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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 1 3 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Josh for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Texas Service Center and came before the Administrative Appeals Office (AAO) on appeal. This decision was affirmed and the appeal was dismissed by the AAO on February 21, 2013. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO, dated February 21, 2013, will be affirmed, and the petition will remain denied.

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a store manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). As set forth in the director's decision issued on August 3, 2009, the director determined: (1) that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward; and (2) that the labor certification was no longer valid because it had apparently been used by original beneficiary to adjust status. The director denied the petition accordingly. The petitioner appealed the director's decision to the AAO. The AAO determined: (1) that the beneficiary had been properly substituted to the original labor certification,[1] and the labor certification had not been used by the original beneficiary as previously thought; (2) that the appellant had established a successor-in-interest relationship to the labor certification employer; and (3) that the predecessor entity had not shown its ability to pay the proffered wage from the priority date until the date of the successorship on November 30, 2007, specifically for the years 2005 and 2007.[2]

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.

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 or motion.[3]

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.

---

[1] The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, the requested substitution is permitted.

[2] The AAO notes that the record contains a business organizations inquiry which states that the predecessor's "Certificate of Termination" was issued on November 29, 2010, several years after the successorship relationship was established. In any further filings, the petitioner should resolve this discrepancy.

[3] 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).

The AAO notes that counsel submitted Form I-290B, Notice of Appeal or Motion, on March 22, 2013, indicating that the petitioner was filing a "motion to reopen and reconsider" the AAO's decision. In Part 3 of Form I-290B, the petitioner requests an extension of time to collect and submit the predecessor's insurance, income statements, state sales tax records and other evidence regarding its ability to pay the proffered wage. A motion to reopen must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The instructions to Form I-290B, which are incorporated by reference into the regulations, do not permit additional time for the submission of a brief or additional evidence. *See* 8 C.F.R. § 103.2(a)(1). Neither the petitioner nor counsel submitted any additional documentation after the March 22, 2013 filing.

At issue on motion is whether the predecessor had the ability to pay the beneficiary's proffered wage in 2005 and 2007.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on August 12, 2005. The proffered wage as stated on the ETA Form 9089 is $45,500.00 per year.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[4] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

---

[4] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

In the instant case, the predecessor's net income for 2005 and 2007 amounted to $22,124.00 and $10,535.00, respectively. The predecessor's net current assets amounted for 2005 and 2007 amounted to $35,724.00 and $41,872.00, respectively. Counsel asserts in the Form I-290B, Notice of Appeal or Motion, that the petitioner suffered property casualty loss in December 2005, as a result of Hurricane Katrina, which allegedly affected its net income and net current assets for that year. However, the record does not contain any evidence of the alleged property damage. 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). Further, 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)). Therefore, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the predecessor had the ability to pay the proffered wage despite its amounts of net income and net current assets for 2005 and 2007.

Additionally, USCIS records indicate that the petitioner has filed I-140 petitions on behalf of multiple other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). In any future filings, the petitioner must provide evidence of its ability to pay the proffered wages for each beneficiary for whom it has file I-140 petitions from the priority date of the instant case onward. Such evidence must include: the priority date of each petition; the proffered wage or wages paid to each beneficiary; whether any of the other petitions have been withdrawn, revoked, or denied; or whether any of the other beneficiaries have obtained lawful permanent residence.

Therefore, the petitioner has failed to overcome the AAO's grounds for denial. The petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onward.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reopen is granted, and the decision of the AAO dated February 21, 2013 is affirmed. The petition remains denied.