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

[redacted]

B6

DATE: **NOV - 3 2012** OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Texas Service Center, denied the immigrant visa petition on February 3, 2009, which the petitioner appealed to the Administrative Appeals Office (AAO) on March 5, 2009. The appeal was dismissed on January 26, 2011. On February 25, 2011, the petitioner filed a motion to reopen or reconsider the AAO's decision. The Director, Texas Service Center, dismissed the motion on July 22, 2011, and the Form I-140 remained denied. The petitioner filed an appeal on August 22, 2011. We note that the Director, Texas Service Center, did not have jurisdiction to adjudicate the motion to reopen or reconsider the AAO decision. Thus, the Director's decision will be withdrawn, and the February 25, 2011 motions to reopen or reconsider and the August 22, 2011 appeal will be consolidated into one motion to reopen or reconsider, and adjudicated.

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.[1]

The regulations at 8 C.F.R. § 103.5(a)(3) state that 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 Service 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."

With the motion to reopen or reconsider, the petitioner submitted for the first time a "Contract for Sale of Business" between [redacted] and [redacted] as well as the 2008 and 2009 federal income tax returns of [redacted] Inc. and additional documentation of the finances of the owner of [redacted] Counsel asserts in the motion to reopen or reconsider and subsequent appeal that the AAO incorrectly applied the law in determining the petitioner's ability to pay the proffered wage. Therefore, the evidence submitted meets the requirements for filing a motion to reopen or reconsider. The motion is granted, and the decision will be reopened and reconsidered.

The petitioner also failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

---

[1]The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <*new* evidence> . . . ." *Webster's II New Riverside University Dictionary* 792 (1984)(emphasis in original).

A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

The petitioner failed to establish that it and the labor certification employer had the ability to pay the proffered wage of $23,400 per year as of the April 30, 2001 priority date and subsequently. *See* 8 C.F.R. § 204.5(g)(2).

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.[2] 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).

The record contains Forms W-2 which show the petitioner and the labor certification employer employed and paid the beneficiary varying amounts from 2001 through 2007. However, the two entities never paid the beneficiary the full proffered wage in any year. The ordinary or net income or net current assets of the two entities were not sufficient, when added to the wages paid to the beneficiary, to pay the proffered wage for 2001, 2003, 2004, 2006, and 2007. The petitioner's tax returns also reflect that it did not have enough net income or net current assets to pay the beneficiary the proffered wage in 2008 or 2009. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the two entities had the ability to pay the proffered wage, despite their shortfalls in wages paid to the beneficiary, ordinary or net income and net current assets.

---

[2] *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).

Counsel asserts that the petitioner's tax returns show large enough officer compensation to pay the proffered wage. Counsel asserts that, by failing to apply the amount of officer compensation towards the proffered wage, USCIS committed error. However, counsel did not provide a letter from either the the labor certification employer or the petitioner's officers stating they would be willing to forgo compensation. 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). Counsel asked that the AAO consider the circumstances surrounding the petition, and the petitioner's history. However, counsel does not find fault with the analysis previously performed by the AAO under *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel did provide copies of the petitioner's 2008 and 2009 federal income tax returns. This evidence does not address the underlying rationale of the denial: the petitioner's lack of continued ability to pay the proffered wage in 2001, 2003, 2004, 2006, and 2007.

Both the director and the AAO determined that the petitioner failed to establish that it or the preceding employer had the continued ability to pay the proffered wage. The petitioner, without citing to controlling authority states that by combining wages paid, net income, and assets of the petitioner for each applicable year, that it has the ability to pay the proffered wage. USCIS will consider separately, but not in combination, the taxable income and the net current assets of a business to determine the ability of a petitioner to pay the proffered wage on the priority date. Counsel's method would duplicate revenues received by the business during the year.

Accordingly, after considering the totality of the circumstances, the AAO finds that the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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 motion to reopen or reconsider the petition is granted, the petition remains denied.