



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF D-W-

DATE: OCT. 9, 2015

MOTION OF ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an individual operating a farm and ranch, seeks to permanently employ the Beneficiary in the United States as a farm worker. *See* Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The Director, Texas Service Center, denied the petition. On October 21, 2014, we dismissed the appeal. On January 13, 2015, we denied the subsequent motion to reopen and reconsider. The matter is now before us on a second motion to reopen and motion to reconsider. The motions will be denied.

Section 203(b)(3)(A)(iii) the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States. The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is August 21, 2012. *See* 8 C.F.R. § 204.5(d). The Director's decision denying the petition concluded that the Petitioner did not establish that the Beneficiary possessed the required experience for the offered position by the priority date.

On October 21, 2014, we found that the Petitioner had not established that the Beneficiary possessed the required experience for the offered position. Beyond the decision of the Director,¹ we found that the Petitioner's identity had not been sufficiently established and the Petitioner did not establish its ability to pay the proffered wage.

On January 13, 2015, we found that the Petitioner had established its identity but that it had not established that the Beneficiary possessed the required experience for the offered position or that the Petitioner had the ability to pay the proffered wage.

¹ 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 (9th 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).

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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 motion. On motion, the Petitioner submits the Form I-290B, a statement entitled “notice of appeal or motion,” an affidavit from [REDACTED] regarding the Beneficiary’s experience, 2013 and 2014 Internal Revenue Service (IRS) Form 1099-MISC, Miscellaneous Income, for the instant Beneficiary and copies of the Beneficiary’s 2013 and 2014 individual tax returns.

The regulations at 8 C.F.R. § 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.” 8 C.F.R. § 103.5(a) provides, that “[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 Service 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.”

The “notice of appeal or motion” statement is an undated addendum to Part 4 of the Form I-290B completed by the Petitioner’s Counsel. The Petitioner contends that the Beneficiary’s experience far exceeds the requisite 12 months of experience as a farm worker and that it has established its ability to pay the proffered wage. While the addendum states reasons for the motion to reconsider, it is not supported by any pertinent precedent decisions to establish that our decision was based on an incorrect application of law or Service policy based on the evidence of record at the time of the initial decision. Therefore, the motion to reconsider is denied.

I. BENEFICIARY QUALIFICATIONS

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. The position also requires the following special skills listed in Part H.14 of the ETA Form 9089: use of tools and equipment such as tractors, welding machine, mowers, chain saws, tree trimmers, post hole, diggers, drills, electric power saws.

On motion, the Petitioner submits an affidavit from [REDACTED] regarding the Beneficiary’s experience. The February 9, 2015, affidavit states that [REDACTED] owns [REDACTED] ranch in [REDACTED] Mexico and that the Beneficiary worked for [REDACTED] from August 2005 to April 2011 as a farmer.³ However, this document, which

² The record reflects that [REDACTED] is the instant Beneficiary’s father and the beneficiary of another Form I-140 immigrant petition filed by the instant Petitioner.

³ The experience stated in the affidavit does not appear on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the

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purports to establish the Beneficiary's experience does not clarify the previously noted inconsistencies in the Beneficiary's experience documentation and contradicts the claimed experience listed on the labor certification. 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). Doubt cast on any aspect of the applicant's evidence also reflects on the reliability of the applicant's remaining evidence. *See id.* Further, 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).

While [REDACTED] affidavit asserts that he employed the Beneficiary in Mexico from August 2005 to April 2011, we noted in our previous decision that U.S. Citizenship and Immigration Services (USCIS) records indicate that [REDACTED] (A-Number [REDACTED] arrived in the United States on July 15, 1989. The Petitioner has not explained how [REDACTED] could have employed the Beneficiary on a farm in Mexico when he was in the United States working for the Petitioner. Additionally, the affidavit is inconsistent with an April 21, 2014, affidavit from [REDACTED]. [REDACTED] affidavit states that he is the Petitioner's neighbor and that the Beneficiary has been employed by the Petitioner for the past seven years (approximately since 2007) in the United States.⁴

Further, [REDACTED] affidavit and [REDACTED] affidavit are both inconsistent with the labor certification which states that the Beneficiary was self-employed as a general manager and farm worker at [REDACTED] Mexico, from May 31, 2001, to August 21, 2012. The labor certification does not list any other employment.

