

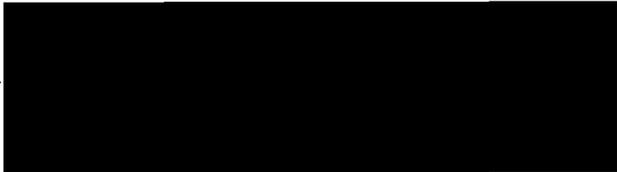
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



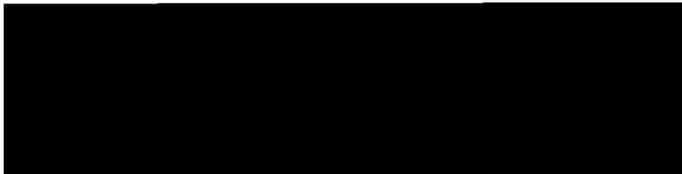
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Date: JUN 17 2011 Office: VERMONT SERVICE CENTER FILE: [REDACTED]

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:



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,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, initially approved the immigrant visa petition on October 12, 2001. However, on March 6, 2009, the director reversed its decision and revoked the approval of the petition. On March 19, 2009, an entity called [REDACTED] filed an appeal with the Administrative Appeals Office (AAO). In adjudicating the appeal, the AAO found that the original petitioner's business status [REDACTED] according to the Maryland Department of Assessment and Taxation, had been forfeited.¹ On November 8, 2010, the AAO sent a notice of derogatory information (NDI), alerting the original petitioner to this fact. The AAO's NDI specifically states that where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. In response to the NDI, the petitioner did not dispute that its business had been closed in 2004, but counsel for the petitioner asserted that the petitioner and India [REDACTED] had merged and become one (1) corporation. [REDACTED], however, failed to submit sufficient evidence to demonstrate that the two corporations merged and became one corporation. On January 3, 2011, the AAO dismissed the appeal as moot, accordingly. The AAO further affirmed the director's finding of fraud and material misrepresentation against the petitioner and invalidated the labor certification.² [REDACTED] has filed a motion to reopen and a motion to reconsider the AAO decision. The motion will be dismissed.³

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).⁴ As required by statute, the petition is accompanied by a

¹ The definition of forfeited as provided by the Maryland Department of Assessment and Taxation is as follows:

For a Maryland entity, its existence has been ended by the State for some delinquency. For a non-Maryland entity it means its authority to do business and legal presence here has been terminated. For a trade name it means the filing has lapsed after 5 years and not been renewed.

² When USCIS (including the AAO) invalidates the labor certification, the approval of the petition is by law automatically revoked. See 8 C.F.R. § 205.1(a)(iii)(D). The petition, without a valid labor certification, could not be approved under any circumstances. See 8 C.F.R. § 204.5(a).

³ The AAO notes that the motion could additionally be rejected as improperly filed pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1), since the party filing the motion in this case is not the same party that originally filed the petition. The petitioner [REDACTED] and the party filing the appeal/motion [REDACTED] appear to be two distinct and separate entities. Therefore, the party filing the motion in this case is not the affected party, as defined by the regulation at 8 C.F.R. § 103.3(a)(1)(iii)(B). However, as the successor-in-interest issue is still at issue in the proceedings, the motion will not be rejected as improperly filed.

⁴ 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

Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As noted above, the petition was initially approved in 2001, but was later revoked in 2009. The director revoked the approval of the petition, finding that the labor certification was obtained through fraud, that the beneficiary did not intend to work full-time for the petitioner if his application to adjust status were to be granted, that the petitioner had no ability to pay the proffered wage, and that the petitioner's business had been closed and there was no evidence of successorship-in-interest to [REDACTED]. The AAO agreed.

On motion to reopen/reconsider, counsel for the petitioner, among other things, asserts that the appeal should not have been dismissed as moot since [REDACTED] and [REDACTED] (the original petitioner) have merged and have become one (1) company. As evidence of the assertions, counsel submits a copy of a letter sent by the Internal Revenue Service (IRS) to [REDACTED]. The IRS sent this letter because the owner of [REDACTED], and [REDACTED] – previously sent a letter inquiring about the procedure to merge two companies.

[REDACTED] letter to the IRS reads:

Re: [REDACTED]

My name is [REDACTED] and I am the president of both above mentioned Corporations [referring to [REDACTED] and [REDACTED]]. I would like to merge these two corps into one in [REDACTED]. and keep my [REDACTED]. If you can tell me what's [sic] the procedure of doing that or this letter will do the job. If so, Can [sic] you please confirm this merger by writing us.

The response from the IRS states:

When a merger occurs the surviving corporation should continue to use the established taxpayer identification number. The discontinued business should file its last returns marked "Final" showing the date it last conducted business.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). 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 USCIS policy. 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

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.

Here, the motion does not state new facts to be proved in the reopened proceeding. Nor does it provide reasons for reconsideration. The letter from the IRS offers no new facts to the instant proceeding, nor does it shed new light as to the issue of merger between the original petitioner and the party filing the appeal/motion. The AAO has determined earlier that [REDACTED] is not the successor-in-interest to the original petitioner. The record contains no articles of merger or other documentation showing the merger, or combining of assets and interests of the two companies. The record also does not include explanation why [REDACTED] was unable to produce such evidence. 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)).

On motion, counsel also contends that the AAO's finding of fraud or material misrepresentation against the petitioner is not supported by the evidence of record, that the beneficiary is qualified to perform the duties of the position, and that the beneficiary had the requisite work experience before the priority date. No new evidence, however, has been submitted to rebut the AAO's conclusions. 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).

As the motion to reopen/reconsider does not state any new facts, provide new evidence, or indicate reasons as to why the AAO's decision should be reconsidered, the motion must be dismissed.

ORDER: The motion is dismissed.