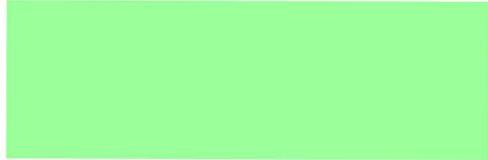




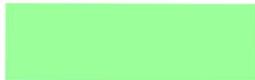
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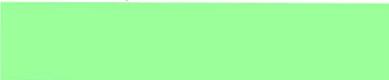
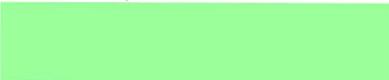
(b)(6)



DATE: **NOV 27 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 (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 preference visa petition was denied by the Director, Texas Service Center. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on September 25, 2012. The petitioner filed a motion to reopen and reconsider the AAO decision. On May 15, 2013, the AAO granted the motion, affirming its previous decision. The petitioner filed a subsequent motion to reopen and reconsider. On July 26, 2013, the AAO granted the motion and affirmed its previous decision. The matter is now before the AAO on another motion to reopen and a motion to reconsider. The motion to reopen and reconsider will be dismissed. The previous decisions of the AAO, dated September 25, 2012, May 15, 2013, and July 26, 2103, will not be disturbed, and the petition will remain denied.

The petitioner describes itself as a “gold manufacturer.” It seeks to employ the beneficiary permanently in the United States as a jewelry designer. 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 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.¹ The director denied the petition accordingly.

On appeal, the AAO determined that the petitioner did not have the ability to pay the proffered wage, and that it further had failed to show that the beneficiary satisfied the minimum work experience requirements for the proffered position as set forth in the labor certification. Accordingly, the AAO, in a decision dated September 25, 2012, dismissed the petitioner’s appeal.

On October 24, 2012, the petitioner filed a motion to reopen and a motion to reconsider the AAO’s decision. In its May 15, 2013 decision, the AAO found that the petitioner has not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; (2) whether a *bona fide* successor-in-interest exists, or that the petitioner has undergone a corporate name change; and (3) that the beneficiary possessed the experience required by the terms of the labor certification as of the priority date. The petitioner filed a second motion, and in its July 26, 2013 decision, the AAO affirmed its prior decisions, finding that the petitioner failed to establish its ability to pay the beneficiary the proffered wage for the years 2001 through 2004, and that the petitioner failed to establish that the beneficiary was qualified for the proffered position.

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.² In this

¹ The director’s decision also noted that the tax returns in the record did not reflect the name of the petitioning business identified in the labor certification and Form I-140, Immigrant Petition for Alien Worker.

² 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).

matter, the motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because counsel submits no additional documentation and provides no new facts.³

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part, that “[a] motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.” Counsel’s statements on motion are limited to an assertion that the “AAO decision did not consider ‘current assets’ as the employer’s ability [to] pay.” In a letter, dated August 26, 2013, accompanying Form I-290B, counsel asserts that prior “evidence submitted to support the claim of the petitioner’s ability to pay was clear and sufficient.” The motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the motion does not state reasons for reconsideration, and is not supported by any pertinent precedent decision to establish that the AAO’s decision was based on an incorrect application of law or policy.

On motion, counsel requests an oral discussion before the AAO, stating that he “would like to present additional evidence that is not permissible to send via mail such as large amounts of documentation that proves ability to pay and proof that the petitioner’s company underwent a name change.” The regulations provide that the requesting party must explain in writing why oral argument is necessary. *See* 8 C.F.R. § 103.3(b). Furthermore, Citizenship and Immigration Services (USCIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *Id.* In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons oral argument should be held or why the “large amounts of documentation” could not be mailed. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

However, even if the AAO were to examine the entirety of the record, as set forth below, following consideration, the petition would remain denied and the AAO’s prior decisions would be affirmed.

Here, the Form ETA 750 was accepted on September 21, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year. The Form ETA 750 states that the position requires four years of high school education, a bachelor’s degree in art or design, and two years of experience as a jewelry designer.

