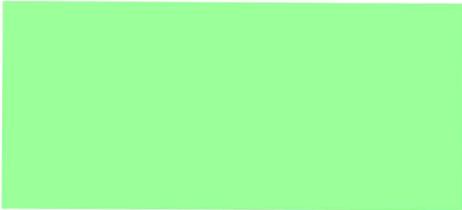


(b)(6)

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

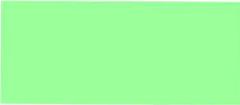


U.S. Citizenship  
and Immigration  
Services

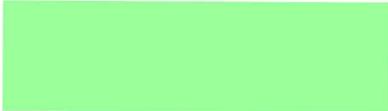


DATE: **JUN 03 2014** OFFICE: TEXAS SERVICE CENTER

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, approved the immigrant visa petition on November 10, 2008. The director subsequently issued the petitioner a notice of intent to revoke the approval, and on September 13, 2010, the director revoked the approval of the instant petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO). The appeal was dismissed on December 26, 2012, and the petitioner filed a motion to reopen this decision. On May 28, 2013, we dismissed the motion and affirmed our previous decision. On July 5, 2013, the petitioner filed a second motion to reopen which we dismissed on November 27, 2013. The petitioner then submitted a third filing, a motion to reopen and reconsider on January 7, 2014, in which we reconsidered and dismissed the matter on February 20, 2014. The petitioner has now filed a fourth filing, a motion to reopen and reconsider. The matter will be reconsidered, and the previous approval of the petition will remain revoked.

The petitioner describes itself as a liquor store. It seeks to permanently employ the beneficiary in the United States as an evening manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 30, 2001. *See* 8 C.F.R. § 204.5(d).

The director revoked the approval of the instant petition because the petitioner had not established that the beneficiary met the experience requirements of the labor certification. We dismissed the appeal and concluded that the petitioner had not established that the beneficiary met the education and experience requirements of the position offered or that the petitioner had the ability to pay the beneficiary's proffered wage for 2001 and 2003. We subsequently dismissed the first and second motions and concluded that the petitioner had not submitted any "new" evidence as is required for motions to reopen under 8 C.F.R. § 103.5(a)(2). We dismissed the third filing, concluding that the record did not demonstrate (1) that the beneficiary had two years of experience in the job offered or that the petitioner had graduated from high school to meet the requirements of the labor certification; (2) that the petitioner had the ability to pay the beneficiary's proffered wage from the priority date onward, and (3) that the position offered constituted a *bona fide* job offer.

The brief from counsel for the petitioner in the instant matter addresses these issues but does not provide any additional evidence beyond what was submitted previously. The regulations at 8 C.F.R.

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

§ 103.5(a)(2) state, 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.” 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. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide the required evidence, the evidence submitted on motion will not be considered “new” and will not be considered a proper basis for a motion to reopen. Therefore, the instant matter will not be reopened.

As counsel’s brief alleges that the previous decisions were erroneous through misapplication of law or policy, the instant matter qualifies for consideration as a motion to reconsider pursuant to 8 C.F.R. § 103.5(a)(3).

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.<sup>2</sup>

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The issues in this matter are: (1) whether the beneficiary meets the education and experience requirements of the labor certification; (2) whether the petitioner had the ability to pay the beneficiary’s proffered wage from the priority date onward; and (3) whether the position offered constituted a *bona fide* job offer.

### **Beneficiary Qualifications**

The petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). In evaluating the beneficiary’s qualifications, U.S. Citizenship and Immigration Services (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

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<sup>2</sup> 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).

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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires graduation from high school and two years of experience in the job offered. The labor certification states that the beneficiary attended [REDACTED] in Dharmabad, India from May 1963 until May 1973. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a general manager for [REDACTED] in Nizamabad, India from April 1987 until May 1995.

First, the evidence in the record is insufficient to demonstrate that the beneficiary has graduated from high school. The labor certification specifically asks for the names and addresses of “schools, colleges and universities attended,” but the labor certification only states that the beneficiary attended high school until May 1973 and that the beneficiary received a Secondary School Certificate. The petitioner has not provided this certificate. Instead, the petitioner has submitted a copy of the beneficiary’s Bachelor of Commerce degree from [REDACTED] and states that such a program requires high school graduation and therefore establishes that the beneficiary has graduated from high school. As we noted in our February 20, 2014 decision, it is unclear why this education was omitted from the labor certification. The petitioner has not resolved this issue on motion.