The Petitioner's submission on motion does not resolve the inconsistencies that we discussed in our previous decisions. The qualifying experience claimed for the Beneficiary on the ETA Form 9089 – from May 31, 2001 to August 21, 2012 – was gained with self-employment at a ranch in Mexico. No employer letter or any other evidence has been submitted to substantiate this work experience. The Petitioner has not established that the Beneficiary has any of the qualifying experience or required skills listed on the labor certification.

The Petitioner has not explained why the employment with [REDACTED] was not listed on the labor certification, why [REDACTED] has claimed that the Beneficiary was employed with the Petitioner since 2007 when he was working in Mexico until 2011, or how the Beneficiary was employed by his

beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

⁴ 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 the Petitioner. In previous submissions, letters from the Petitioner regarding the Beneficiary's employment have been retracted due to admissions that these letters were regarding the Beneficiary's father's experience with the Petitioner.

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father in Mexico while his father was in the United States. Further, as we noted in our previous decision, even if the Beneficiary did work on the Petitioner's farm and 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.

For the reasons discussed above, we affirm our previous finding that the Petitioner has not established that the Beneficiary had 12 months of qualifying experience as a farm worker or any of the required skills for the proffered position by the priority date of August 21, 2012, as required on the labor certification to qualify for the proffered position.

II. ABILITY TO PAY

On motion, the Petitioner states that she is an individual and that she established her ability to pay the proffered wage through her tax-exempt revenues from [REDACTED] or [REDACTED] assets.⁵ The Petitioner contends that [REDACTED] is not a separate entity from the individual because it is a Texas limited partnership of which 99% is owned by the Petitioner and 1% is owned by [REDACTED] a Texas corporation solely owned by the Petitioner.

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 Petitioner's contention that [REDACTED] assets can be used to meet her ability to pay the proffered wage because it is a limited partnership and is not a corporation is unpersuasive. While it is true that [REDACTED] is not a corporation, it is not an entity which has a legal obligation to pay the Beneficiary's wage. As such, we cannot consider [REDACTED] assets when considering the Petitioner's ability to pay the proffered wage. Even if [REDACTED] assets were to be considered in the Petitioner's ability to pay the proffered wage, as discussed below, the Petitioner has not provided information required to enable us to determine whether the job offer is realistic.

The Petitioner's contention that her \$35,000.00 monthly stipend from [REDACTED] may be used in determining whether she has the ability to pay the proffered wage was considered in our

⁵ In our decision of January 13, 2015, we withdrew our previous finding that the identity of the Petitioner had not been established, stating that we were persuaded that the petitioning employer is [REDACTED] and not [REDACTED] Properties. We did not, however, make a finding that [REDACTED] is the employer listed on the labor certification. This will be discussed further in section III.

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previous decision.⁶ As discussed in our January 13, 2015, decision, the Petitioner may establish the ability to pay the instant Beneficiary's proffered wage through payment of wages to the Beneficiary, or through the Petitioner's adjusted gross income plus tax-exempt income while taking into account the Petitioner's yearly household expenses. While we found that the Petitioner had established her ability to pay the proffered wage or the difference between the actual wages paid and the proffered wage to one beneficiary, we noted that she did not establish that the job offer was realistic because she did not provide information about another Form I-140 immigrant petition she had filed on behalf of another beneficiary.

USCIS records reflect that the Petitioner has filed one other Form I-140 Immigrant Petition for Alien Worker and that she must produce evidence that her job offer to each beneficiary is realistic. Therefore the Petitioner must establish that she also has the ability to pay the proffered wages to each of the beneficiaries of her pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). *See also* 8 C.F.R. § 204.5(g)(2). As discussed in our October 21, 2014, and January 13, 2015, decisions, the Petitioner did not provide the priority date of the other petition, the proffered wage offered to the other beneficiary, the actual wages paid to the other beneficiary, or whether that beneficiary obtained lawful permanent residence in the United States.

