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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

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[redacted]

DATE: FEB 2 4 2012 Office: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Texas Service Center. It then came before the Administrative Appeals Office (AAO) on appeal. On December 13, 2011, this office provided the petitioner with notice of adverse information in the record and afforded the petitioner an opportunity to provide evidence that might overcome this information.

The petitioner is a kosher food services business. It seeks to employ the beneficiary permanently in the United States as a kosher food production manager. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the two years of experience that is stated on the labor certification. Therefore, the director denied the petition.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On December 13, 2011, this office notified the petitioner that according to the records, M.S.Y., Inc.'s status is not in good standing in the state of New York, and that its current status is inactive.

This office also notified the petitioner that, if it is currently not in good standing, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. *See Matter of Ho*, 19 I&N Dec. 582, 586 (BIA 1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See id.*

In response to the AAO's Notice of Intent to Dismiss (NOID), counsel asserts that [redacted] is the successor-in-interest to [redacted] and that the former is doing business in the same neighborhood, with the same ownership, business and clientele. The president of the petitioner, [redacted] asserts that he was the sole shareholder in [redacted] and that he is now the sole shareholder in the new company [redacted] The president further asserts that the new company, [redacted] is doing the same business and has the same customers and is located in the same town as [redacted] The petitioner submitted for [redacted] a statement of the owner, a New York State Certificate of Incorporation Receipt, a statement from the IRS issuing a Federal Tax I.D. Number, and a recent unaudited profit and loss statement. However, the petitioner did not submit any evidence of its

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

alleged successor-in-interest relationship with [redacted] 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the petitioner that filed the labor certification and petition is a different entity from [redacted] for which the certificate of incorporation receipt, IRS Federal Tax I.D. number notice, and unaudited profit and loss statement was submitted as evidence of the petitioner's ability to pay the proffered wage.

Counsel asserts, and the petitioner's president implies, that [redacted] is a successor-in-interest to [redacted] The petitioner's president indicated in his statement submitted in response to the AAO's NOID that he is the sole owner of the petitioner and the new corporation; and that [redacted] naturally assumed the business that he was conducting as M.S.Y., Inc. The petitioner submitted the above noted evidence. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The record contains no evidence to establish a valid successor relationship. There is no evidence of the organizational structure of the predecessor prior to the alleged transfer, or the current organizational structure of the successor. The evidence does not establish that the petitioner acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the alleged ownership transfer.

The fact that the petitioner's president claimed ownership of [redacted] is not sufficient alone to establish a successor-in-interest relationship. Regardless, the petitioner's president's name does not appear on any of the documentation submitted on behalf of [redacted]. Therefore, the evidence in the record is not sufficient to establish that the [redacted] is a successor-in-interest to [redacted]. that apparently ceased its operations on January 26, 2011. Thus, the appeal is moot.[2]

The petitioner's status was dissolved by the state of New York on January 26, 2011. The petitioner's corporate status remains inactive in New York, and shall be inactive until such time that the petitioner revalidates its status. As such, the petitioner does not exist under New York law and could not conduct business in that state as a legal non-entity. The job offer no longer exists. Although the petitioner's owner may wish to offer a job to the beneficiary through his new corporation, the labor certification approved for [redacted] cannot be used for this purpose absent evidence of a successor-in-interest relationship. *See* 20 C.F.R. § 656.30(c)(2).

Finally, it is noted that, if the AAO were to consider the merits of the instant appeal, it would dismiss the appeal for the same reasons as the director.

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.

ORDER: The appeal is dismissed.

[2] As noted in the notice of intent to deny, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.