



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE:

OCT 09 2014

OFFICE: TEXAS SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

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

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 Director, Texas Service Center (Director), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides accounting, tax, and advisory services. It seeks to permanently employ the beneficiary in the United States as a consultant specializing in corporate governance.

The petition requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition.²

The Director concluded that the petitioner did not establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. Accordingly, the Director denied the petition on May 20, 2014.

The record shows that the appeal is properly filed and alleges specific errors in law or fact. The record documents the procedural history in this case, which is incorporated into the decision. We will elaborate on the procedural history only as necessary.

This office conducts appellate review on a *de novo* basis. See *Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We may consider all pertinent evidence in the record, including new evidence properly submitted on appeal.³

Ability to Pay the Proffered Wage

A petitioner must establish its ability to pay the proffered wage from the petition's priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

¹ Section 203(b)(3)(A)(i) of the Act provides preference classification to qualified immigrants who are capable of performing permanent skilled labor (requiring at least two years training or experience) for which qualified workers are unavailable in the United States.

² The labor certification application was filed and approved under the name [REDACTED]. The record indicates that the petitioner acquired the [REDACTED] in October 2012, shortly after filing the labor certification application, and changed its name to [REDACTED]. Notwithstanding the filing of the accompanying labor certification by an earlier entity, the petitioner may sponsor the beneficiary if it establishes its assumption of the essential rights and obligations of its predecessor, that the job opportunity remains the same, and its eligibility for petition approval. See *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 481-82 (Comm'r 1988). The record establishes the petitioner's assumption of the essential rights and obligations of its predecessor and that the job opportunity remains the same. However, the petitioner's eligibility for approval, including its ability to pay the proffered wage, remains at issue.

³ The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow for the submission of additional evidence on appeal. The record in the instant case does not preclude consideration of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

In determining a petitioner's ability to pay, U.S. Citizenship and Immigration Services (USCIS) first examines whether the petitioner paid the beneficiary the full proffered wage during each year from the priority date. If the petitioner does not establish that it paid the beneficiary the full proffered wage during that time, USCIS next examines 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.⁴ If the petitioner's net income or net current assets are insufficient to demonstrate its ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the petition's priority date is September 24, 2012, which is the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). The ETA Form 9089 states the proffered wage of the offered position of Consultant, Corporate Governance, as \$53,539 per year.

The petitioner did not submit copies of the regulatory required annual reports, audited financial statements, or federal income tax returns, and the Director issued a Notice of Intent to Deny (NOID), requesting that the petitioner submit the regulatory required evidence. The Director's NOID also stated, "If the petitioner **employs 100 workers** or more, the petitioner may **submit a statement from the petitioner's financial officer** which establishes the petitioner's ability to pay the proffered wage." (emphasis in original).

In response to the Director's NOID, the petitioner submitted a copy of the Internal Revenue Service (IRS) Form W-2 Wage and Tax Statement, indicating that the petitioner paid the beneficiary wages in 2012 that exceeded the annual proffered wage, and payroll records that documented it paid in excess of the proffered wage in 2013. However, the Director found that the petitioner did not submit copies of annual reports, federal income tax returns, or audited financial statements as required by 8 C.F.R. § 204.5(g)(2), a letter from its financial officer as permitted by that regulation.

For the first time on appeal, the petitioner submits a copy of the first page of its 2012 federal income tax return, and evidence of its request for an extension of time in which to submit its 2013 tax return. The petitioner also submits financial statements for the fiscal year that ended January 31, 2013, a June 11, 2014 letter from its chief financial officer (CFO) dated June 11, 2014, and the beneficiary's 2011 and 2013 W-2 statements.

We note that the purpose of a notice of intent to deny is to put the petitioner on notice of a deficiency in the record, and to permit the petitioner an opportunity to provide further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See*

⁴ *See River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1310 (9th Cir. 1984)); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880-81 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536-37 (N.D. Texas 1989); *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1083-85 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983) (all upholding USCIS's method of determining a petitioner's ability to pay the proffered wage).

8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, we are not required to accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the Director's NOID. *Id.* Under the circumstances, we need not consider the sufficiency of the evidence submitted on appeal.

Even if we were to accept the petitioner's evidence as submitted on appeal, it would be insufficient to establish its ability to pay the proffered wage. First, the financial statement provided is not audited. The regulation at 8 C.F.R. § 204.5(g)(2) specifies that only "audited" financial statements are acceptable to establish a petitioner's ability to pay. The financial statements submitted by the petitioner on appeal contain a report by the company's chief executive officers, which indicates that "[t]hese statements have not been compiled, reviewed or audited by outside accountants." Because the petitioner provides accounting services, counsel states that a qualified accountant prepared the petitioner's financial statements. However, the financial data in the statements appear to constitute solely the representations of the petitioner's management. Also, unlike audited statements, the statements submitted by the petitioner do not indicate that they present fairly, in all material aspects, the financial condition of the petitioner pursuant to generally accepted accounting principles. The financial statements are therefore insufficient to establish the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2).

