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

(b)(6)

DATE: SEP 1 1 2013 OFFICE: NEBRASKA 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, Nebraska Service Center, and the petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on February 1, 2013, and the petitioner has filed a motion to reconsider the AAO's decision. The motion will be granted, the previous decision by the AAO dated February 1, 2013, will be affirmed, and the petition will remain denied.

The petitioner is bakery. It seeks to employ the beneficiary permanently in the United States as a baker. 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 failed to submit sufficient evidence to establish that the petitioner had the ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The petitioner submitted additional documents on appeal. The AAO dismissed the appeal, affirming the director's decision that the petitioner had not established an ability to pay the proffered wage, and also finding, beyond the decision of the director, that the petitioner did not demonstrate that the beneficiary possessed the qualifications for the position offered.

The record shows that the motion is properly filed and timely. 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 motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. The petitioner indicates that the AAO erred in not viewing a totality of the circumstances in determining the petitioner's ability to pay the proffered wage. Counsel also asserts that the beneficiary does in fact have the requisite qualifications as described in the job requirements for labor certification.

As set forth in the AAO decision dated February 1, 2013, one of the issues 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. Beyond the decision of the director, the AAO also determined the petitioner did not demonstrate that the beneficiary obtained the requisite qualifications prior to the priority date of the labor certification.

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.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is $28,080 per year. The Form ETA 750 states that the position requires two years of experience as a baker.

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.[1]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ nine individuals. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 27, 2001 the beneficiary did not claim to have worked for the petitioner at the time of filing. The petitioner has submitted tax returns for 2002, 2003, 2004, 2005, 2006 (both original and amended), and 2007 (original and amended) into the record. The petitioner did not file income taxes in 2001 according to the evidence presented. The petitioner also indicated that the personal net worth of the owner should be considered. The AAO previously reviewed this evidence and found that the petitioner had not established its ability to pay the beneficiary the proffered wage through an analysis of wages paid, its net income or its net current assets. Specifically, the AAO found no ability to pay the proffered wage for the years, 2001, 2006 and 2007. On motion, the petitioner does not contest the AAO's findings on its ability to pay the proffered wage based on an analysis of wages paid, net income, or its net income.[2]

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[1] 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] Counsel for the petitioner has stipulated to the AAO's finding that it has not demonstrated its ability to pay in their brief at page 1.

The petitioner's counsel states that the AAO "did not view the totality of the circumstances," and erred in not viewing the owner's personal assets, as well as the potential of higher revenue with the beneficiary's added contribution to the business, and its reasons for not filing its 2001 income taxes.

However, the AAO did in fact consider the totality of the circumstances in its previous decision, and as previously indicated in that decision dated February 1, 2013, the AAO cannot "pierce the corporate veil" to view the assets of the corporation's owner in order to satisfy the corporation's ability to pay the proffered wage, as there have been longstanding rules which indicate that a corporation is a separate legal entity from its owners and shareholders. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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.

Moreover, without specific information regarding how the beneficiary's employment would generate any future assets may only be viewed as speculative. In this case, no detail or documentation has been provided to specifically demonstrate how the beneficiary's employment as a baker will significantly increase profits for the petitioner.

Against the projection of future *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

In addition, the petitioner has stated that it did not file any income tax for the year 2001, which is also the same year that the labor certification was filed, because of construction and licensing delays that caused unexpected interruptions in the anticipated completion of the operating facility. The petitioner indicates that it finally commenced operations in 2002. However, according to the New York Department of State Division of Corporations website, the petitioning entity was incorporated on February 3, 2005. See www.dos.ny.gov/corps/bus_entity_search.html (accessed August 22, 2013). In addition, the I-140 petition indicates the petitioner was incorporated in 1999; and although the labor certification was filed on April 30, 2001, the petitioner has affirmed that the business was not operating until January of 2002. This casts doubt on whether a bona fide job opportunity existed at the time the labor certification was filed with the DOL and to which U.S. workers could be referred. *See* 20 C.F.R. § 656.3.

