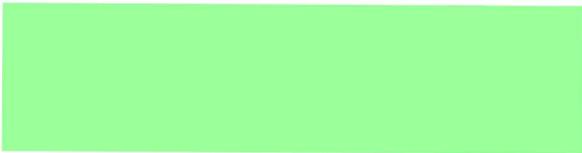


(b)(6)

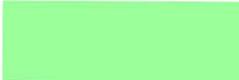
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

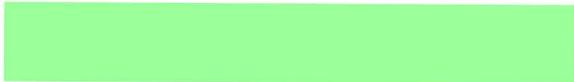
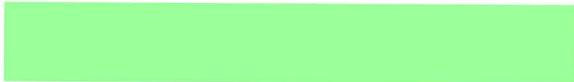


U.S. Citizenship
and Immigration
Services



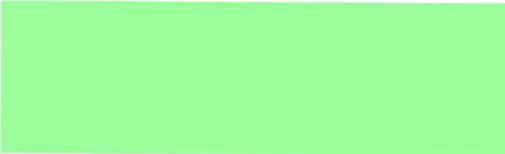
DATE: **NOV 27 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Skilled or Professional Worker 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
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the immigrant visa petition and dismissed a subsequent motion to reopen and reconsider. The Administrative Appeals Office (AAO) summarily dismissed the appeal on May 20, 2009. On March 19, 2013, the AAO reopened the decision *sua sponte*. The appeal will be dismissed.

The petitioner describes itself as a food warehouse and distribution company. It seeks to permanently employ the beneficiary in the United States as a supervisor. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3).¹ The petition is accompanied by a labor certification approved by the U.S. Department of Labor. 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 denied the petition on May 3, 2007 because the petitioner failed to establish that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the petition. On September 4, 2007, the director dismissed the petitioner's motion to reopen the denial of the Form I-140 petition. The petitioner filed an appeal of that decision with the AAO on October 3, 2007. The AAO summarily dismissed the appeal on May 20, 2009, but reopened the matter on its own motion on March 19, 2013.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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 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 appeal.²

On September 13, 2013, the AAO sent the petitioner a request for evidence (RFE) with a copy to counsel. The AAO requested evidence of the petitioner's ability to pay the proffered wage, recruitment documentation and evidence to establish that the beneficiary met the minimum requirements of the labor certification. Specifically, the RFE requested, *inter alia*, copies of the beneficiary's IRS W-2 or 1099-Misc Forms from 2001 through 2012 issued by the petitioner, if

¹ 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.

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 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).

applicable; complete copies of the petitioner's Form 1120S tax returns for 2001 and for 2006 through 2012; evidence of the occurrence of any uncharacteristic business expenditures or losses to explain low or negative net income in any year beginning with the priority date, in particular in 2002, when the petitioner's net income decreased significantly to approximately \$22,163; evidence of the petitioner's longevity and reputation in the industry; and evidence of the number of employees maintained by the petitioner. The RFE also informed the petitioner that the record did not demonstrate that the beneficiary satisfied the minimum requirements of the proffered job as of the priority date. The RFE requested an explanation and official supporting evidence, such as pay records or relevant government ministry records, to confirm the beneficiary's ownership and full-time operation and management of the business, [REDACTED]. The AAO further noted inconsistencies in the beneficiary's claimed work experience and in the number of hours per week required for the proffered position. The RFE allowed the petitioner 45 days in which to submit a response. The RFE informed the petitioner that 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 petitioner responded to the AAO's RFE on October 28, 2013 and supplemented the response on November 1, 2013. However, the petitioner failed to provide copies of the beneficiary's IRS W-2 or 1099-Misc Forms from 2001 through 2012 issued by the petitioner; complete copies of the petitioner's Form 1120S tax returns for 2001 and for 2006 through 2012; evidence of the occurrence of any uncharacteristic business expenditures or losses; evidence of the petitioner's longevity and reputation in the industry; or evidence of the number of employees maintained by the petitioner.³ Since the petitioner failed to submit requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14). Further, the evidence in the record is not sufficient to establish the petitioner's continuing ability to pay the proffered wage as of the priority date.

The Form I-140 indicates that the offered full-time position is for a 35 hour work week and the petitioner contends that the proffered wage, using a 35 hour work week schedule, is \$24.77 per hour (\$45,081 per year). However, the Form ETA 750 clearly states that the position is for 40 hours per week, which would result in an annual proffered wage of \$ 51,521.60, which the petitioner must demonstrate it can pay. A labor certification is only valid for a specific job opportunity, as described in the Form ETA 750. 20 C.F.R. § 656.30(c)(2). The petitioner's response to the AAO's RFE includes evidence that the position was represented to the DOL and advertised to U.S. workers as requiring a 40 hour work week schedule.

The petitioner bears the burden of proof to show that the beneficiary satisfied the minimum requirements of the proffered job as of the April 30, 2001 priority date. 8 C.F.R. § 103.2(b)(1), (12).

³ The petitioner submitted copies of the beneficiary's tax returns for 2001 through 2006 and 2009 through 2012 and IRS account transcripts for 2007 and 2008; however, this is not evidence of payment of any wages by the petitioner. The petitioner submitted income and expense statements for 2002 through 2003; however, unaudited financial statements are not tax returns or one of the three primary forms of evidence set forth in 8 C.F.R. § 204.5(g)(2).

See *Matter of Wing's Tea House*, 16 I&N Dec. at 159; see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The labor certification in this case requires a minimum of two (2) years of work experience as a supervisor to qualify for the proffered position. The beneficiary claims on the Form ETA 750 to have gained this experience in [REDACTED] while employed as a manager with [REDACTED] from March 1984 to September 1988 and as the owner and manager of [REDACTED] from July 1989 to January 1994. In support of this work experience, the petitioner submitted only a letter, dated April 23, 2007, from the beneficiary's former employee at [REDACTED]. The employee states that he was employed from 1990 to 1993 at [REDACTED] which he asserts was involved in importing and exporting construction materials and was owned and managed by the beneficiary from July 1, 1989 until January 31, 1994. The employee was not employed at [REDACTED] for the entire period of time that he claims the beneficiary owned and managed the business, and he does not provide an explanation as to how he came to have his knowledge of the business' operation before or after his purported employment there. Further, the record indicates that the beneficiary was admitted to the United States on or about January 13, 1994, which appears to contradict his employee's statement that the beneficiary owned and managed the business until January 31, 1994. In addition, although line 12 on the Form ETA 750B indicates that the beneficiary has accounting skills that would help establish that the beneficiary meets the requirements of the job offer, the employee's letter does not provide corroboration of the beneficiary's skills. Further, the labor certification indicates that the beneficiary was enrolled in technical post-secondary education from 1990-1991, casting doubt on his claimed full-time employment with [REDACTED] from 1989. 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 employee's letter does not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The petitioner also failed to submit credible secondary evidence, such as government or ministry records in response to the AAO's RFE. 8 C.F.R. § 103.2(b)(2)(i). While the petitioner submitted two affidavits attesting to the existence of [REDACTED] the petitioner has failed to establish that secondary evidence is unavailable. *Id.* Further, the evidence does not overcome the inconsistencies in the record with respect to the beneficiary's claimed end date of employment and his entry into the United States. *Matter of Ho*, 19 I&N Dec. at 591-92.

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.