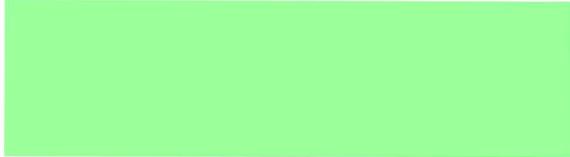




U.S. Citizenship  
and Immigration  
Services

(b)(6)



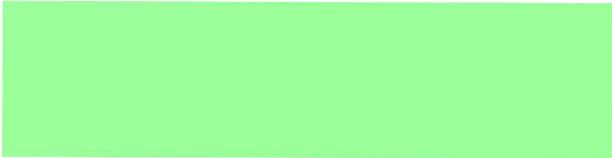
DATE: **AUG 07 2013** OFFICE: TEXAS SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted. The appeal will again be dismissed.

On November 4, 2008, [REDACTED], the petitioner, filed the Form I-140 on behalf of the above-named beneficiary. The petitioner describes itself as a massage center. It seeks to permanently employ the beneficiary in the United States as a manager. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, the petition is accompanied by a Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The director's decision denying the petition on February 20, 2009, states that the petitioner failed to establish the ability to pay the proffered wage. The petitioner appealed. On April 24, 2012, the AAO issued a Notice of Derogatory Information (NOI) notifying the petitioner that the corporate status of [REDACTED], had been dissolved, and therefore, the appeal would be dismissed as moot. The petitioner failed to respond to the NOI. Therefore, on July 6, 2012, the AAO dismissed the appeal, as abandoned. The matter is again before the AAO on a motion to reopen filed by [REDACTED] claiming to be a successor-in-interest to [REDACTED], the company that filed the labor certification underlying the instant petition and the petition.

On June 3, 2013, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOI/RFE) notifying the petitioner that [REDACTED], has been dissolved and is no longer in business; and, that if the petitioner intends to continue the appeal it must demonstrate the organization's continued existence, operation, and good standing. The petitioner was given 30 days to respond to this NOI/RFE. However, as of the date of this decision, the record does not reflect any response.

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. 8 C.F.R. § 103.5(a)(3). In addition, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The motion to reopen is granted as the filing meets applicable standards based on new evidence. On motion, counsel states that in 2009 the petitioner, [REDACTED], became [REDACTED], and contends that the petitioner and [REDACTED] share the same owner and are one and the same company; that the status of [REDACTED] has been forfeited; however, the company is in good standing as the status of [REDACTED] is "active." In support, the petitioner submits a June 29, 2012 letter from [REDACTED] stating that in January 2009, its lawyer suggested that the company's name be changed from [REDACTED], to [REDACTED]

The evidence does not establish that [REDACTED], Federal Identification Number (FEIN) [REDACTED], is the same company as [REDACTED], FEIN [REDACTED] that the new company was the result of a name change, and that [REDACTED] is the successor-in-interest to [REDACTED]. The appellant failed to establish that it is a successor-in-interest to the entity that filed the petition and 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 appellant is a different entity than the petitioner/labor certification employer, 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).

An appellant 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. Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

The documents submitted to establish a valid successor relationship merely state that the petitioner, [REDACTED], changed to [REDACTED].<sup>1</sup> The documentation of record does not provide any description of the nature of the assets acquired, if any, the number of the employees acquired, and do not document the transfer of assets and responsibilities from one corporation to the other.

The evidence in the record does not establish the organizational structure of the predecessor prior to

---

<sup>1</sup> The June 29, 2012 letter from [REDACTED], simply states that in January 2009, its lawyer suggested that the company's name be changed from [REDACTED], to [REDACTED], and that the two companies are owned by the same person. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

any transfer, or the current organizational structure of any successor; that the successor acquired the essential rights and obligations of [REDACTED] necessary to carry on the business in the same manner as the predecessor; that the successor is continuing to operate the same type of business as the predecessor; and, that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

Therefore, the evidence in the record is not sufficient to establish that [REDACTED], is the successor-in-interest to [REDACTED]

Further, in a successor-in-interest case, the petitioner must also establish that the original employer possessed the ability to pay the proffered wage from the priority date until the date the petitioner assumed the original employer's rights and responsibilities. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). The evidence of record is insufficient to establish that the petitioning organization possessed the ability to pay the proffered wage from the priority date until another company may have acquired its assets.

In the NOI/RFE, the AAO requested that the petitioner submit additional evidence to establish the company's ability to pay the proffered wage of the manager. The regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

*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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Thus, the petitioner must establish the company's continuing ability to pay the proffered wage from the priority date up to the present. The priority date is the date the labor certification application was filed with the DOL. There is insufficient evidence in the record of your company's ability to pay the proffered wage – \$39,312 per year – since the priority date of May 16, 2008.

Accordingly, in the NOI/RFE the AAO requested that the petitioner submit copies of the Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, it may have issued to the beneficiary for the years 2008 to 2012, and evidence of wages paid to the beneficiary during 2013. The AAO also requested that the petitioner submit copies of the federal income tax returns filed by the organization for the years 2009, 2010, 2011, and 2012. In the alternative, the AAO requested the petitioner to submit copies of audited financial statements for the organization for the years 2009, 2010, 2011, and 2012. As noted above, the petitioner has failed to submit the requested evidence.

In addition, this motion to reopen was filed by [REDACTED]. The record of proceeding contains a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, for [REDACTED]. Additionally, the Form I-290B, Notice of Appeal or

Motion, was signed by the representative of [REDACTED]. In the NOI/RFE the AAO notified the petitioner that there is no evidence in the record that the petitioner consented to the filing of the appeal. As also noted above, the petitioner has failed to respond to the NOI/RFE and submit the requested evidence. As such, the petitioner has not established the ability to pay the proffered wage. Further, the petitioner has not established that the petition is not moot, as it is no longer in operation and does not have a successor-in-interest.

Upon review, the petition will again be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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 reopen and reconsider is granted. The appeal is dismissed. The denial of the petition is undisturbed.