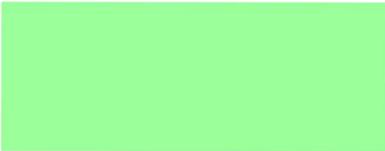


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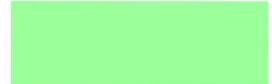


DATE:

JAN 13 2015

OFFICE: TEXAS SERVICE CENTER

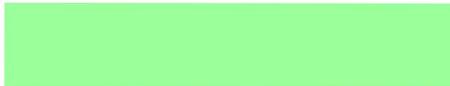
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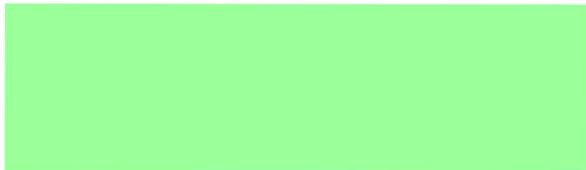
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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 employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The case is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reopen will be granted, the motion to reconsider will be denied, and the dismissal of the appeal will be affirmed.

The petitioner describes her business as a farm and ranch. On April 26, 2013 she filed a Form I-140, Immigrant Petition for Alien Worker, seeking to employ the beneficiary permanently in the United States as a farm worker and to classify him as an “other worker (requiring less than 2 years of training or experience)” under section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This section of the Act allows preference classification to be granted to “qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”

As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the U.S. Department of Labor (DOL) on August 21, 2012, and certified by the DOL (labor certification) on November 8, 2012.

On August 19, 2013, the Director issued a Request for Evidence (RFE) in which the petitioner was requested to submit additional documentation to establish that the beneficiary had 12 months of experience as a farm worker, as required on the labor certification, and that the petitioner had the ability to pay the proffered wage of the job offered from the priority date¹ up to the present. The petitioner responded to the RFE with additional documentation on November 4, 2013.

On April 7, 2014, the petition was denied by the Director on the ground that the evidence of record failed to establish that the beneficiary had 12 months of experience in the job offered, as required on the labor certification. The Director did not address the issue of the petitioner’s ability to pay the proffered wage.

The petitioner filed a timely appeal on May 9, 2014. The appeal was supplemented by a brief from counsel and supporting documentation, including affidavits from [REDACTED] and a neighbor stating that the beneficiary had worked for Ms. [REDACTED] over many years. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

On October 21, 2014, we issued a decision dismissing the appeal. In addition to finding that the record still failed to establish that the beneficiary had the requisite 12 months of experience as a farm worker, we also found that the record did not establish the identity of the petitioning employer or the ability of the petitioner to pay the proffered wage from the priority date up to the present.

¹ The priority date of the petition is the date the underlying labor certification application was received for processing at the DOL. *See* 8 C.F.R. § 204.5(g)(2). In this case the priority date is August 21, 2012.

With regard to the beneficiary's experience, we noted that the record is full of conflicting evidence and information. According to the labor certification, the beneficiary had 11 years of experience at two overlapping jobs at [REDACTED] in the city of [REDACTED] province of Guanajuato, Mexico. The first job is identified as general manager of his own farm and ranch, 40 hours per week, from June 1, 2001 to August 21, 2012. The second job is identified as farmworker at a ranch, 50 hours per week, from May 31, 2001 to August 21, 2012. According to the labor certification, therefore, the beneficiary worked 90 hours per week for 11 years. The record contains no documentary evidence of this employment. As evidence of the beneficiary's experience [REDACTED] initially submitted a letter dated October 15, 2013, asserting that the beneficiary had worked at her ranch from July 1, 2012 up to the present and performed a variety of general ranch and wildlife management duties.² Ms. [REDACTED] did not explain how the beneficiary could be working at two jobs in Mexico during the months of July and August 2012 at the same time he was allegedly working at her farm and ranch in [REDACTED] Texas. Moreover, on the labor certification, which she signed on April 23, 2013, Ms. [REDACTED] indicated that the beneficiary was not currently employed by her (Part J.23 of the ETA Form 9089), which conflicted with the information provided in the letter of October 15, 2013. Ms. [REDACTED] amended the information in her initial letter with an affidavit, dated April 21, 2014, in which she asserted that the starting date of the beneficiary's employment was incorrectly given as July 1, 2012, which was actually the date she employed an attorney to prepare the I-140 petition, and that she had employed the beneficiary since 1994.³ We found that the Woodlee affidavit of April 21, 2014 did not comply with the substantive requirements for employer letters in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because it did not state what job the beneficiary had or describe what duties he performed. Nor did the affidavit confirm that the beneficiary gained the specific skills required in the labor certification (Part H.14 of the ETA Form 9089), or indicate whether the beneficiary's employment was full-time or part-time. Moreover, the affidavit was inconsistent with the beneficiary's employment experience as set forth in the labor certification, which listed two jobs in Mexico and none with the petitioner, and also indicated that the beneficiary did not gain any qualifying experience with the petitioner in a job substantially comparable to the proffered position in this proceeding (Part J.21 of the ETA Form 9089). Finally, we noted that the beneficiary, who was born on [REDACTED] was only nine years old in [REDACTED] the year Ms. [REDACTED] claims to have employed him for the first time. For all of the reasons discussed above we concluded that the record did not establish that the beneficiary was qualified for the proffered position as of the priority date, August 21, 2012.

