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

(b)(6)

DATE: MAY 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, initially denied the preference visa petition. On appeal, the Administrative Appeals Office (AAO) remanded the matter to the director, who ultimately denied the petition on September 17, 2011. The matter is now before the AAO on appeal for the second time. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification[1] (labor certification), approved by the United States Department of Labor (DOL). The director's September 17, 2011 decision determined that the minimum requirements for the position offered, as set forth on the labor certification, exceeded the statutory requirements of the other worker classification sought in the petition. Further, the director found that the petitioner had not demonstrated the beneficiary met the minimum qualifications for the proffered position as set forth on the labor certification. Accordingly, the director denied the petition.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 17, 2011 denial, the issues in this case include: (1) whether the other worker classification that the petition seeks is supported by the underlying labor certification; and (2) whether the petitioner has demonstrated that the beneficiary meets the minimum qualifications of the proffered position, as set forth in the labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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

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[1] The record indicates that the petition was filed on January 7, 2008 without the accompanying original labor certification, and was, therefore, initially denied on that basis by the director on January 24, 2009. The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any Form I-140, Immigrant Petition for Alien Worker, filed under the preference category of section 203(b)(3) of the Act be accompanied by a labor certification. Further, the labor certification must be submitted in the original. 8 C.F.R. §§ 103.2(b) and 204.5(g). In this case, the petitioner did not file the original approved labor certification until February 19, 2009, when the petitioner filed a motion to reopen, which USCIS subsequently granted. We note that all labor certifications approved prior to July 16, 2007 expired within 180 calendar days of that date, unless filed in support of an I-140 petition with USCIS prior to the expiration of the 180 days. 20 C.F.R. § 656.30(b)(2). Here, the labor certification, which was approved on April 17, 2007, was already expired by the time it was finally filed with USCIS, and therefore, could no longer support a Form I-140. However, as indicated, it appears that the director granted the petitioner's motion to reopen and permitted the late filing of the original labor certification.

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.

Here, the Form I-140 was filed on January 7, 2008. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing a petition for an "other worker" by checking box "g" in that section.

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.[2] On appeal, counsel states the beneficiary has the requisite 24 months of experience indicated on the labor certification for the proffered job and asserts that the inconsistencies raised by the director regarding the beneficiary's work experience were due to error committed by prior counsel who prepared the labor certification. Counsel does not address, however, the director's initial determination the other worker classification sought in the petition is not supported by the labor certification.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, as noted, the labor certification requires a minimum of 24 months experience in the proffered job. However, the petitioner requested the other worker classification on the Form I-140, which requires no specific education, training or experience requirements. Accordingly, the minimum requirements of the proffered position on the labor certification exceed the statutory definition of the other worker category, placing the position within the skilled worker category. Moreover, we note that the AAO previously raised this issue in its April 15, 2011 decision, which remanded the proceeding to the director.[3] The petitioner was placed on notice about the discrepancy between the minimum requirements of the proffered position in the labor certification and the classification sought in the Form I-140. However, the petitioner did not seek on remand to amend the Form I-140 to reflect the classification of skilled worker, which has the same minimum requirements as those certified in the labor certification. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification, once the decision has been rendered. A petitioner may

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Counsel requested an additional 30 days to submit evidence on the Form I-290B. However, as of the date of this decision, the petitioner has not submitted a brief or additional evidence. The AAO, therefore, will consider all evidence received to date in the record of proceeding in its decision.

[3] A *complete* original labor certification, signed by the petitioner and beneficiary, was not before the AAO, even at that time.

not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence in the record does not establish that the labor certification requirements for the position offered requires less than two years of experience or training, such that the beneficiary could be found qualified for classification as an "other worker" on the petition. Therefore, the petitioner has not demonstrated its eligibility for the instant petition under section 203(b)(3)(A)(iii) of the Act.

The director also found that the petitioner had not established that the beneficiary met the minimum requirements for the position as set forth on the labor certification. In our prior decision, the AAO noted discrepancies[4] in the record relating to the beneficiary's work experience. We further noted that, given such discrepancies, which were not addressed or explained in the record at that time, the evidence also failed to establish that the beneficiary had the requisite 24 months of work experience prior to the January 29, 2001 priority date. On remand, the petitioner again failed to specifically address or explain the inconsistencies raised by the AAO. Instead, in response to a Request for Further Evidence (RFE), issued May 23, 2011 by the director, counsel submitted another employer letter, dated August 15, 2011, from a different employer, , in Victorville, CA, stating that it had employed the beneficiary as a full time cook from September 10, 1995 to May 20, 1999. The director did not consider this letter as it was untimely. However, the AAO observes that this new letter raises additional discrepancies, in part because this employment experience was never indicated on the labor certification. *See Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976) (noting in dicta that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted). As noted in our prior decision, it is incumbent on 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel contends that the inconsistencies raised by the director (and the AAO) were the result of error or "ineptitude," on the part of prior counsel, who prepared the labor certification. Furthermore, although the petitioner appears to be claiming that its prior counsel was incompetent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada,*19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. The unsupported 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).

Although counsel requested an additional 30 days on the Form I-290B to obtain evidence that the

[4] As the discrepancies were adequately addressed in detail both in our prior decision and in the director's September 17, 2011 decision, we need not set them forth again here.

beneficiary had the requisite 24 months of work experience, the AAO has yet to receive any brief or additional evidence as of this decision, approximately eighteen months later. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel.

There is no evidence in the record to overcome the director's finding, or to overcome the inconsistencies in the record regarding the beneficiary's purported experience. Therefore, the petitioner has failed to demonstrate that the beneficiary met the minimum requirements of the position offered as set forth on the labor certification as of the priority date.

Additionally, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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 the AAO conducts appellate review on a *de novo* basis).

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Where there is a successorship, the petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482. Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

The record before the director closed on August 24, 2011 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2010 federal income tax return was the most recent return available. However, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for the years 2008 through 2010.[5]

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[5] The record contains the tax returns for the sole proprietor on the labor certification from 2001 through 2003 and for the petitioning corporation on the Form I-140 from 2004 to 2007. 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 (IRS 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). Here, the AAO notes that the

The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

The AAO notes also that if the petitioning organization is no longer in business, then no *bona fide* job offer exists, and the petition and appeal would be therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioning organization's business. *See* 8 C.F.R. § 205.1(a)(iii)(D). Here, the employer listed on the labor certification, a sole proprietor business, has a different federal employer identification number than the petitioning entity on the Form I-140, which is a S corporation of the same name and address. They appear to be two separate and distinct entities. The petitioner was put on notice of this issue in the AAO's previous decision. However, no evidence in the record of proceeding before the AAO addresses this issue. Therefore, it is unclear whether the petitioner continues to operate or if there is a *bona fide* successorship. The petitioner may establish a valid successor relationship with the original employer on the labor certification for immigration purposes so long as certain requirements are met. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*"). These requirements were set forth in the AAO's prior decision, which notified the petitioner of the obligation to demonstrate that it was a *bona fide* successor-in-interest to the sole proprietor of the same name that is listed on the underlying labor certification. *See* AAO Decision, issued April 15, 2011, at n. 3. On remand, however, the petitioner failed to address or submit evidence to demonstrate its *bona fide* successor-in-interest status.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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sole proprietor's adjusted gross income from 2001 through 2003 is greater than the proffered wage. However, the sole proprietor has not provided a statement setting forth a list of monthly expenses to enable the AAO to determine whether the reported income is sufficient to support the sole proprietor and his or her dependents, as well cover the proffered wage. In any future filings, the petitioner should provide the sole proprietor's monthly expenses for each year from the priority date onward.