(a)(2), (3) and 8 C.F.R. § 204.5(l)(3)(ii)(C). On March 21, 2013, the petitioner filed another motion to reopen and reconsider, submitting amended tax returns for 2003 and 2004.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part, that "[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." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.<sup>1</sup>

This motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. In the instant case, counsel submits copies of the petitioner's amended tax returns for 2003 and 2004. Counsel claims the amended tax returns reflect a net income that exceeds the proffered wage in both years.

The petitioner's amended tax returns reflect its net income as \$24,290 for 2003 and \$8,607 for 2004.<sup>2</sup> The petitioner's amended tax returns reflect no change in its net current assets.<sup>3</sup> It is noted

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<sup>1</sup> The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence> . . ." *Webster's II New Riverside University Dictionary* 792 (1984) (emphasis in original).

<sup>2</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 for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) or line 17e (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed June 24, 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 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns.

<sup>3</sup> Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</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

that the petitioner's Form 1120S for 2004 failed to include Schedule L, Schedule M, and statements indicated on the return, suggesting the petitioner did not provide a complete copy of the 2004 amended return. Even if the AAO were to accept these amended tax returns, they would be insufficient to document the petitioner's ability to pay the proffered wage. Based on the amended tax returns, the petitioner has not demonstrated it had sufficient net income or net current assets to pay the beneficiary the proffered wage of \$26,312 per year in either 2003 or 2004.

The AAO views the petitioner's change of items on the petitioner's subsequent amended tax return as questionable, specifically with regard to the significant increase in the petitioner's net income based on decreased deductions. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Further, the amended tax returns show no evidence of submission to the Internal Revenue Service (IRS) or their receipt or acceptance by the IRS. The instant motion was filed on March 21, 2013. The returns indicate that a preparer completed them on March 13, 2013, however, they are not signed or dated by the petitioner's authorized representative. USCIS requires IRS-certified copies of the amended returns to establish that the amended returns were actually received and processed by the IRS. The amended returns do not reflect that they were received by the IRS; the returns are not certified copies and they are not signed or dated. 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, the AAO will only consider the version of the petitioner's tax returns that were initially submitted and not the amended versions as submitted on appeal. As the AAO previously found, the amounts of net income and net current assets reported for 2003 and 2004 are insufficient to demonstrate its ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The motion to reopen is granted; however, the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The motions are granted. The AAO's prior decision, dated November 17, 2009, remains undisturbed. The petition remains denied.

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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.