³ The record reflects that counsel submitted additional evidence on October 11, 2013, after its August 29, 2013 motion and after the 30 day period allowed for motions. On Form I-290B Instructions, Page 2, it states that, “Although a petitioner may be permitted additional time to submit a brief and/or evidence to support an appeal, no such provision applies to motions. Any additional evidence must be submitted with the motion.” The Form I-290B Instructions are incorporated into the regulations under 8 C.F.R. § 103.2(a)(1). Therefore, any evidence later submitted is not properly before the AAO in this matter.

The petitioner claims to be structured as a sole proprietorship. On the petition, the petitioner claimed to have been established in 1998 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on September 21, 2001, the beneficiary claimed to work for the petitioner since January 2001.

As set forth in the AAO's previous decisions, an issue in this case is that the petitioner failed to establish that the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In its September 25, 2012 decision, the AAO set forth in detail, which will not be replicated here, its analysis of the petitioner's ability to pay, under the assumption that the tax returns in the record related to the petitioner. The AAO concluded that, if this assumption was accurate, the record may be sufficient to demonstrate the petitioner's ability to pay the beneficiary the proffered wage for the tax years 2005 through 2008 through an analysis of wages paid and the sole proprietor's adjusted gross income. However, it still failed to show the petitioner's ability to pay for the years 2001 through 2004. The petitioner has not provided any financial information after 2008.

In its July 26, 2013 decision, the AAO stated that in order to evaluate the petitioner's net current assets, it would consider the sole proprietor's audited balance sheets, not the sole proprietor's individual income tax forms which do not record any information on an individual's assets or liabilities. However, the record failed to contain the sole proprietor's audited balance sheets for any year, thus the AAO was prevented from analyzing the petitioner's ability to pay the proffered wage through an examination of net current assets.

As noted above, the petitioner submitted additional evidence to the AAO after the regulatory prescribed time permitted for the filing of a motion, and after submitting its motion. However, even if the AAO were to consider the late filed evidence, it is insufficient to overcome the AAO's prior finding. Counsel late filed the sole proprietorship's balance sheet, which he contends is audited, and a copy of the accountant's business card. Counsel's claim is unsupported. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. An accountant's report makes clear whether the balance sheet has been merely reviewed or audited, and what documents were considered to reach the conclusions contained in the financial statements. Without an accompanying accountant's report, the AAO cannot conclude that financial statements have been properly audited. Here, counsel provided a two-page Balance Sheet which states "Audit Date: September 1, 2013" and is signed at the bottom by a certified public accountant. There is no statement from the certified public accountant and no accompanying report. This casts doubt on whether an audit was performed. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*,

19 I&N Dec. 582, 591-592 (BIA 1988). 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 unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner has failed to establish its ability to pay the beneficiary the proffered wage based on net current assets.

In its prior decisions, the AAO also noted that the petitioner had failed to show that [REDACTED] are the same business as [REDACTED] the petitioner listed on the labor certification and Form I-140, or that they are its *bona fide* successors-in-interest. Further, the AAO observed that the beneficiary's IRS W-2 forms for the years 2001 through 2008 list his employer as [REDACTED] located at the same address originally set forth on the labor certification ([REDACTED]) and the same federal employer identification number (EIN) as indicated for the petitioner on the Form I-140. However, the record is unclear whether [REDACTED] are the same entity. The sole proprietor's tax returns do not indicate that the business possesses an EIN, changed its name, or underwent a corporate change. Additionally, even if the record demonstrated that [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the petitioner still failed to establish its ability to pay as the record contains no corresponding tax returns for that business from 2003 onwards.⁴

Counsel also contends that the petitioner has one EIN for all three businesses and with the late filed evidence submits a letter from the IRS confirming the petitioner's EIN. The IRS letter is addressed to [REDACTED] and confirms its EIN as [REDACTED]. Counsel further notes that the address listed on public records is the same address as on the instant labor certification, and that the beneficiary's Forms W-2 for 2001 through 2008 list the same petitioner's EIN as on the instant petition. Counsel contends that the name confusion stems from a typographical error by previous counsel listing the wrong name of the petitioner "[REDACTED]", when it should have stated "[REDACTED]". No explanation was provided as to why this claim was not raised in earlier proceedings or why the petitioner failed to amend the instant petition to reflect the petitioner's true name.

