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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

PUBLIC COPY

[redacted]

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DATE: JUL 20 2011 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the decision. The motion will be dismissed.

The petitioner describes itself as a construction business. It seeks to permanently employ the beneficiary in the United States as a carpenter. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1] The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is February 23, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director's December 9, 2008 decision denying the petition states that the petition was submitted without all of the required initial evidence. The petitioner appealed the decision to the AAO on January 9, 2009. The AAO dismissed the appeal on June 15, 2010. The AAO's decision states that the petitioner failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position as set forth in the labor certification; and the petitioner failed to establish that it was a successor-in-interest to the sole proprietorship that filed the labor certification underlying the petition.

The petitioner filed a motion to reopen and reconsider the decision on July 15, 2010.

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 U.S. Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). 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. *Id.* The instant motion to reconsider is not supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. The motion also does not establish that the decision was incorrect based on the evidence of record at the time of the initial decision. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). Accordingly the motion to reconsider is dismissed.

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)(2). On motion, counsel claims that the petitioner, a corporation, is the successor-in-interest the sole proprietorship that filed the labor certification. Counsel also claims that the beneficiary had received a wage that met or

[1] Section 203(b)(3)(A)(iii) of 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.

exceeded the proffered wage for each year from the priority date, and therefore the petitioner has established the ability to pay the proffered wage.

In support of the first claim, counsel also submits the petitioner's Articles of Incorporation and stock certificate, evidence that the petitioner in active status with the state of California, and a Contract of Cession of Rights and Obligations ("Contract") between the petitioner and the sole proprietorship, dated April 10, 2007. The Contract states that the petitioner assumed "all of the goods and rights related to the operation . . . of the sole proprietor."

If the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984).

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold.[2] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering the precedent decision *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Therefore, a successor-in-interest must not only show that it purchased assets from the predecessor, but assumed the essential rights and obligations of the predecessor necessary to carry on the business

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[2] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

in the same manner. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

The Contract, taken together with the other evidence in the record, is sufficient to establish that the petitioner has assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. However, as is explained below, the petitioner has failed to establish the predecessor's ability to pay the proffered wage for 2004, 2005 and 2006. A successor-in-interest must establish the predecessor entity's ability to pay the proffered wage from the priority date until the transfer of ownership. *See id.*

Specifically, the AAO's decision noted that the record only contained the Schedules C from the predecessor sole proprietor's Forms 1040, U.S. Individual Income Tax Return, for 2004, 2005 and 2006. The decision stated that partial excepts of tax returns do not satisfy the requirements of 8 C.F.R. § 204.5(g)(2). This regulation states that evidence of ability to pay "*shall* be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added). *Id.* Therefore, the petitioner's failure to provide the sole proprietorship's complete tax returns is sufficient cause to dismiss the motion. While additional evidence may be submitted to establish the ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Therefore, since the sole proprietorship's complete tax returns were not submitted for 2004, 2005 and 2006, the petitioner failed to establish the predecessor entity's ability to pay the proffered wage for those years. *See Matter of Dial Auto* at 482 (Commr. 1986).[3]

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[3] The record contains copies of the beneficiary's Forms W-2, Wage and Tax Statement, for 2004, 2005, 2006, 2007 and 2008. The petitioner issued the Forms W-2 for 2007 and 2008, and the predecessor sole proprietorship issued the Forms W-2 for 2004, 2005 and 2006. Except for 2007, the Forms W-2 show that the beneficiary was paid at or above the of $35,360.00 proffered wage each year. The 2007 Form W-2 indicates wages paid in the amount of $12,512.00. The record also contains the beneficiary's 2007 Form 1040, U.S. Individual Income Tax Return. The return states that the beneficiary received $28,560.00 in wages from the predecessor entity in addition to $12,512.00 in wages from the petitioner. The tax return also states that the beneficiary did not receive a Form W-2 from the predecessor. Taking into account all of the evidence in the record, it is concluded that the petitioner has established that, in 2007, the wages paid to the beneficiary by the petitioner and the sole proprietorship totaled $41,072.00, an amount that exceeds the proffered wage of $35,360.00. Therefore, the petitioner has established that it and/or the predecessor sole proprietorship paid the beneficiary a wage that met or exceeded the proffered wage in 2004, 2005, 2006, 2007 and 2008. If the petitioner establishes by documentary evidence that it paid the beneficiary a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay, but only if the petitioner has submitted the

The AAO decision also concluded that the petitioner failed to establish that the beneficiary is qualified for the offered position. 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)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 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. 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. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

The labor certification submitted with the petition in the instant case states that the offered position requires one year of experience in the job offered. Evidence submitted to establish the beneficiary's qualifying experience must be in the form of letters from current or former employers and include the name, address, and title of the writer, and a specific description of the duties performed. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A); *see also,* 8 §C.F.R. § 204.5(g)(1). The AAO's decision concluded that there was no evidence in the record establishing the beneficiary's experience in the job offered. The petitioner failed to address this additional basis of the dismissal on motion. Thus, the petitioner has still not established that the beneficiary possesses the one year of experience required to perform the offered position. 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. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, it is noted that a motion must be accompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding. 8 C.F.R. 103.5(a)(1)(iii). The petitioner's motion does not contain this required statement. The motion to reopen and reconsider must therefore also be dismissed for this reason.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty,* 502 U.S. 314, 323 (1992)(citing *INS v. Abudu,* 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu,* 485 U.S. at 110. The petitioner has not met that burden.

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documentation required by 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit tax returns, annual reports or audited financials statements for each year from the priority date. The petitioner has failed to do so.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. Accordingly, the motion will be dismissed and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.