



U.S. Citizenship  
and Immigration  
Services

(b)(6)

[Redacted]

DATE: OCT 10 2013

OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner:  
Beneficiary:

[Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(i)

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,

Ron Rosenberg  
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 matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a designer and manufacturer of orthopedic shoes. It seeks to employ the beneficiary permanently in the United States as an orthopedic shoe machine operator. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment 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, and that the petitioner had not established that the beneficiary possessed the required experience for the offered position prior to the priority date. The director denied the petition accordingly.

On June 24, 2013, the AAO dismissed the appeal, holding that the petitioner failed to establish that the beneficiary possessed the experience required by the terms of the labor certification and that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The petitioner then filed a motion to reopen the AAO decision. We will accept the motion to reopen the matter based on the new information submitted. Thus, the instant motion is granted. 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.

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.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on February 22, 2011. The proffered wage as stated on the ETA Form 9089 is \$27,061 per year.

In the AAO's June 24, 2013 decision, we specifically reviewed the petitioner's 2010 Internal Revenue Service (IRS) Form 1120S, an unaudited financial statement for the period ending September 30, 2011, copies of the petitioner's bank statements covering February 2011 through June 2011, a compiled balance sheet as of December 31, 2010, a copy of the petitioner's Form 941, Florida Department of Revenue, Employer's Quarterly Report, for the second quarter of 2011; and a copy of the petitioner's federal Form 941 for the second quarter of 2011.

With its motion, the petitioner submitted its 2011 IRS Form 1120, which states net income<sup>1</sup> of -\$25,383 and net current assets<sup>2</sup> of \$78,937. Although the net current assets exceed the proffered wage amount, the petitioner has filed two additional Immigrant Petitions for Alien Worker (Form I-140). Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7 50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). No evidence was submitted concerning the proffered wages to either of the other sponsored workers, any wages received during the relevant time, nor a statement regarding whether they were still employed by the petitioner and/or were lawful permanent residents. As a result, this evidence is insufficient to demonstrate the petitioner's ability to pay the proffered wage.

The petitioner also resubmitted the 2011 statement of assets, liabilities and equity. As stated in the previous decision, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies

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<sup>1</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 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 13, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.).

<sup>2</sup> As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. 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 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.

on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On motion, counsel states that the accountant's letter stating that the petitioner's 2012 Form 1120S would not be available until September 15, 2013 should be considered and that any decision should not be issued until this evidence can be considered. Any evidence concerning the petitioner's ability to pay the proffered wage in 2012 would not affect the analysis and conclusion as to whether the petitioner was able to pay the proffered wage in 2011. In addition, any evidence submitted concerning the petitioner's ability to pay the proffered wage in 2012 would need to include evidence regarding the additional sponsored workers.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has not demonstrated sufficient net income or net assets to pay the proffered wage to the instant beneficiary and the other sponsored workers. The petitioner also failed to include any evidence of historical growth of the petitioner's business, the petitioner's reputation

within the industry, or the occurrence of any uncharacteristic business expenditures or losses. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

Concerning the beneficiary's qualifications for the position, the beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Associate's degree in design orthopedic shoes or equivalent five years experience
- H.5. Training: None required
- H.6. Experience in the job offered: 60 months
- H.7. Alternate field of study: None accepted
- H.8. Alternate combination of education and experience: None accepted
- H.9. Foreign educational equivalent: None accepted
- H.10. Experience in an alternate occupation: 60 months (5 years) of experience in custom
- H.14. Specific skills or other requirements: Associate's degree in design orthopedic shoes or equivalent 5 years of foreign experience in custom orthopedic shoe maker machine operator with many abilities and dynamic, arm, hand steadiness. Drug test background check.

On motion, the petitioner re-submitted a copy of the beneficiary's degree from The National Technological Institute (INATEC), conferring a title of Basic Technical Designer on April 24, 1998. No evidence was submitted to demonstrate that this title is equivalent to an associate's degree in the U.S. The petitioner previously submitted a high school diploma stating that the beneficiary graduated from [REDACTED] in 2012, which indicates that no associate's degree, a degree more advanced than a high school diploma, was earned previously. In addition, counsel previously indicated that the beneficiary had a sixth grade education. As a result, the evidence does not establish that the beneficiary has an associate's degree. The degree submitted also was not accompanied by a translation required by 8 C.F.R. § 103.2(b)(3). In addition, as stated in the previous AAO decision, the labor certification in Part H.9 states that no foreign equivalent degree is acceptable. Therefore, the beneficiary's degree from Nicaragua would not qualify him for the offered position.

We will next consider whether the petitioner demonstrated that the beneficiary had the ten years of experience required by the terms of the labor certification (the labor certification requires five years of experience as an equivalent to a associate's degree plus five years of experience in addition to the degree). The previous AAO decision considered an undated experience letter from [REDACTED]

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Owner/Manager, on letterhead stating that the company employed the beneficiary “where he was in charge of design and elaboration of both Orthopedic and Casual shoes, operating the many types of the various machines utilized for the elaboration of said type of shoes,” from 1988 until 1990 and an undated experience letter from Owner/Manager, on letterhead stating that the company employed the beneficiary “where he was in charge of design and elaboration of both Orthopedic and Casual shoes, operating the various types of machines in the design and elaboration of both Orthopedic and Casual shoes,” from 1994 until 1998.

The previous AAO decision also noted certain inconsistencies including that the beneficiary’s dates of employment as listed on the experience letter from are inconsistent with the dates of employment that the beneficiary listed on the labor certification and the beneficiary claimed to have worked for R.L. full-time from March 1, 1992 until January 5, 1997. However, the experience letter from states that the beneficiary was employed by from 1994 until 1998. On motion, counsel states that the beneficiary’s resume resolves the discrepancies and that not all of the beneficiary’s experience was listed on the labor certification and resubmitted the previously considered letters to verify the beneficiary’s experience.

The beneficiary’s resume is purely the representations of the beneficiary. 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 petitioner submitted no independent, objective evidence in the record to resolve these inconsistencies. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on 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. *Id.* at 592.

As stated in the prior decision, the letters submitted do not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A). The experience letters do not provide the beneficiary’s title, the exact dates of employment, or a detailed description of the beneficiary’s duties. The letters also do not discuss any of the special skills or other requirements indicated in Part H.14.<sup>3</sup> Furthermore, the experience letters do not state whether the positions were full-time. The prior decision also stated that the letters in the record contained English letters that were unsigned with no indication who did the translation or that the translation was done by someone who is fluent in Spanish and English as

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<sup>3</sup> Part H.14 on the labor certification requires specific skills or other requirements. Part H.14 states, “Associate Degree in Design Orthopedic Shoes or equivalent 5 years of Foreign experience in custom orthopedic shoe maker machine operator with many abilities and dynamic, arm, hand steadiness. –Drug Test Background Check.”

required by 8 C.F.R. § 103.2(b)(3), so that the letters cannot be relied upon as evidence of the beneficiary's experience.

Even if the letters were reliable, the experience expressed was not listed on the labor certification. 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.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

The petition will be 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; *Matter of Otiende*, 26 I&N Dec. 127 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motions to reopen is granted and the decision of the AAO dated June 24, 2013 is affirmed. The petition remains denied.