Although we previously accepted that the beneficiary had more likely than not graduated from high school, upon reconsideration, our conclusion is withdrawn. The beneficiary’s Secondary School Certificate from [REDACTED] states that he passed the Secondary School Certificate Examination in March 1973. The beneficiary’s Bachelor of Commerce degree from [REDACTED] states that the beneficiary passed the Part-I examination in May 1980 and that he passed the Part-II examination in May 1981, which would mean that the beneficiary began the bachelor’s degree program in 1979. It is unclear why there was such a long gap between the time that the beneficiary received his Secondary School Certificate in 1973 and the beneficiary was allegedly awarded his Bachelor of Commerce degree in 1979. Additionally, the lack of transcripts accompanying this degree further calls into question the beneficiary’s educational history.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that a Bachelor of Commerce degree is “awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (or equivalent).”<sup>3</sup> It is unclear why the beneficiary did not

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<sup>3</sup> According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” <http://www.aacrao.org/About-AACRAO.aspx> (accessed April 30, 2014). Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* According to the registration page for EDGE, EDGE is “a web-based

receive his Bachelor of Commerce degree until 1981, as EDGE states that this is a two- or three-year degree. The gap between when the beneficiary allegedly graduated high school and received his degree from [REDACTED] calls into question the validity of the beneficiary's claim. The petitioner has not submitted the beneficiary's transcripts from [REDACTED], which further calls into question this education.

Second, the petitioner has not established that the beneficiary meets the experience requirements of the labor certification. The petitioner has not submitted any new evidence regarding the beneficiary's qualifying experience. We noted in our February 20, 2014 decision that the beneficiary's signature on pay receipts from March 1988 to August 1992 was different from the beneficiary's signature on the labor certification. On motion, counsel states that "[d]ue to passage of time, Beneficiary has altered the way he signs his name." There is no evidence in the record from the beneficiary attesting to this. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also states that two decisions issued by the DOL's Board of Alien Labor Certification Appeals (BALCA) are applicable to the instant petition before us. 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, BALCA 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 evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

### **Ability to Pay the Proffered Wage**

The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). At issue in this matter is whether the petitioner had the ability to pay the beneficiary's proffered wage in 2001 and 2003.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine

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resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed April 30, 2014). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.

*See also An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>4</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

As we stated in our previous decisions regarding this matter, the petitioner's tax returns do not demonstrate that the petitioner had sufficient net income or net current assets in 2001 and 2003 to pay the beneficiary's proffered wage in these years. We also stated in our February 20, 2014 decision that the petitioner did not provide any evidence to corroborate the petitioner's assertion that its net current assets for 2001 and 2003 were diminished due to "temporary losses." 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 has not provided any additional evidence to demonstrate that factors similar to *Sonogawa* 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 wages paid to the beneficiary, net income and net current assets.

The record contains an affidavit, dated June 28, 2013, from [REDACTED] the petitioner's shareholder, in which he states that he is willing to be personally liable for the beneficiary's proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The record contains a copy of Mr. [REDACTED]'s personal tax returns for 2001 and 2003 which state that he files his tax returns jointly with his wife and claims two dependent children. Even if we were to consider the assets of the petitioner's shareholder who is willing to make his assets available to pay the beneficiary's proffered wage, nothing in the record demonstrates that Mr. [REDACTED] can support himself and his family if his personal assets are used to pay the beneficiary's salary. The record does not include any Forms W-2 issued to Mr. [REDACTED] or evidence of Mr. [REDACTED]'s personal monthly expenses in 2001 or 2003. Further, the petitioner's 2001 and 2003 tax returns do not include Schedule K-1 identifying Mr. [REDACTED] as a sole shareholder in those years.

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<sup>4</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

The petitioner has not explained why its tax returns for 2001 and 2003 do not state any officer compensation, as noted in our November 27, 2013 and February 20, 2014 decisions. Further, the record does not contain any Forms W-2 for the petitioner's owner.