² Since less than two months of this claimed experience was acquired by the priority date of August 21, 2012, the Director found that the letter of October 15, 2013 did not establish that the beneficiary had the requisite experience to qualify for the proffered position under the terms of the labor certification.

³ The petitioner also submitted an affidavit from [REDACTED], a neighbor of [REDACTED] likewise dated April 21, 2014, who stated that he had known the beneficiary "intermittently for a period of seven years" and that during this time the beneficiary had worked for [REDACTED]

With respect to the identity of the petitioning employer, we discussed in our decision of October 21, 2014, the ways in which the documentation of record made it unclear as to whether the intended employer is [REDACTED] individually. On the ETA Form 9089 – Part C (Employer Information) identifies [REDACTED] as the employer, but also provides the FEIN (Federal Employer Identification Number) of [REDACTED]. On the Form I-140 – Part 1 (Information About the Person or Organization Filing This Petition) provides both the family name, [REDACTED] and the company name, [REDACTED] though the petitioner was supposed to choose one or the other. Adding to the confusion, the Form I-140 also provides both the FEIN of the company and the Social Security Number (SSN) of [REDACTED]. Nor did other documentation in the record conclusively resolve the issue of the intended employer. Since the identity of the employer was not certain, we concluded that the *bona fides* of the job opportunity was in question.

As for the petitioner's ability to pay the proffered wage, we noted that the lack of clarity regarding the intended employer made it impossible to assess the relevance of the financial documentation in the record. If the intended employer was [REDACTED] individually, her individual federal income tax return would be relevant. However, the only such form in the record, the Form 1040 for 2012, appeared to be incomplete as it lacked key schedules on business, farm, and investment income. (No corporate income tax return(s) of [REDACTED] had been submitted.) While [REDACTED] indicated that most of her financial resources were in the name of [REDACTED], these assets could not be considered in determining the petitioner's ability to pay the proffered wage because a corporation is a separate and distinct legal entity from its owners and shareholders, citing *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). We also pointed out that, according to the records of U.S. Citizenship and Immigration Services (USCIS), the petitioner filed an additional Form I-140 on behalf another beneficiary. We noted that the petitioner must establish its ability to pay the proffered wage of the other beneficiary as well as that of the instant beneficiary from the priority date of the instant petition up to the present, citing *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

On November 24, 2014, the petitioner filed a motion to reopen and a motion to reconsider, accompanied by a brief from counsel and supporting documentation which includes copies of the affidavit of [REDACTED] dated April 21, 2014 (previously submitted), individual income tax returns of [REDACTED] (Forms 1040) for 2012 and 2013, corporate income tax returns of [REDACTED] (Forms 1120) for 2012 and 2013, and partnership income tax returns of [REDACTED] (Forms 1065) for 2012 and 2013. The foregoing materials address each of the grounds for denial of the petition.

The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

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.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [USCIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As further provided in 8 C.F.R. § 103.5(a)(4):

A motion that does not meet applicable requirements shall be dismissed.