Second, if a petitioner employs 100 or more workers, USCIS may accept a statement from a financial officer that establishes the petitioner's ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2). The record indicates that the instant petitioner employs more than 100 workers. However, acceptance of the CFO's statement alone to establish the petitioner's ability to pay is inappropriate in this case because the petitioner failed to provide a statement from its financial officer in response to the Director's request in the NOID and because USCIS records show that the petitioner has multiple immigrant visa petitions pending. Counsel states on appeal that "USCIS has approved AT LEAST TEN other petitions with the same documentary evidence originally filed in the instant petition."⁵

As of the petition's September 24, 2012 priority date, USCIS records indicate the pendency of at least 26 other approved immigrant visa petitions filed by the petitioner or its predecessors. Because the petitioner must demonstrate its ability to pay the proffered wage of each beneficiary, it must establish

⁵ We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r 1988). USCIS is not required to treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved immigrant petitions on behalf of other beneficiaries, we would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

that it has, and that its predecessors had, the ability to pay the combined proffered wages of the instant beneficiary and the beneficiaries of the other pending petitions. The combined proffered wages include the proffered wages of the beneficiaries of the other pending petitions from the instant petition's priority date until the beneficiaries obtained lawful permanent residence, or until their petitions were denied without appeal, revoked, or withdrawn. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-45 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2).

The evidence of record does not indicate the receipt numbers, priority dates, and proffered wages of the other pending petitions by the petitioner and its predecessors, or any actual wages that the petitioner or its predecessors may have paid to the beneficiaries of those petitions. The record also does not indicate whether any of the other petitions have been withdrawn, revoked, or denied without appeal, or whether any of the other beneficiaries have obtained lawful permanent residence. Therefore, counsel's argument, without evidence to support those assertions, is insufficient to overcome the lack of regulatory required evidence. 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). 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)).

Even if we were to accept the petitioner's 2012 federal income tax return and evidence of its 2013 extension request to satisfy the mandatory documentation requirements of 8 C.F.R. § 204.5(g)(2), that evidence would be insufficient to establish the petitioner's ability to pay the proffered wages of all of its beneficiaries from the instant priority date onward. In addition, we note that by submitting only the first page of its 2012 tax return, the petitioner would be effectively forfeiting consideration of its net current assets in determining its ability to pay the combined proffered wages of the beneficiaries. The information needed to calculate net current assets is not included on the first page of the petitioner's IRS Form 1065 U.S. Return of Partnership Income.

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 single page of the petitioner's 2012 tax return indicates substantial gross revenue, but the record lacks evidence from any other year with which it could determine the petitioner's financial history. The petitioner previously provided printed copies of pages from its website. However, these materials are more akin to marketing or advertising materials, and cannot, on their own, document that the totality of the petitioner's financial circumstances. The petitioner has not provided any evidence of the petitioner's historical growth, its reputation, or any other evidence to establish its financial circumstances. Despite the Director's request, or the opportunity provided by this appeal, the petitioner has not provided the regulatory required evidence of its ability to pay the beneficiary's proffered wage. In addition, the petitioner has not provided sufficient evidence to establish that it has the ability to pay the proffered wages of the additional beneficiaries that it has sponsored.⁶ 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 to the instant beneficiary, in addition to the additional beneficiaries it has sponsored.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The appeal will be dismissed on this ground.

However, even if the petitioner had provided the regulatory required evidence pursuant to 8 C.F.R. § 204.5(g)(2), the petition is not approvable as the record does not contain evidence establishing that the beneficiary is qualified for the position offered.

Evidence of the Beneficiary's Qualifying Experience

Beyond the Director's decision, the record also does not establish the beneficiary's qualifying experience for the offered position.

A petitioner must establish that a beneficiary possessed all the education, training, and experience specified on the labor certification by the petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications,

⁶ In any future filings, the petitioner must provide the receipt numbers, priority dates, and proffered wages of the other pending petitions by the petitioner and its predecessors, and document any actual wages that the petitioner or its predecessors may have paid to the beneficiaries of those petitions. The petitioner may indicate the date that any of the other petitions have been withdrawn, revoked, or denied without appeal, and any of the beneficiaries that have obtained lawful permanent residence.

