

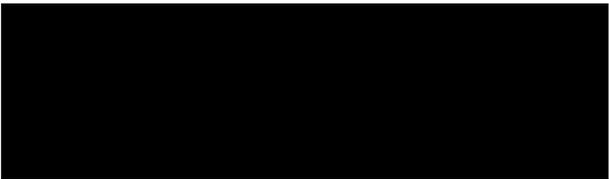
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: FEB 06 2012 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion but affirm the previous decision of the director and the dismissal of the appeal. The petition remains denied.

The petitioner, [REDACTED],¹ operates as a supermarket. It sought to employ the beneficiary permanently in the United States as a butcher.² As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that [REDACTED] had not established that it is the successor-in-interest to the petitioner and that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage³ and denied the petition accordingly on February 11, 2008.⁴

The AAO dismissed the appeal⁵ on May 24, 2011. The AAO explained that in order for The

¹ Part of the confusion in this case is that the petitioner on the Form I-140, Immigrant Petition for Alien Worker, was erroneously specified as the [REDACTED],” but the new employer, The [REDACTED], should have filed the Form I-140 itself as the claimed successor-in-interest with all relevant documentation supporting the successor relationship.

² Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified 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.

³ The regulation at 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

⁵The AAO conducts appellate review on a *de novo* basis. The AAO’s *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

██████████, Inc. to use the Form ETA 750 approved for ██████████ on behalf of the beneficiary, ██████████. ██████████ must establish that it is the successor-in-interest to ██████████. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). *Matter of Dial Auto* was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) states that precedent decisions are binding on all immigration officers in the administration of the Act. The petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. 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.

Following a review of the record,⁶ the AAO determined on appeal that it had not been established that ██████████ is a successor-in-interest to ██████████ Supermarket, the entity listed on the certified labor certification, and the stated petitioner on Form I-140. In discussing the December 2005 sale agreement between ██████████, ██████████,⁷ the AAO noted:

The petitioner has not established that it transferred to ██████████ the essential obligations necessary to carry out the business in the same manner. As noted by the director, the buyer did not accept the liabilities of the seller. The seller states that Section 1.3 is to protect the purchaser by requiring the

⁶The record suggests two transfers; 1) ██████████ on behalf of ██████████ Supermarket to ██████████ on behalf of ██████████, on December 17, 2005, and; 2) ██████████'s purchase of ██████████ from ██████████ on June 15, 2007.

⁷This agreement appeared to be executed before ██████████ was incorporated in the state of New York, which the record indicates was February 6, 2006.

seller to disclose all liabilities. Nevertheless, the section clearly states that the purchaser shall not assume any of the liabilities of the seller, except those disclosed on schedule 1.2.1(b). There are no disclosed liabilities on schedule 1.2.1(b).

The AAO additionally determined:

Further, there is little evidence that the operation of the business remains the same following the transfer of ownership, and following the recent expansion of the physical plant as described in the record. Finally, as discussed below, the petitioner has not established that it has the ability to pay from the date of transfer of ownership forward. Thus, the record does not establish a valid successor relationship between the petitioner and [REDACTED]. As such, the petition is not accompanied by an approved labor certification on behalf of [REDACTED]. The petition must be denied for this reason.

The AAO continued to find that the petition could not be approved even if it were to consider both the ability to pay of [REDACTED] and the ability to pay of [REDACTED].⁸ As noted by the director, the petitioner had filed 20 other petitions since 2003. In the response to the AAO's request for evidence of specific information relevant to six of the beneficiaries claimed by [REDACTED] original owner, [REDACTED], he claimed to have no specific memory of six of the individuals for whom he admitted to have sponsored. Additionally, with respect to the immigrant petitions filed on behalf of 20 other beneficiaries, the petitioner admits that many of the filings are fraudulent.⁹ The AAO found that it could not determine which of these were fraudulent and which of these were not, given that [REDACTED] could not provide the names of any of the beneficiaries for whom he filed applications for labor certifications, other than the current beneficiary. The AAO could not conclude, without further investigation, that the petitioner is not responsible to pay the wages of the other sponsored beneficiaries. For this reason, the AAO could not make a positive

⁸ Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its job offer to a beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

⁹ See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). 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. This admission casts doubt on the petition and evidence offered in support.

determination of the petitioner's ability to pay the proffered wage of \$23,400 per year.¹⁰

Further, even if considering only the instant beneficiary's proffered wage of \$23,400, the AAO found that the ability to pay had not been demonstrated from the priority date onward through the examination of the financial information submitted. It concluded that although [REDACTED] Discount Supermarket's Form 1120 net income appeared to be sufficient to cover the proffered wage from 2001 to 2005, the asserted successor, [REDACTED] financial data could not establish its continuing ability to pay from 2006 through 2009. In each of those years, it reported significant losses in both net income¹¹ and significant losses in net current assets in each year as detailed in the AAO's May 24, 2011 decision. Neither source was sufficient to pay the proffered wage. The AAO additionally determined that the petition did not warrant approval pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).¹²

On June 23, 2011, the petitioner, through counsel, filed a motion to reopen and reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits additional evidence

¹⁰Neither counsel nor the petitioner addressed the issue of the additional beneficiaries with its motion, but rather asserts only that it has the ability to pay this beneficiary based on the documentation submitted. As noted in the AAO's prior decision, without resolution of the petitioner's total filings, the AAO cannot adequately determine the petitioner's ability to pay the proffered wage to this beneficiary.

¹¹With exception of 2006, in which the net income was still negative, -\$4,562, but a smaller loss was reported.