Based on the petitioner's current submission, we find that the requirements for a motion to reopen have been met. Accordingly, we will grant the motion to reopen. At the same time, we find that the requirements of a motion to reconsider have not been met because the petitioner has not established that our decision dismissing the appeal was incorrect in any respect based on the evidence of record at that stage of the proceeding. Accordingly, we will dismiss the motion to reconsider.

For the reasons discussed hereinafter, we find that the petitioner has failed to overcome all of the bases for denial discussed in our dismissal of the appeal. Therefore, we will affirm our decision to dismiss the appeal, and the petition will remain denied.

Identity of the Petitioning Employer

Based on the entire record, we conclude that the intended employer in this proceeding is [REDACTED] individually. In his current brief counsel points out that the labor certification application, ETA Form 9089, identifies the employer as [REDACTED] (misspelled ' [REDACTED] on the form), notwithstanding the fact that the FEIN of [REDACTED] is also entered on the form. Likewise, the certification notice from the DOL was issued to [REDACTED] (once again misspelled ' [REDACTED], not [REDACTED]. While the immigrant petition, Form I-140, confusingly identifies both the individual and the company as the petitioner, USCIS records identify the petitioner in this case as [REDACTED] not [REDACTED]. Moreover, as counsel points out, the record includes a copy of Form 1099-MISC for 2012 which records "nonemployee compensation" to the beneficiary of \$7,800.00, the payer's name as [REDACTED] and the payer's federal ID number as [REDACTED] SSN. Despite the confusing information entered on the ETA Form 9089 and the Form I-140, therefore, we are persuaded that the petitioning employer in this case is [REDACTED] not [REDACTED]. Accordingly, we will withdraw our finding that the identity of the petitioning employer has not been established.

Beneficiary's Qualifications for the Job Offered

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See* 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 this case, the ETA Form 9089 specifies that a minimum of 12 months of experience in the job offered is required to qualify for the proffered position of farm worker. No specific education or training is required.

In his current brief counsel asserts that the conflicting information provided about the beneficiary's previous employment history is the result of confusing the beneficiary, [REDACTED] with his father, [REDACTED] who has also been employed by [REDACTED]. According to counsel, it is the beneficiary's father, not the beneficiary, who has been employed "intermittently" by [REDACTED] since 1994.⁴ The beneficiary's experience as a farm worker goes back to May 31, 2001, counsel asserts, as stated on the ETA Form 9089. As evidence of this experience counsel cites the resubmitted affidavit of [REDACTED], dated April 21, 2014, who stated that he was a neighbor of [REDACTED] and had known the beneficiary intermittently for seven years, during which time the beneficiary had worked for [REDACTED].

The petitioner's submission on motion does not resolve the myriad conflicts and evidentiary shortcomings we discussed in our previous decision dismissing the appeal. The qualifying experience claimed for the beneficiary on the ETA Form 9089 – from May 31, 2001 to August 21, 2012 – was gained at a farm and ranch in Mexico. No employer letter or any other evidence has been submitted to substantiate this work experience. Nor has any explanation been provided as to how the beneficiary could have worked at two jobs totaling 90 hours per week for a period of eleven years. The petitioner has failed to establish that the beneficiary has any of the qualifying experience listed on the labor certification.

The only evidence of the beneficiary's employment are the affidavits of [REDACTED] and her neighbor, [REDACTED], who state that the beneficiary was working for Ms. [REDACTED] in Texas during some or all of the time period from 2001 up to the present. The affidavits make no mention of any employment in Mexico.⁵ The petitioner offers no explanation for this conflicting narrative of the beneficiary's employment history, or why the employment with [REDACTED] was not listed on the labor certification. In any event, even if the beneficiary did work on Ms. [REDACTED] farm and

⁴ USCIS records indicate that [REDACTED] (A-Number [REDACTED]) arrived in the United States on July 15, 1989. [REDACTED] filed an initial Form I-140 petition on behalf of [REDACTED] on September 10, 2001 ([REDACTED]) which was denied on August 20, 2002. [REDACTED] filed another Form I-140 petition on behalf of [REDACTED] on November 27, 2013 ([REDACTED]), which was approved on September 22, 2014.