Moreover, the labor certification states an employment address of [redacted] as of the filing date in April of 2001, which appears to be a residential address, but the I-140 indicates the petitioner's address as [redacted] The AAO therefore, also notes

that the petitioner's varying incorporation date information, coupled with the lack of objective evidence of completion delays, or copies of business plans, and the fact that the petitioner's owners did not fund the company's start-up costs casts doubt on whether a *bona fide* job offer existed at the time the labor certification was filed.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

The petitioner has therefore, not established that it had the ability to pay through regulatory prescribed evidence from the priority date of the labor certification. Upon motion, the petitioner has not provided sufficient evidence to overcome the director's and the AAO's previous findings. 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)).

Counsel refers to a decision issued by the AAO concerning the ability to pay, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has not submitted any new evidence upon motion regarding its ability to pay the beneficiary's proffered wage which would be sufficient to overcome the AAO appeal decision dated, February 1, 2013. In its prior decision, the AAO informed the petitioner that it had not demonstrated its ability to pay the proffered wage based on an analysis of wages paid, net income, or its net current assets, as well as based on an analysis of the totality of the petitioner's circumstances. The AAO previously found that the petitioner failed to provide a tax return for 2001, the year in which the priority date fell. The petitioner's gross receipts during the relevant years varied, as did the wages paid; and although the petitioner claimed to be in business since 1999, it did not pay substantial compensation to its owner. The AAO also found that the petitioner had not submitted sufficient evidence demonstrating that the owner was willing and able to forgo officer compensation in order to pay the proffered wage. The petitioner also submitted no evidence into the record prior to the appeal decision which would demonstrate a historical growth of its business, a history of uncharacteristic business expenditures or losses from which it has since recovered, or of a loss of the petitioner's reputation within the industry. In reviewing the totality of the circumstances, upon motion, the AAO finds that although the petitioner has submitted evidence regarding its start-up issues, it has still not submitted a business plan, objective evidence of unusual delay costs as stated, income taxes for 2001, or any other evidence indicated as absent in the AAO's appeal decision. Further, as discussed above, the petitioner's admission that it was not operational at the time of the labor certification's filing, and for some time thereafter, casts additional doubt on the petitioner's ability to pay the proffered wage fromt the priority dated onward. Therefore, the petitioner has again not sufficiently demonstrated through its evidence a basis to overcome this ground for denial in the instant motion.

The AAO also found beyond the decision of the director that the petitioner did not establish that the beneficiary possessed the requisite experience in order to qualify for the position. 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).

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 AAO determined that the petitioner submitted insufficient evidence that the beneficiary possessed the experience as required on the Form ETA 750. The AAO in reviewing all of the evidence presented as a whole, determined that the beneficiary did not have the requisite two years of experience in the position offered as baker, as required by the petitioner in the labor certification application. The Form ETA 750 indicates that the offered position requires two years of experience as a baker.

The petitioner previously submitted an experience letter dated October 1, 2000 from on letterhead. The AAO in its prior decision informed the petitioner that the letter did not list the title of its author, , as required under 8 C.F.R. § 204.5(l)(3)(ii)(A).

Therefore, the evidence did not establish that the beneficiary possessed the requisite experience as stated on the labor certification by the priority date. The petitioner did not submit any further evidence regarding this issue upon motion. Counsel instead asserts that "given that the labor certification was approved without any objection to the beneficiary's qualifications, and neither previous notice of intent to deny raised this as an issue, it is a complete lack of due process in terms of notice as well as arbitrary and capricious at this point." 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)).

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). Regulations establish that evidence of the beneficiary's experience must meet certain requirements. 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).

According to the ETA Form 750B, the position requires two years of experience as a baker. The petitioner submitted an experience letter. However, as the experience letter did not conform to the requirements under the regulations, and the petitioner has not submitted any new information on this issue, the petitioner has not demonstrated that the beneficiary possessed the requisite experience as of the priority date of the labor certification.

On motion, the petitioner has not established that it had the ability to pay the beneficiary's proffered wage from the priority date, and the petitioner has not established that the beneficiary possessed the requisite experience as required by the terms of the labor certification. Therefore, the petitioner has not overcome the grounds for denial in the director's decision, or the AAO's decision.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The motion to reconsider the previous decision of the AAO is granted. The prior decision of the AAO dated February 1, 2013, will not be disturbed. The petition remains denied.