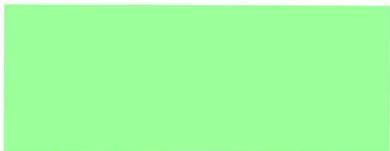




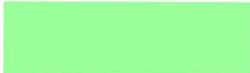
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **OCT 31 2013**

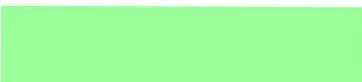
OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE:

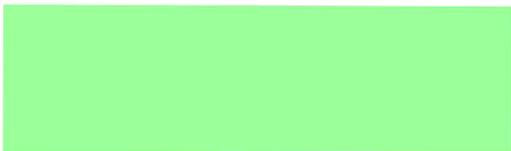
Petitioner:

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:

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 the matter to the Administrative Appeals Office (AAO). On March 15, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reconsider will be granted, the previous decision of the AAO dated March 15, 2013 will be affirmed, and the petition will remain denied.

The petitioner is an auto repair company. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition. On March 15, 2013, the AAO affirmed the director's decision, stating that the petitioner has not established its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. Beyond the decision of the director, the AAO concluded that the petitioner has also failed to establish that the beneficiary is qualified for the offered 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.¹

In this matter, the petitioner presented no facts or evidence on motion that may be considered “new” under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and could have been discovered or presented in the previous proceeding. The evidence submitted on motion will not be considered “new” and will not be considered a proper basis for a motion to reopen.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the AAO made an erroneous decision through misapplication of law or policy and cites to *Matter of Sonogawa* in support. The record shows that the motion to reconsider is properly filed and timely. However, as set forth below, following consideration of the record on motion, the petition remains denied and the AAO's decision of March 15, 2013 is affirmed.

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

¹The 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).

² The submission of additional evidence on motion 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). No additional evidence was submitted on motion.

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.

As set forth in the AAO's previous decision, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, 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).

Here, the Form ETA 750 was accepted on August 23, 2004. The proffered wage as stated on the Form ETA 750 is \$14.43 per hour (\$30,014.40 per year). The Form ETA 750 states that the position requires two years of experience in the job offered as a manager.

The evidence in the record of proceedings shows that the petitioner was initially structured as a limited liability company (LLC) and later changed corporate form to a S corporation.³ On the petition, the petitioner claims to have been established in 1998, to have a gross annual income of \$301,972, and to employ 4 workers. On the Form ETA 750, signed by the beneficiary on August 17, 2004, the beneficiary did not claim to have worked for the petitioner and, as noted in the AAO's prior decision, did not list any work experience.

³ An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election.

In its March 15, 2013 decision, the AAO determined that 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 net income in 2004 and 2008; the record failed to contain evidence of the petitioner's net current assets in the record in 2004⁴ and 2008; nothing showed that the petitioner employed the beneficiary or paid her any wages; and the petitioner failed to establish its ability to pay the proffered wage under a totality of the circumstances analysis. Accordingly, the AAO concluded that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage as of the priority date through wages paid to the beneficiary (here, none), its net income, net current assets, or a totality of the circumstances analysis.

On motion, counsel submits a copy of the petitioner's Form 1120S tax return for 2010 and a franchise agreement between the petitioner and [REDACTED] dated May 30, 2008, with an "original contract date" of November 29, 1999. Counsel states that the petitioner seeks reconsideration of similar discretion as was accorded to the petitioner in *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel asserts that, with the exception of 2004 and 2008, the petitioner's "business income from 2005, 2006 and 2007 shows a steady and realistic increase in profits for the Petitioner, a trend that was only broken in the year 2008,⁵ when the US stock-market crashed and began a national recession that lasted well into 2010." Counsel claims that "in 2009, the petitioner's financial profitability quickly returned to a status very similar to 2005, which saw business income well enough to cover the proffered wage." Counsel submits a contract between the petitioner and [REDACTED] asserting that the contract allowed the petitioner to quickly recover in 2009. The contract was originally dated in November 29, 1999, and its value would already be accounted for in the petitioner's tax returns from 2004 onward. Counsel fails to submit evidence of how the petitioner was directly impacted by the economic downturn in 2008 and fails to submit the petitioner's 2008 tax return in order to properly evaluate its net current assets or the petitioner's totality of the circumstances. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No explanation is provided as to why this information was previously unavailable on appeal as the initial contract date is November 29, 1999. Further, even if the petitioner provided evidence of how the petitioner was directly

⁴ The petitioner's 2004 Form 1065 does not state any end of year items on Schedule L, which is unusual as Schedule L contains entries for the beginning of the tax year. This issue must be resolved before the tax return can be definitively accepted. 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). 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.

⁵ The petitioner failed to submit its 2008 Form 1120S tax return. The record contains the member's IRS tax transcript showing income on his Schedule E attributable to the petitioner's net income for that year of \$23,919. The petitioner must submit annual reports, federal tax returns, or audited financial statements for each year in accordance with 8 C.F.R. § 204.5(g)(2).

impacted by the economic downturn in 2008, the petitioner would still fail to overcome its inability to pay the proffered wage in 2004.

The petitioner has failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in net income or net current assets. The AAO acknowledges that the petitioner has conducted business since 1998 as indicated on the instant petition; however, according to its tax returns, the petitioner has shown inconsistent growth in net income in 2004 and 2008. The petitioner has failed to establish any unusual business losses or expenditures that otherwise explain its deficit in its ability to pay in 2004 and 2008. The record does not contain the petitioner's 2008 federal tax return as noted above and must explain the anomalies in the petitioner's 2004 Schedule L as noted above. As stated in the AAO's previous decision, the record is incomplete concerning the petitioner's history of growth, overall number of employees, and the petitioner's reputation within its industry. On motion, the petitioner failed to reconcile these issues. Therefore, considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has not demonstrated its continuing ability to pay the offered wage since the priority date. The AAO therefore affirms its previous decision.

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

In its March 15, 2013 decision, beyond the decision of the director,⁶ the AAO also determined that the petitioner has not established that the beneficiary is qualified for the offered position.

In the instant case, the labor certification states that the offered position requires two years of experience in the job offered. On the labor certification, the beneficiary does not list any experience qualifying her for the offered position. 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. On motion, the petitioner fails to explain why the beneficiary's experience is not listed on the labor certification.

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(l)(3)(ii)(A). As stated in the AAO's previous decision, the record contained one experience letter which misspells the beneficiary's name and there is no title given for the author of the letter. On motion, the petitioner submits an updated letter from the same author. In this letter, the author indicates that he is the President & CEO of [REDACTED]. He states that the beneficiary was

⁶ 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).

employed as the financial and purchasing manager from November 1993 through November 1995. However, in his previous letter, he states that the beneficiary was employed in the position of manager. There is no explanation to account for the job title discrepancy. Nothing in either letter indicates the exact start and end date, to include month and day, and whether the experience was part-time or full-time to calculate the beneficiary's total length of 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). In any future filings, the petitioner must provide reconcile the inconsistencies noted above. As the petitioner failed to list this experience on the Form ETA 750, the petitioner must submit independent, objective evidence in the form of pay stubs, or relevant government ministry records (if applicable) to verify the claimed experience, and whether the experience was full-time.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

In summary, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and does not establish that the beneficiary met the requisite experience as set forth on the labor certification by the priority date.

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, 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 reconsider will be granted, however the petition will remain denied for the reasons stated above.

ORDER: The motion to reconsider is granted. The previous decision of the AAO, dated March 15, 2013, is affirmed. The petition remains denied.