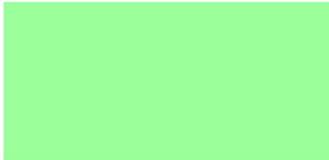


(b)(6)

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



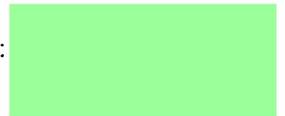
U.S. Citizenship  
and Immigration  
Services



DATE: FEB 18 2015

OFFICE: TEXAS SERVICE CENTER

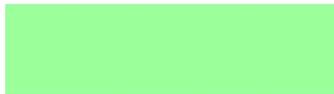
FILE:



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:

SELF-REPRESENTED

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 cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based visa petition was denied by the Director, Texas Service Center, (director). The director denied a subsequent motion to reopen and motion to reconsider. The director reopened the case on his own motion and certified his denial to the Administrative Appeals Office (AAO) for review. We affirmed the director's decision. The case is now before us on motion to reopen and motion to reconsider. The motion to reopen will be dismissed; the motion to reconsider will be granted. Our previous decision will be affirmed and the petition will remain denied.

The petitioner describes itself as a machine shop. It seeks to employ the beneficiary permanently in the United States as a [REDACTED]. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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. The director denied the petition accordingly.

The motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner did not provide new facts with supporting documentation not previously submitted. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

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.<sup>1</sup>

The issue identified by the director 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. In our previous decision we affirmed the director's decision regarding the petitioner's ability to pay the proffered wage and also found that the petitioner had failed to establish that the beneficiary possessed the required education and experience set forth on 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<sup>1</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 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 appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

### Ability to Pay the Proffered Wage

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). Here, the Form ETA 750 was accepted on April 4, 2001. The proffered wage as stated on the Form ETA 750 is \$13.61 per hour (\$28,308.80 per year). The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in [REDACTED] to have a gross annual income of \$1,048,616, and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year covers the period from January 1 through May 31. On the Form ETA 750B, signed by the beneficiary on March 26, 2001, the beneficiary did not claim to have worked for the petitioner.

In determining the petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (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 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>2</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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

According to USCIS records, the petitioner has filed Form I-140 petitions on behalf of three other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

<sup>2</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 *Tac 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's tax returns reflect the following net income<sup>3</sup> and net current assets<sup>4</sup>:

	Net Income	Net Current Assets
2001	\$-95,534	\$66,797
2002	\$-8,599	\$57,164
2003	\$-124,181	\$-18,938
2004	\$-37,485	\$-68,879
2005	\$53,842	\$-9,589
2006	\$24,773	\$31,730
2007	\$99,603	\$4,846
2008	\$113,070	\$52,829
2009	\$-78,175	\$122,122
2010	\$76,338	\$123,870
2011	Not submitted	Not submitted
2012	Not submitted	Not submitted
2013	Not submitted	Not submitted

The petitioner did not submit any evidence of net income or net current assets in 2011, 2012, or 2013. Although the petitioner's net income was greater than the proffered wage of the instant beneficiary in 2005, 2007, 2008, and 2010, and the petitioner's net current assets were greater than the proffered wage of the instant beneficiary in 2001, 2002, and 2009, the petitioner has filed three other Form I-140 petitions for different beneficiaries. Our previous decision identified these other petitions and advised the petitioner that it would need to demonstrate its ability to pay the proffered wage for each of these I-140 beneficiaries from the priority date until the beneficiary obtains permanent residence.<sup>5</sup> See 8 C.F.R. § 204.5(g)(2). Although the petitioner acknowledges these other beneficiaries on motion to reconsider, the petitioner has not provided any evidence relating to its ability to pay the proffered wage to these other beneficiaries. Without the specifically requested information of the petitioner's other filings, we cannot determine that the petitioner had the ability to pay all of its beneficiaries their proffered wage from the priority date onward.

On motion, the petitioner asserts that the company's owner was willing to accept a reduction in officer compensation in 2003 and 2004 in order to allow the company to pay the proffered wage. The petitioner also stated that the company owner owned the building in which the company was

<sup>3</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>4</sup> Net current assets are the difference between the petitioner's current assets and current liabilities. 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.

<sup>5</sup> The petition filed under receipt number [REDACTED] indicates a priority date of December 24, 1997, and that beneficiary received permanent residence on November 20, 2001. The petition filed under receipt number [REDACTED] indicates a priority date of January 14, 1998, and that beneficiary received permanent residence on September 9, 2002. The petition filed under receipt number [REDACTED] indicates a priority date of April 30, 2001, and that beneficiary received permanent residence on June 17, 2005.

located, and would have accepted a reduced rent in order to allow the petitioning company to pay the proffered wage during the years in question.

Our previous decision discussed the petitioner's assertion that the company owner could have reduced the amount paid in officer compensation or the amount paid in rent in order to allow the petitioning company to be able to the proffered wage to the instant beneficiary. We found that the petitioner had submitted incomplete and unverifiable evidence of the company owner's ability to forego compensation or rent. We also found that the evidence that had been submitted directly contradicted corresponding information disclosed in submitted tax records.<sup>6</sup> Specifically, we found that the estimated expenses provided by the petitioner do not appear to be accurate, as the mortgage interest and property taxes alone equal or exceed the owner's total monthly expenses as reported by the petitioner. 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). Our previous decision concluded that we cannot accept the owner's estimated expenses as provided by the petitioner and noted that the petitioner must resolve these inconsistencies with independent, objective evidence in any further filings. *Id.* at 591-92. Nevertheless, while the petitioner finds fault with our conclusion, no evidence was submitted on motion to resolve the discrepancies detailed in our decision.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the instant beneficiary and all of its other beneficiaries 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.

Considering the totality of the circumstances, the petitioner has not established the historical growth of its business or its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. Our previous decision pointed out that the petitioner's tax returns document steadily declining gross receipts and net current assets for the first five (5) years beginning with the priority date, and a constantly negative net income. Our decision further noted that the petitioner had obligations to demonstrate its ability to pay a proffered wage to additional I-140 beneficiaries during fiscal years 2000, 2001, 2002, 2003, 2004, and 2005. The petitioner did not demonstrate its ability to pay the proffered wages to the beneficiary by means of its net income or net current assets from the priority date. 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 from the priority date onwards.

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<sup>6</sup> Our decision also noted that even if we accepted that the stated expenses are accurate and that both officers are able to forgo all of their compensation, there appears to be insufficient officer compensation to pay the beneficiary's proffered wage after allowing for just the owners' expenses in fiscal years 2003 and 2004.

### **Qualifications of the Beneficiary**

Beyond the decision of the director, our previous decision also found that the petitioner has not established that the beneficiary is qualified for the offered position.<sup>7</sup> 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, 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, 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 four years of high school education, and two years of experience in the job offered. On the labor certification, which was signed by the beneficiary on March 26, 2001, the beneficiary does not indicate that he attended any educational institutions. The employment letter submitted to document the beneficiary's claimed qualifying work experience fails to meet the regulatory requirements for an experience letter as it does not indicate the employer's name, title, or address, it does not indicate whether the beneficiary was employed full-time or part-time, and it does not describe the employee's work experience. The evidence in the record does not establish that the beneficiary possessed the required education or experience set forth on the labor certification by the priority date. No additional evidence regarding the beneficiary's qualifications was submitted on motion and the petitioner does not assert any error of law regarding this portion of our decision. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

### **Conclusion**

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. Here, that burden has not been met.

**ORDER:** The motion to reconsider is granted, our previous decision is affirmed, and the petition remains denied.

<sup>7</sup> We may deny an application or petition that fails to comply with the technical requirements of the law 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).