



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **MAY 08 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as Skilled Worker or Professional pursuant to § 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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion to reopen the petition will be granted. Upon review of the matter, the AAO's prior decision, dated June 7, 2012, is affirmed. The petition remains denied.

The petitioner¹ is an automobile body shop. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. 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 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. The director denied the petition accordingly.

On appeal, the AAO affirmed the director's ground for denial. Beyond the decision of the director, the AAO further denied the petition on appeal on the ground that the petitioner failed to sufficiently establish that the beneficiary is qualified for the position offered.

The record shows that the motion to reopen is properly filed. 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.

The regulation at 8 C.F.R § 103.5(a)(2) provides 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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has stated new facts in his motion which are supported by documentary evidence. The motion to reopen will be granted and the matter, therefore, will be reviewed.

In regard to the AAO's finding that the petitioner did not establish the beneficiary's qualifications for the position offered, counsel states: (1) that on October 19, 2006 the Department of Labor (DOL) sent an "Analyst Finding Facsimile" noting that Part B, section 15 had to be amended; (2) on October 25, 2006 the petitioner and beneficiary through counsel submitted a complete response to the DOL analyst answering the analyst's request for corrections; and (3) the response is included with the motion. Counsel states that the beneficiary has provided an affidavit of his work experience in Peru and at an auto body shop named [REDACTED] a recommendation letter from the petitioner for the beneficiary and a certificate of employment from an auto body shop named [REDACTED]

¹ The AAO notes that the petitioner's corporate name as listed on the labor certification and Form I-140 is a trade name, and its true corporate name is [REDACTED]. The tax returns in the record are for [REDACTED] which has the same Federal Employer Identification Number (FEIN) as the labor certification entity. According to the California Secretary of State, [REDACTED] was incorporated in 1954. It is unclear from the record of proceeding whether [REDACTED] is a registered trade name. In any further filings, the petitioner should submit evidence to resolve this inconsistency.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion.²

The Form ETA 750A lists the minimum education, training and experience in section 14 as six years of grade school, six years of high school and two years of experience in the job offered. The Form ETA 750B states “see amendment” in the boxes for the beneficiary’s work experience. On motion, the applicant has submitted the amendment to Form ETA 750B that was submitted in response to an October 19, 2006 DOL request. The amendment states that the beneficiary was employed at [REDACTED] as an automobile body repairer from February 2002 until present, employed at [REDACTED] as an auto body paint helper from February 2001 until January 2002, employed at [REDACTED] as an automobile body repairer from September 2000 until January 2001, and employed at [REDACTED] as an automobile body repairer from January 1992 until January 2000.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and Immigration Services (USCIS) must examine whether the alien’s credentials meet the requirements set forth in the labor certification. 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 (1st Cir. 1981). The AAO notes that the priority date is April 30, 2001. Therefore, only experience obtained before this date will be addressed.

The record includes evidence that the beneficiary had a business license in Peru for an auto mechanic shop. While this license may indicate the beneficiary intended to operate a business, it cannot be construed to document the amount or type of employment experience purportedly gained through this claimed self-employment. The record also includes a letter from the beneficiary in which he states that he owned an auto mechanic shop in Peru; he worked from 1992 until 1999 in the field of auto body repair; he worked 40 hours a week, 8 hours per day; and his job duties included repairing damaged auto bodies and parts, and using heavy hand held and large power tools. 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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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)). In addition, the letter is not clear as to the amount of time the beneficiary was an automobile repairer versus how much time he was a business owner. This prevents the AAO from determining the length of any purported qualifying employment experience. Therefore, this affidavit is insufficient to document whether the beneficiary possessed the required experience.

The record does not include a letter from [REDACTED]. Further, the AAO notes that the beneficiary's affidavit states that he was employed by [REDACTED] during the same time period.

The petitioner has submitted a letter date April 13, 2007 which states that the beneficiary has been working for them since February 2001 and his duties are repairing body and automobile parts and other repairs according to book manuals. The letter is not clear as to whether the beneficiary worked as an auto body paint helper from February 2001 until January 2002. The AAO notes that only experience obtained before the April 30, 2001 priority date will be addressed. The record is not clear as to whether his claimed experience as an auto body paint helper from February 2001 until January 2002 was substantially comparable to the job offered. If it was, then that experience would not be accepted. The labor certification does not allow for experience in an alternate occupation.

The beneficiary states that he worked as a body shop assistant from September 23, 2000 until February 18, 2001 at [REDACTED] California. The record includes paystubs from [REDACTED] for the beneficiary but it does not include an employer letter per 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). These pay statements cannot stand in lieu of regulatory required evidence. In addition, this employment was not listed on the Form ETA 750. 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. These dates of employment conflict with the claimed dates of employment on the labor certification for [REDACTED] casting doubt on the beneficiary's claimed experience. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states, "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."

The record includes a letter from a company called [REDACTED] which states that the beneficiary worked as an auto body straightener assistant from January 1, 1978 until December 31, 1980 for 40 hours a week. The AAO notes that this letter does not provide the beneficiary's specific job duties as required by 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). In addition, this employment was not listed on the Form ETA 750, which lessens the credibility of this purported 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.

Therefore, the petitioner has not overcome this ground of denial. The petitioner has not established that the beneficiary possessed the minimum experience required for the position offered as of the priority date.

In order to demonstrate the petitioner's ability to pay the proffered wage, counsel's motion states that had the petitioner's owner known that United States Citizenship and Immigration Services (USCIS) would determine that the company's tax returns would not establish ability to pay the prevailing wage, he would have loaned his company money from his personal assets to cover the shortage. Counsel states that the company's owner has provided: a letter stating that he would loan the company money; a bank letter and statements that reflect over \$100,000 in his personal accounts; his portfolio management account statements that reflect an average balance of more than \$70,000; and he is working on obtaining portfolio records from 2001 to 2004. The AAO notes the financial documents provided on motion.

Counsel's reliance on the balances in the petitioner's bank and portfolio accounts is misplaced. The petitioner is a C corporation. First, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Second, bank and portfolio statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Third, bank and portfolio statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Fourth, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank and portfolio statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position.

The petitioner's owner's ability and willingness to loan personal assets to the corporation today cannot establish the corporation's past ability to pay the proffered wage. A petitioner must establish its ability to pay from the time of the priority date. A petition cannot be approved at a future date after eligibility is established under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Based on the record, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Therefore, the petitioner has not overcome this ground for denial.

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, the burden of proving eligibility for the

benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The previous decision of the AAO will be affirmed.

ORDER: The motion to reopen is granted, and the petition was reconsidered. The previous decision of the AAO dated June 7, 2012 is affirmed. The petition remains denied.