With the instant motion, the Petitioner provided evidence of payment of partial wages to the Beneficiary in 2013 and 2014 which were not included previously. The record also contains evidence of payment of partial wages to the Beneficiary in 2012. However, we are unable to verify that the social security number (SSN) listed on the Forms 1099-MISC issued to the Beneficiary in 2012, 2013 and 2014 belongs to the Beneficiary and that the amounts listed on the Forms 1099-MISC were actually paid to the Beneficiary. In any future filings the Petitioner must provide evidence that the SSN listed on the Forms 1099-MISC belongs to the instant Beneficiary. We also note that the Federal Employer Identification Number (FEIN) listed on the [REDACTED] tax records submitted by the Petitioner does not match the [REDACTED] FEIN listed in public records for [REDACTED]. In any future filings, the Petitioner must address this inconsistency. *See Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).

⁶ It is noted that the \$35,000.00 monthly stipend referenced by the Petitioner in the "notice of appeal or motion" statement actually refers to the tax-exempt dividends the Petitioner receives from [REDACTED]. These amounts are reflected on the Petitioner's tax returns as part of her income from tax exempt interest (Box 8b) and correspond to the [REDACTED] Schedule K issued to the Petitioner. The Petitioner also receives ordinary dividends from [REDACTED] which are reflected in her adjusted gross income.

If the Petitioner is able to demonstrate that the Forms 1099-MISC represent actual wages paid to the Beneficiary, the documents in the record reflect the following:

Tax Year	AGI + tax-exempt income (TEI)	[AGI +TEI] - Expenses⁷	W-2 Wage	Balance Due to Instant Beneficiary	Balance Due to Other I-140 Beneficiary	Total Remaining Balance
2012	\$571,479.00	\$309,579.00	\$7,800.00	\$23,400.00	Unknown	Unknown
2013	\$651,796.00	\$389,896.00	\$16,083.00	\$15,117.00	Unknown	Unknown
2014	Unknown	Unknown	\$15,600.00	\$15,600.00	Unknown	Unknown

While the Petitioner established that she had sufficient income (minus expenses) to pay the proffered wage or the difference between the actual wages paid and the proffered wage to the instant Beneficiary, on motion she has still not established that the job offer was realistic because she did not provide information about the Form I-140 immigrant petition she filed on behalf of another beneficiary.

For the reasons above we affirm our finding that the Petitioner has not established her ability to pay the proffered wage.

III. SUCCESSOR IN INTEREST

Beyond the decision of the director, the Petitioner has not established that it is a successor-in-interest to the entity that filed the labor certification. The Petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

20 C.F.R. § 656.3(1) provides that, in order to satisfy the definition of employer for purposes of a labor certification, an employer must possess a valid FEIN. The answer to question 6 of the DOL's Office of Foreign Labor Certification's frequently asked questions specifically states that all employers, including employers of household domestic workers, must possess a valid FEIN. See

⁷ The Petitioner submitted a list reflecting \$261,900.00 of yearly household expenses.

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www.foreinlaborcert.doleta.gov/faqanswers.cfm (accessed October 7, 2015). The employer listed on the labor certification is [REDACTED] with FEIN [REDACTED]. The Petitioner, as listed on the Form I-140, is [REDACTED] an individual with a SSN. The Petitioner also lists FEIN [REDACTED] on the Form I-140. However, the record indicates that the FEIN listed on the labor certification and Form I-140 was not issued to [REDACTED], an individual; rather it was issued to [REDACTED], a Texas corporation. As is discussed above, even though [REDACTED] may own [REDACTED] as a corporation, it is a separate and distinct legal entity from its owners and shareholders. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The evidence in the record does not demonstrate that the Petitioner, [REDACTED] the individual, is the same entity that filed the labor certification, [REDACTED] with FEIN [REDACTED]. Accordingly, the petition must also be denied because the Petitioner has not established that it is the same entity as, or is a successor-in-interest to, the employer that filed the labor certification.

The burden of proof in these proceedings rests solely 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 sustained that burden.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of D-W-*, ID# 13562 (AAO Oct. 9, 2015)