In our November 27, 2013 and February 20, 2014 decisions, we also noted that the petitioner had filed a Form I-140 for multiple beneficiaries and that it must demonstrate its ability to pay the proffered wages of the instant beneficiary as well as these beneficiaries. The petitioner did not provide any evidence to resolve this issue. USCIS records demonstrate that the petitioner has filed the following petitions, each of which has an approved Form I-140:

Receipt Number	Priority Date
[REDACTED]	May 23, 2012
[REDACTED]	July 27, 2008
[REDACTED]	March 24, 2008
[REDACTED]	January 24, 2006
[REDACTED]	October 28, 2005
[REDACTED]	February 27, 2001

Counsel asserts that it is not necessary to provide any information on the filings of these multiple Form I-140 petitions because none of the petitioners have 2001 or 2003 priority dates. The petitioner must demonstrate its continuing ability to pay each beneficiary, in addition to the instant beneficiary, from the respective priority dates of each beneficiary until receiving lawful permanent residence. One of the beneficiaries tied to the above filings adjusted to lawful permanent status in 2006 and another did so in 2009. Therefore, the petitioner must demonstrate its ability to pay the proffered wage of at least two beneficiaries from 2001 through 2004, three beneficiaries in 2005, four beneficiaries in 2006, three beneficiaries in 2007, five beneficiaries from 2008 through 2009, four beneficiaries from 2010 through 2011, and five beneficiaries from 2012 onward.

The petitioner must also demonstrate its ability to pay the required wages of its sponsored H-1B beneficiaries in any further filings. USCIS records indicate that the petitioner has sponsored eight H-1B beneficiaries since the priority date in 2001. The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

Therefore, after considering the totality of the circumstances, the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

**Bona Fide Job Offer**

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). The record contains conflicting

information regarding the entities owned by the petitioner, which calls into question the validity of the job offer and whether a *bona fide* job offer is available to U.S. workers.

On motion, counsel for the petitioner states that [REDACTED] formerly known as “[REDACTED]” is owned by [REDACTED] Inc. d/b/a [REDACTED] and the beneficiary’s work location moved within the same metropolitan statistical area. Counsel’s brief in the record states that when [REDACTED] closed in October 2008, “[the beneficiary’s] employment was moved to [REDACTED] (formerly known as [REDACTED] located at [REDACTED] Texas.” The record contains a liquor license for [REDACTED], which states that it was valid from April 9, 2003 until April 8, 2012, and a liquor license for [REDACTED] which states that it was valid from October 5, 1999 until October 4, 2009. These documents demonstrate that both [REDACTED] and [REDACTED] are separate entities. The record contains liquor licenses for [REDACTED] and [REDACTED] which state the same taxpayer Employer Identification Number (EIN). The liquor license for [REDACTED], issued April 9, 2008, states an EIN that is different from the number that corresponds with [REDACTED] and [REDACTED]. However, the record also contains a confirmation page of taxes to be paid to the state of Texas, due on November 20, 2008, listing the entities related to [REDACTED] Inc. and that contains hand-written separate amounts due for [REDACTED] and [REDACTED]. It is unclear why [REDACTED] and [REDACTED] have the same EIN but are listed here as separate entities owing different amounts in taxes. The record contains an additional confirmation page that contains hand-written amounts for taxes that [REDACTED] owes, due on April 20, 2009. An earlier confirmation page for taxes due October 20, 2008 contains hand-writing for the taxes that [REDACTED] owes. It is unclear when [REDACTED] became [REDACTED], and why [REDACTED] name would continue to be referred to after [REDACTED] was in existence. It is also unclear how [REDACTED] and [REDACTED] are separate entities, while [REDACTED] and [REDACTED] have the same EIN. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.*

We affirm the director’s decision and our previous decisions that the petitioner failed to establish its ability to pay the beneficiary’s proffered wage from the priority date onward and that a *bona fide* job offer exists.

The petition will remain revoked 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). Here, that burden has not been met.

**ORDER:** The matter is reconsidered. The previous approval of the petition will remain revoked.