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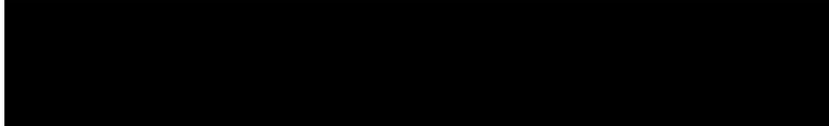
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **JAN 05 2012** 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 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 preference visa petition was denied by the Director, Texas Service Center (“the director”). The petitioner subsequently filed a motion to reopen and a motion to reconsider with the director. The motion was denied by the director and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.

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.¹

The petitioner is a restaurant serving Indian-inspired dishes. It seeks to permanently employ the beneficiary in the United States as an Indian specialty cook, DOT job code 313.361-030 (Cook, Specialty, Foreign Food for hotels and restaurants). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director denied the petition, finding that the Form ETA 750 accompanying the petition was not issued to the petitioner, but to a different entity.² The director also found that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On motion to reopen/reconsider, counsel for the petitioner submitted copies of the following evidence to demonstrate that the petitioner has the continuing ability to pay the proffered wage from the priority date:

- Forms 1120S, U.S. Income Tax Return for an S Corporation, of [REDACTED] for the years 1995 through 2006; and
- A Form 1120S of [REDACTED] for 2007.

Counsel stated on motion that [REDACTED] initially filed the Form ETA 750 on behalf of the beneficiary in 1995. Counsel contended that even though [REDACTED] was closed in 2007, the operation of the restaurant (the business) continued without any interruption and that the only thing that had changed was the name of the corporation which operated the restaurant. Counsel further stated that the owner merely decided to operate his restaurant under a new corporation.

To demonstrate that [REDACTED] continued the business operation of [REDACTED] counsel submitted the following evidence:

¹ 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 record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The AAO observes that the approved Form ETA 750 was issued to an entity called [REDACTED]

- A signed statement dated November 4, 2008 from [REDACTED]
- A copy of the lease agreement between [REDACTED] and [REDACTED] (the real estate holding company owned by [REDACTED]);
- A copy of the lease agreement between [REDACTED] and [REDACTED]
- Copies of [REDACTED]'s Annual Reports to the Commonwealth of Virginia, State Corporation Commission for the years 1995 through 2007; and
- A copy of [REDACTED] Annual Report to the Commonwealth of Virginia, State Corporation Commission for 2007.

In his signed statement dated November 4, 2008, the current President/Owner of the restaurant, [REDACTED], stated that he originally founded the restaurant in 1992. At that time, [REDACTED] indicated that the restaurant was operated by [REDACTED]. In 2007, [REDACTED] stated that he closed [REDACTED] primarily for legal and business reasons, and he then formed a new corporation called [REDACTED] to continue the business.³ [REDACTED] further stated that nothing changed after [REDACTED] was closed and [REDACTED] was established; the restaurant maintained the same name ("[REDACTED]"), location, and even the phone number. Additionally, [REDACTED] indicated in his signed statement dated November 4, 2008 that he also owned the real property housing the restaurant.

Upon review, the director determined that the company named on the Form ETA 750 was not the same company that filed the Form I-140. The director further concluded that the petitioner had failed to establish a successor-in-interest relationship between the petitioning company and [REDACTED]

On appeal to the AAO, counsel states, "Although it is recognized that two separate corporations are at issue in the instant case, note well that both corporations were owned and controlled by a single individual [referring to [REDACTED]]." In essence, counsel contends on appeal that there is no successor-in-interest relationship between [REDACTED] and [REDACTED]. Counsel argues that since both companies are owned by the same individual, operating the same business at the same location under the same trade name, and that the transition from one corporation to the other was seamless, that the assets of [REDACTED] should be considered to establish the ability to pay the beneficiary's wage.

³ Based on the tax returns submitted, [REDACTED] did not own [REDACTED] in 2007. The record reflects that [REDACTED] last owned [REDACTED] in 2003, when he had a 5.09% interest in [REDACTED]. In 2004 and 2005, [REDACTED] and [REDACTED] each owned 50% of the company. In 2006, [REDACTED] owned 17.53425% of the company, and [REDACTED] 82.46575% of the company. 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).

Further, counsel states that even if a successor-in-interest relationship exists in this case, the petitioner has met its burden since [REDACTED] had, in his signed statement dated November 4, 2008, expressly assumed all assets and liabilities of [REDACTED].

The issue here is not whether [REDACTED] and the petitioner are distinct and separate entities. We know they are distinct and separate entities; counsel for the petitioner acknowledges that fact on appeal to the AAO. Instead, the issue in this case is whether or not there was a transfer of ownership from [REDACTED] to the petitioner. If the petitioner had simply changed the name of the corporation, or if the corporation had undergone a reorganization, then the petitioner may not be required to demonstrate that it is the successor-in-interest to the predecessor entity.

Upon *de novo* review, the AAO finds that the petitioner did not simply change its name, nor did the corporation simply reorganize itself. Rather, the ownership of the business changed from [REDACTED] to [REDACTED] in 2007. As one corporation closed the business and a second corporation reopened it, the petitioner must demonstrate that it is the successor-in-interest to the predecessor company ([REDACTED]).

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the petitioner) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Here, the record contains no evidence of transfer of ownership or assumption of rights, duties, and obligations between [REDACTED] and the petitioner. [REDACTED] wrote and signed a statement on November 4, 2008, in which he stated that he assumed and undertook all immigration related rights, duties, and obligations of [REDACTED] and further confirmed that his company (the petitioner) would continue to offer employment to the beneficiary in the same position as described in the certified Form ETA 750. No supporting documentation, however, has been submitted to corroborate the veracity of the statement. In *Matter of Dial Auto*, *id.* the petitioner in that case had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in

fact, true; the Commissioner, consequently, dismissed the appeal and denied the petition. Similarly, in this case, [REDACTED] statement alone is not reliable. 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)).

As the petitioner has not established that it is the successor-in-interest to [REDACTED], the petition must be denied. The labor certification was issued to [REDACTED] and not to the petitioner. Thus the petition is not accompanied by a valid labor certification. See 8 C.F.R. § 204.5(1)(3); see also 8 C.F.R. § 204.5(a)(2), which states, "A petition is considered properly filed if it is accompanied by any required individual labor certification." As the petition is not accompanied by a labor certification approved for use by the petitioner and since the petitioner is not the successor-in-interest to [REDACTED], the petitioner is not entitled to use the labor certification. For this reason, the petition must be denied.

The issue involving the petitioner's ability to pay is considered moot and will not be discussed further since there is no valid labor certification.

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.