¹²The AAO noted:

Unlike *Sonogawa*, [REDACTED], Inc. has not submitted any evidence, explaining why the company was unable to generate sufficient income or why it did not have sufficient net current assets to pay the beneficiary's wage from 2006 [onward]. Counsel for [REDACTED], Inc. indicates on appeal that the business had to be closed for 11 months due to major building reconstruction between September 2007 and August 2008. Even if we consider this factor as the reason why [REDACTED], Inc. could not pay the proffered wage in 2007 and 2008, this factor alone does not explain why [REDACTED], Inc. was unable to pay the proffered wage in 2006 and 2009. The record contains no evidence that reflects the occurrence of an uncharacteristic business expenditures or loss in 2006 and 2009 that would explain [REDACTED] Inc.'s inability to pay the proffered wage in those years.

related to the asserted successor relationship and The [REDACTED] ability to pay the proffered wage.

With the motion, counsel provides the following:

- 1). An undated letter from [REDACTED], Director of Operations of The [REDACTED], [REDACTED] has paid outstanding invoices and debts from vendors that supplied [REDACTED] food products to the asserted predecessor [REDACTED] Discount Supermarket, Inc.
- 2). An undated letter from [REDACTED], Brooklyn, New York, signed by [REDACTED], President, stating that The [REDACTED] "has paid towards the outstanding debts from (and open invoices with) its predecessor company, [REDACTED]. The amount of these payments totaled approximately \$24,000."
- 3). A copy of The [REDACTED], Inc.'s 2010 federal tax return.
- 4). A copy of an unaudited financial statement covering 2009 and 2010.

Counsel asserts that the two letters establish that The [REDACTED] Inc. is the successor-in-interest to the initial labor certification applicant, [REDACTED]. The AAO does not concur. First, it is noted that the director's request for evidence issued on October 1, 2007 requested that the petitioner provide evidence of the sale of the business that must include copies of any documents recording the sale (and the assets and liabilities transferred in the sale). The request for evidence was to elicit information that clarifies whether eligibility for the benefit sought had been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not consider evidence offered for the first time on motion when it could have been submitted earlier. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*¹³ Under the circumstances, the AAO need not, and does not, consider the sufficiency of the letters submitted on motion. Second, as noted above, the letter from [REDACTED] is undated and only confirms a payment "toward" outstanding obligations. [REDACTED]' letter is also undated and vague. Neither establishes the total amount of liabilities held by [REDACTED] and neither undated document demonstrates when these liabilities were settled. They do not support the December 2005 sale agreement previously submitted to the record.¹⁴ Going on

¹³ The petitioner also did not submit such documentation on appeal in response to the director's determination that a successorship was not established, but only for the first time with the instant motion to reopen.

¹⁴ As noted above in the AAO's prior decision:

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)). 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evidence submitted on motion does not resolve the inconsistencies set forth in the director and AAO's prior decisions and does not establish that The [REDACTED], Inc. is the successor-in-interest to the initial labor certification applicant, and I-140 petitioner, [REDACTED] Discount Supermarket as of the date of transfer. A petitioner must establish the elements for the approval of the petition at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. 8 C.F.R. § 103.2(b)(1); *See also, Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With respect to the ability to pay, it is noted that the copy 2010 federal tax return filed by The [REDACTED] Inc. shows sufficient net income to cover the proffered wage in that year. This tax return, however, submitted on motion, is not persuasive in establishing a *continuing* financial ability to pay beginning as of the date of alleged transfer as required by the regulation at 8 C.F.R. § 204.5(g)(2) and the underlying requirements in establishing a successor relationship. As noted above, the alleged successor's tax returns would not establish its ability to pay the beneficiary the proffered wage in 2006 through 2009. Additionally, the petitioner and alleged successor have failed to resolve the issue related to sponsorship of multiple beneficiaries as set forth above, and in the prior AAO's decision. This is required as it impacts the determination of ability to pay the proffered wage. Further, it is noted that the submission of unaudited financial statement on motion are not determinative of The [REDACTED] Inc.'s ability to pay the proffered wage in 2009.¹⁵ As noted herein, the financial statement is not

Article 1.3(b) of both agreements state, 'Except for and limited solely to the liabilities set forth on Schedule 1.2.1(b) and the contractual obligations under the Maintenance Contracts listed on Schedule 1.1.1(j), the Purchaser shall not assume and shall not be liable for, any liabilities or obligations of the Seller of any nature whatsoever, express or implied, fixed or contingent, including but not limited to any liability owing to the Shareholder or any claim,....'

(May 24, 2011, AAO decision, p.3, footnote 2.)

¹⁵ We note that the tax returns for The [REDACTED] for 2008, 2009 and 2010 do not report any salaries on Form 1120S, line 8 (salaries and wages), or Schedule A, line 3 (costs of labor). The reason for this is unclear. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence

audited. According to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), as amended in 1991, where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. As stated on the cover page of the accountant's accompanying letter, the statement is not audited and is restricted to information based upon the representations of management. Thus, it will not be considered as probative of the petitioner's ability to pay the proffered wage.

Based on the foregoing and for the reasons set forth above and in the AAO's prior decision, the AAO does not conclude that the petitioner has established that The [REDACTED], Inc. is a successor-in-interest to [REDACTED] or has demonstrated the continuing ability to pay the proffered wage from the priority date onward.

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 motion to reconsider and motion to reopen is granted. The prior decision of the AAO dated May 24, 2011 is affirmed. The petition remains denied.

offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).