USCIS must examine the job offer portion of the labor certification to determine the minimum requirements of the offered position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying labor certification states that the offered position of Consultant, Corporate Governance, requires a bachelor's degree or a foreign equivalent degree in accounting, business administration, or finance, plus 18 months of experience in the job offered. The labor certification states that experience in an alternate occupation is unacceptable. *See* Part H.10, ETA Form 9089.

The labor certification also states that “[a]ny single degree or any combination of degrees, diplomas, or professional credentials determined to be equivalent to [a] Bachelor’s Degree by a qualified evaluation service is acceptable. Any suitable combination of education, training, & experience is acceptable.”

On the labor certification, the beneficiary stated more than eight years of consulting experience before joining the petitioner’s predecessor in the offered position on October 8, 2007. He stated that he worked full-time for [REDACTED] in India in corporate governance and as head of finance and administration from February 1, 2006 to September 30, 2007. He also stated that he worked full-time for the [REDACTED] as a consultant and accounts executive from January 1, 1999 to January 31, 2006. The beneficiary’s educational qualifications are not at issue.

The petitioner must support the beneficiary’s claimed qualifying experience with 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).

The record contains a January 9, 2013 letter from the purported former country head of India for [REDACTED]. The letter states that the beneficiary worked for the company as the head of finance and administration from February 1, 2006 to September 30, 2007. The letter also describes the beneficiary’s duties at the company.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires experience letters from “employers.” The January 9, 2013 letter is from a purported ex-employee of [REDACTED]. The letter is not on [REDACTED] letterhead, nor does the record contain evidence that the letter’s author worked for that company. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal., Inc.*, 14 I&N Dec. 190, 193 (Reg’l Comm’r 1972) (stating that an uncorroborated statement is insufficient to meet the burden of proof in visa petition proceedings). In addition, the letter does not provide the address of the author as 8 C.F.R. § 204.5(l)(3)(ii)(A) requires, nor does it provide any other contact information for the author. Because the January 9, 2013 letter does not comply with 8 C.F.R. § 204.5(l)(3)(ii)(A), it does not establish the beneficiary’s claimed qualifying experience with [REDACTED].

The record also contains three letters on [REDACTED] stationery. A January 31, 2006 letter from a manager states that the beneficiary worked for [REDACTED] from January 1, 1999 to January 31, 2006. The letter includes a brief description of his job duties there. A January 23, 2006 letter from an assistant director of finance and administration states that the beneficiary worked for [REDACTED] for about seven years and also includes a brief description of his job duties there. The third [REDACTED] letter is dated June 10, 2006 and is signed by a regional internal audit manager. The letter states the beneficiary worked as a finance and administration executive since 2001. The letter commends the beneficiary's performance, but does not describe his experience in detail.

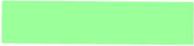
The letters on IATA stationery do not establish that the beneficiary gained at least 18 months of experience in the offered position as the labor certification requires. The labor certification states the job duties of the offered position as "identify[ing], examin[ing], and analyz[ing] key financial internal controls to assess effectiveness of controls, accuracy of financial records, and efficiency of operations." The job duties also include "[d]evelop[ing] risk control matrices and models that measure internal financial controls" and "[p]erform[ing] tests of process and financial controls as defined by the COSO and Sarbanes-Oxley Act."⁷

The January 23, 2006 letter states that the beneficiary "was primarily responsible for preparation and monitoring of budgets, financial analysis, accounting operations, managing various audits and was also involved in various non-financial projects." The January 26, 2006 letter states that the beneficiary "is responsible for the finance and administrative duties in [REDACTED] India." The letter states that his duties include: submission of monthly financial reports to headquarters; detailed monthly budget analyses; annual budget preparations; and overseeing daily financial operations. The June 10, 2006 letter states that the beneficiary "was directly involved with the implementation of a number of local initiatives to strengthen the system of internal controls of [REDACTED] India."

None of the [REDACTED] letters establish that the beneficiary gained experience in the specific job duties of the offered position, including: identifying, examining, and analyzing key financial internal controls; developing risk control matrices and models; and performing tests as defined by the COSO and Sarbanes-Oxley Act. The letters state the beneficiary's broad areas of responsibility and involvement in implementing internal controls. However, the letters do not detail any specific job duties that the beneficiary performed at [REDACTED] that match the job duties of the offered position stated on the labor certification, including his performance of tests defined by the COSO and Sarbanes-Oxley Act. Therefore, the record does not establish the beneficiary's qualifying experience for the offered position by the petition's priority date.

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.

⁷ The labor certification does not define the acronym "COSO." However, it appears to refer to the Committee of Sponsoring Organizations of the Treadway Commission, which has established an internal control model against which companies and organizations may assess their control systems. See Comm. of Sponsoring Orgs. of the Treadway Comm'n, <http://www.coso.org> (accessed Sept. 12, 2014).



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, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.