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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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B6

FILE: [REDACTED]
SRC 03 022 50153

Office: TEXAS SERVICE CENTER

Date: **AUG 19 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, revoked the approval of the employment-based immigrant visa petition. The beneficiary filed a motion to reopen and reconsider the decision. The director dismissed the motion as improperly filed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected and the petition's approval will remain revoked.

The instant petition was filed on October 28, 2002. On the petition, the petitioner claimed to be a Japanese restaurant. It sought to employ the beneficiary permanently in the United States as a cook, Japanese food. The petitioner requested classification of the beneficiary as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹

As required by 8 C.F.R. § 204.5(l)(3), the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the Department of Labor (DOL). The priority date of the instant petition is April 16, 2001, the date the labor certification was filed with the DOL. See 8 C.F.R. § 204.5(d). The labor certification states that the position requires two years of experience in the job offered. On the labor certification, signed by the beneficiary on April 11, 2001, the beneficiary claimed to have previously worked for Dusit Thani Fulbari Resort in Pokhara, Nepal, from June 1997 until November 1999.

U.S. Citizenship and Immigration Services (USCIS) approved the petition on September 13, 2005. On February 15, 2006, the beneficiary was granted lawful permanent resident status.

The beneficiary's spouse and two children subsequently filed immigrant visa applications with the Department of State as derivative beneficiaries. The consular section of the U.S. Embassy in Kathmandu, Nepal processed the immigrant visa applications. During the application process, the consular section investigated the beneficiary's claimed work experience. According to the consular section, the human resources department of the alleged former employer stated that it had no record of the beneficiary's prior employment. Based on its investigation, the consular section denied the immigrant visa applications on November 9, 2006, and recommended that USCIS revoke the beneficiary's immigrant status.

On November 30, 2007, USCIS issued a notice of intent to revoke the approval of the instant petition pursuant to 8 C.F.R. § 205.2. On January 2, 2008, counsel submitted a response. On February 6, 2008, USCIS issued a notice of revocation of the petition's approval (NOR). The NOR concludes that the labor certification was fraudulently obtained. The NOR incorrectly states that the decision could not be appealed.²

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

²A petitioner may appeal the decision to revoke a petition approval pursuant to 8 C.F.R. § 205.2 within 15 days after the service of notice of the revocation. 8 C.F.R. § 205.2(d).

On March 10, 2008, the beneficiary filed a motion to reopen and reconsider (MTR) the decision to revoke the petition's approval. The brief in support of the MTR states that the petitioner no longer exists, "has no vested interest in this petition and does not wish to participate in proceedings."³ Therefore the beneficiary "files this motion to reopen as the only remaining interested party." The MTR claims that the beneficiary worked for the petitioner's "successor-in-interest" through February 2008.⁴

The brief in support of the MTR argues that USCIS erred in stating that the revocation of the petition's approval could not be appealed. The brief also claims that USCIS erred in not providing additional time to respond to the notice of intent to revoke the petition's approval. The MTR also included additional evidence of the beneficiary's employment with Dusit Thani Fulbari Resort Hotel.

On May 9, 2008, USCIS dismissed the MTR as improperly filed, stating that the beneficiary cannot file an MTR.⁵

On June 11, 2008, counsel appealed the dismissal of the MTR to the AAO. The appeal includes a Form G-28, Notice of Entry of Appearance as Attorney or Representative, from the former owner of the petitioner. The brief in support of the appeal states that the petitioner was formally dissolved on October 31, 2006. Counsel claims that "regardless of the procedural posture of the motion to reopen, [the] process and decision in revoking [the petition's approval] was so fraught with error as to

³The Kentucky Secretary of State Online Business Database states that the petitioner was administratively dissolved on November 8, 2004, reinstated on September 16, 2005, and administratively dissolved again on November 2, 2006. The petitioner's records are available at [REDACTED] (accessed August 18, 2009). The petitioner's current status is listed as "Inactive" and its standing is listed as [REDACTED]." *Id.*

⁴The record of proceeding contains no evidence of a successor-in-interest relationship between the petitioner and any purchasing entity. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

⁵The regulation at 8 C.F.R. § 103.5(a) requires an MTR to be filed by the "affected party". The regulation at 8 C.F.R. § 103.3(a)(1)(i)(B) defines "affected party" as "the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition."

constitute a nullity; and should have resulted in a *sua sponte* reopening by [USCIS]." Counsel also claims that the director's statement that the petitioner could not appeal the revocation of the petition's approval should have voided the NOR.

A motion to reconsider or reopen must be filed by an "affected party." *See* 8 C.F.R. § 103.5(a). The regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) defines "affected party" as "the person or entity with legal standing in a proceeding. *It does not include the beneficiary of a visa petition.*" (Emphasis added). Therefore, the beneficiary is unable to file a motion to reopen or reconsider a prior USCIS decision. Further, by counsel's admission, and according to the Kentucky Secretary of State Online Business Database, the petitioner no longer exists and there is no evidence in the record of proceeding of a successor-in-interest to the petitioner.⁶ Accordingly, counsel's submission of a new G-28 on appeal, signed by the former owner of the now-defunct petitioner, does not change the fact that the MTR was not filed by an "affected party."

Further, neither the beneficiary nor the former owner of the petitioner are eligible to appeal the director's decision to dismiss the MTR. The regulation at 8 C.F.R. § 205.2(d) states that the "*petitioner or self-petitioner* may appeal the decision" to revoke the approval of the petition. (Emphasis added). And the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B) also prohibits a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal. In this case, the appeal was not filed by an affected party because the beneficiary has no standing, the petitioner's owner no longer has standing as the petitioner has been dissolved,⁷ and there is no evidence that a successor-in-interest has acquired all of the rights, duties, and obligations of the petitioner and consented to the filing of the appeal. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

As the appeal was not properly filed, it must be rejected.

ORDER: The appeal is rejected.

⁶Going 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)).

⁷It is noted that the petitioner had been dissolved for over a year when USCIS revoked the petition's approval.