Additionally, even if the record demonstrated that [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the petitioner still fails to establish its ability to pay the proffered wage in 2001 through 2004. The sole proprietor's tax returns do not demonstrate an amount sufficient to offset the deficit needed to meet the beneficiary's proffered wage for years 2001, 2002, 2003, and 2004.

⁴ If in fact [REDACTED] is the petitioner, or its *bona fide* successor-in-interest, the existence of Forms W-2 it issued to the beneficiary from 2003 to 2008 would suggest that [REDACTED] are separate, unrelated businesses, such that their corresponding tax returns may not be used to satisfy the requirements of 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the beneficiary the proffered wage from 2003 through 2008.

Counsel's assertions on motion cannot be concluded to outweigh the evidence presented by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Accordingly, the AAO concludes that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Further, in its previous decisions, the AAO noted that beyond the decision of the director,⁵ the petitioner had failed to meet its burden of proof to show that the beneficiary satisfied the minimum requirements of the proffered job as of the September 21, 2001 priority date.

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(1)(3)(ii)(A).

As stated in the AAO's September 25, 2012 decision, the record contains a November 20, 2006 "employment certificate" and accompanying English translation from [REDACTED] in Seoul, Korea. The AAO determined that the submitted certificate does not include the name or title of the person preparing the certificate. It does not contain a description of the beneficiary's experience, and it states that he was an assistant manager, rather than a jewelry designer. Given the above, the AAO concluded that the evidence failed to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date.

As previously noted, the petitioner submitted additional evidence to the AAO after the regulatory prescribed time permitted for the filing of a motion, and after submitting its motion. However, even if the AAO were to consider the late filed evidence, it is insufficient to overcome the AAO's prior finding. Counsel late filed a certificate of employment and accompanying English translation from [REDACTED] and copies of the beneficiary's jewelry designs and employee training program. The translation of the certificate of employment lacks a translator's certification, and as such it does not comply with the regulatory terms of 8 C.F.R. § 103.2(b)(3).⁶ Because the petitioner failed to submit a certified translation of the document, the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and would not be accorded any weight in this proceeding. Further, while the newly submitted

⁵ 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).

⁶ Pursuant to the regulations at 8 C.F.R. § 103.2(b)(3), "*Translations*. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English."

certificate of employment contains the author's name and title and a description of the beneficiary's duties, the author states that the certificate is based on his personal knowledge and not based on company records. There are also discrepancies in the employer's name and address between this employment certificate and the original one submitted. It is further noted that while both employment certificates indicate that the beneficiary was employed as an assistant manager, the beneficiary stated on the labor certification that he worked as a jewelry designer. These inconsistencies cast doubt on the beneficiary's claimed work experience. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Here, the petitioner has failed to overcome the above inconsistencies, or provide any explanation of the previously identified inconsistencies.

Thus, even if the petitioner had established its ability to pay the proffered wage to the beneficiary, the petition would still be denied as the petitioner has not demonstrated that the beneficiary meets the minimum requirements of the proffered job.

Accordingly, the petitioner would have failed to establish that the beneficiary was qualified for the proffered position.

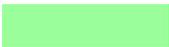
Furthermore, the motion shall be dismissed for failing to meet an applicable requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii) lists the filing requirements for motions to reopen and motions to reconsider. Section 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. Therefore, because the instant motion did not meet the applicable filing requirements listed in 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.

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.

The petition will remain denied for the above stated reason. 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). The petitioner has not met that burden. Accordingly, the motion to reopen and reconsider will be dismissed and the previous decisions of the AAO will not be disturbed.

ORDER: The motion to reopen and reconsider is dismissed. The previous decisions of the

(b)(6)



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NON-PRECEDENT DECISION

AAO, dated September 25, 2012, May 15, 2013 and July 26, 2013, will not be disturbed. The petition remains denied.