⁵ The affidavit of [REDACTED] has little evidentiary weight since it does not meet the substantive requirements of 8 C.F.R. § 204.5(g)(1). This regulation provides that: "Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or the training received." [REDACTED] has never employed the beneficiary and his affidavit lacks a specific description of the beneficiary's job duties with [REDACTED].

ranch, it would not be qualifying experience under the terms of the labor certification because the ETA Form 9089, signed by both the petitioner and the beneficiary, does not indicate at Part J.21 that the beneficiary gained any qualifying experience with the petitioner in a substantially similar position to the farm worker job at issue in this proceeding.

It is incumbent upon an applicant to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No such evidence has been submitted to resolve the inconsistencies in this case. Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.*

For the reasons discussed above, we affirm our previous finding that the petitioner has failed to establish that the beneficiary had 12 months of qualifying experience as a farm worker by the priority date of August 21, 2012, as required on the labor certification to qualify for the proffered position. On this ground alone, therefore, the petition cannot be approved.

Petitioner's Ability to Pay the Proffered Wage

The petitioner must demonstrate its continuing ability to pay the proffered wage as of the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). As previously indicated, the priority date in this case is August 21, 2012. The proffered wage, as stated in Part G on the ETA Form 9089, is \$600 per week (which would amount to \$31,200 per year, based on a work year of 52 weeks). On the Form I-140, however, the wages are stated to be \$19,483 per year. The petitioner has offered no explanation for this discrepancy.

As previously discussed, the petitioner in this case is [REDACTED] individually. She is the sole proprietor of her farm and ranch. A sole proprietorship is a business in which one person operates the business in his or her personal capacity. *See* Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record includes [REDACTED] individual income tax returns for the years 2012 and 2013, which recorded adjusted gross income of \$43,454 in 2012 and \$150,048 in 2013. The Forms 1040

also recorded tax-exempt interest income of \$528,025 in 2012 and \$501,748 in 2013, which counsel indicates derived from [REDACTED] sole ownership of [REDACTED]. These amounts are consistent with the interest income figures recorded on the Form 1065 income tax returns of [REDACTED] for 2012 and 2013. The record also includes a list of [REDACTED] annual expenses which total \$261,900. Subtracting her annual expenses from her annual income, it appears that the petitioner has the ability to pay the proffered wage of the instant beneficiary.

As previously discussed, however, the petitioner filed another Form I-140 for the beneficiary's father in 2013, which was approved in 2014. The petitioner must demonstrate its ability to pay the proffered wage not only of the instant beneficiary, but of every other I-140 beneficiary from the priority date of the instant petition until the other beneficiaries are denied, obtain lawful permanent residence, or cease working for the petitioner. See 8 C.F.R. § 204.5(g)(2); see also *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). In our previous decision we stated that the documentation of record did not show the priority date of the other petition, the proffered wage paid to the beneficiary, the current status of the petition, and whether that beneficiary has obtained lawful permanent residence in the United States. While we have independently ascertained the current status of that petition on behalf of [REDACTED] (approved), the petitioner has not furnished any additional evidence about that petition so that we can ascertain the petitioner's ability to pay the proffered wage of that beneficiary, as well as the instant beneficiary.

Based on the current record, therefore, we determine that the petitioner has failed to establish its continuing ability to pay the proffered wage of the instant beneficiary in addition to the proffered wage of his father from the priority date of August 21, 2012, up to the present. On this ground as well the petition cannot be approved.

Conclusion

Based on the foregoing discussion, we determine that the petition is deniable on the following grounds:

1. The petitioner has failed to establish that the beneficiary has 12 months of qualifying experience as a farm worker, as required in the labor certification to qualify for the proffered position.
2. The petitioner has failed to establish its continuing ability to pay the proffered wage of the instant beneficiary, and its other I-140 beneficiary, from the priority date up to the present

⁶ The income tax returns of [REDACTED] (Forms 1065 for the years 2012 and 2013) show that the partnership is owned 99% by [REDACTED] as an individual limited partner and 1% by [REDACTED] the general partner which is wholly owned by [REDACTED]

Therefore, we will affirm our dismissal of the appeal.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). That burden has not been met in this action.

ORDER: The motion to reopen is granted, and the motion to reconsider is denied. Our dismissal of the appeal is affirmed, and the petition remains denied.