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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

[redacted]

B6

Date: JUL 07 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The peference visa petition was denied by the Director, Nebraska Service Center, and the petitioner subsequently appealed the director's decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on June 25, 2010. Following the AAO's dismissal, the petitioner filed a motion to reopen and a motion to reconsider on July 23, 2010. On March 28, 2011, the AAO reopened the adjudication, issued a Request for Evidence (RFE), and afforded the petitioner 45 days to provide evidence that might overcome the adverse information. No response has been sent or received thus far. The motion will be dismissed.

The petitioner is a real estate and property management company. It seeks to employ the beneficiary permanently as a maintenance worker in the United States pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3)(A)(iii).[1] As required by statute, a labor certification approved by the U.S. Department of Labor (DOL) accompanied the petition. The director denied the petition, and the AAO dismissed the appeal, finding that the petitioner did not have sufficient net income and net current assets to pay the beneficiary's proffered wage from the priority date until the beneficiary obtains lawful permanent residence. On motion to reopen/reconsider, counsel contends that the AAO has applied an erroneous standard for determining the petitioner's ability to pay and that the AAO's decision is arbitrary.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 United States Citizenship and Immigration Services (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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the motion does not state the new facts to be proved. It states the reasons for reconsideration, and counsel in his brief provides precedent decisions to support the petitioner's contention concerning its continuing ability to pay the proffered wage from the priority date. As discussed below, the motion to reconsider does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Thus, the motion will be dismissed.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Upon reconsideration of the appeal, the AAO finds, based on the evidence submitted, that none of the evidence submitted to demonstrate the ability to pay comes from the petitioning company. In this case, the petitioning company is [redacted] The record shows that Fifth

[1] Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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.

and [redacted] filed both Forms ETA 750 (Application for Alien Employment Certification) and I-140 (Immigration Petition for Alien Worker). However, to demonstrate its ability to pay, the petitioner submitted copies of federal tax returns belonging to a company called "[redacted]" The petitioner also submitted copies of paystubs issued in 2008 and a Form W-2 for 2007 issued to the beneficiary from a company called "[redacted] Inc." as evidence of the petitioner's ability to pay. The evidence in the record does not reflect that the petitioner and the other companies mentioned above are related to each other, or that [redacted] are the successors-in-interest to the petitioner.

On March 28, 2011 the AAO issued an RFE, noting that the assets and income of a corporation and its stockholders cannot be considered in determining another corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 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."

A search of the California Secretary of State's website [redacted] reveals that the petitioner (established on September 24, 1997), [redacted] (established on September 19, 2000), and [redacted] are three distinct and separate companies. The website also shows that all three companies stated above are still in business.[2]

Consistent with [redacted] cannot consider any evidence from [redacted]. as proof of the petitioner's ability to pay the proffered wage, even where the three entities – the petitioner, [redacted] and [redacted] – may be owned by the same individual(s), *unless* the petitioner establishes by a preponderance of the evidence that these other entities – [redacted]. – are the successors-in-interest to the petitioner.

The record in this case contains no evidence that the petitioner became a subsidiary of, merged with, or otherwise was acquired by [redacted] The AAO in the RFE specifically advised the petitioner to submit evidence to demonstrate that either one or both companies are the successors-in-interest to the petitioner.

The AAO afforded the petitioner 45 days to respond and provide evidence establishing the relevance of the evidence from these other entities.

In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal without further discussion since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

More than 45 days have passed and the petitioner has not responded to the AAO's request. Therefore, the motion will be dismissed without further discussion. The burden of proof in these

[2] The California Department of State's website was last accessed on March 16, 2011.

proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion to reopen and reconsider is dismissed.