



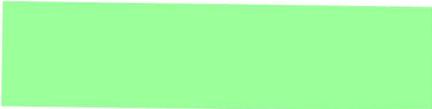
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **DEC 12 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
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the subsequent appeal and motion to reopen. The matter is again before the AAO on a motion to reopen and motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

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, 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 its ability to pay the proffered wage. On April 24, 2012, the AAO issued a Notice of Derogatory Information (NDI) notifying the petitioner that [REDACTED] had been dissolved, and therefore, the appeal would be dismissed as moot. The petitioner failed to respond to the NDI. Therefore, on July 6, 2012, the AAO dismissed the appeal as abandoned.

On August 6, 2012, [REDACTED] filed a motion to reopen claiming to be a successor-in-interest to [REDACTED]. On June 3, 2013, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID) notifying the petitioner that [REDACTED] had been dissolved, was no longer in business, and, that if the petitioner intended 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 NOID. The petitioner again failed to respond to the NOID.

On motion, the AAO determined that the petitioner had not established a valid successor-in-interest relationship for immigration purposes or that it had the continuing ability to pay the proffered wage.

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 motion. On motion, counsel submits a brief, letters from the petitioner and its owners, incorporation and amendment documents, resolutions and stock agreements, credit card and phone bills, leases, licenses, Internal Revenue Service (IRS) payment vouchers, IRS Forms W-2, Wage and Tax Statements, tax returns and news articles on the petitioner.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) *Requirements for motion to reopen.*

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. . .

(3) *Requirements for motion to reconsider.*

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.

On motion, counsel contends that the AAO erred in concluding that the petition is not a valid successor-in-interest, as the petitioner's change from an S corporation [REDACTED] to a limited liability company (LLC) [REDACTED] was *bona fide* and the petitioner and [REDACTED] have had the ability to pay the proffered wage since the September 30, 2008 priority date. Therefore, the petitioner's motion qualifies for reconsideration.

Ability to Pay

Here, the ETA Form 9089 was accepted on September 30, 2008. The proffered wage as stated on the ETA Form 9089 is \$21.60 per hour (\$44,928.00 per year based on a 40-hour work week¹). The ETA Form 9089 states that the position requires 24 months of experience in the proffered position or as a manager.

In the instant case, the petitioner and [REDACTED] have not established that the beneficiary has been paid any wages since the priority date.

In the instant case, the submitted Forms 1120S for the petitioner reflect net income of \$40,938.00 in 2008;² and \$6,506.00 in 2009. The submitted Forms 1120S for [REDACTED] reflect net

¹ While counsel states that the proffered wage is only \$39,312.00 per year, there is no evidence in the record to establish that the proffered position was represented to the DOL or advertised to U.S. workers as requiring less than a 40-hour work week. Evidence to support this claim must be submitted with any further filings.

² The petitioner was structured as an S corporation. Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 4, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2008 through 2009, the petitioner's net income is found on Schedule K of its tax return returns.

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within

income of -\$26,981.00 in 2009;³ \$6,754.00 in 2010; \$14,422.00 in 2011; and \$20,191.00 in 2012. Thus, the petitioner and [REDACTED] did not have sufficient net income to pay the proffered wage for the instant beneficiary from 2008 through 2012.

In the instant case, the submitted Forms 1120S Schedule L for the petitioner reflect net current assets of \$55,493.00 in 2008; and \$0.00 in 2009. The submitted Forms 1120s Schedule L for [REDACTED] reflect net current assets of -\$14,659.00 in 2009; \$9,564.00 in 2010; -\$1,870.00 in 2011; and -\$14,749.00 in 2012. Thus, the petitioner had sufficient net current assets to pay the proffered wage in 2008. However, the petitioner and [REDACTED] did not have sufficient net current assets in 2009 through 2012 to pay the proffered wage.

On motion, counsel advised that the beneficiary will replace two workers, the owners of the business, who have been performing the duties of a manager. In support, counsel submitted IRS Forms W-2 for [REDACTED] who counsel states performed the proffered positions duties since 2008. However, as reflected in the table below, not all of these wages match the wage amounts on the tax returns. Some of the “wages” paid to these individuals are officer compensation.⁴ While the amount of officer compensation paid varies over the course of the

one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 4, 2013) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because [REDACTED] had additional income, credits, deductions, or other adjustments shown on its Schedule K for 2008 through 2009, the petitioner’s net income is found on Schedule K of its tax return returns. While counsel claims that [REDACTED], a limited liability corporation, the tax returns submitted for [REDACTED] reflect that it files tax returns as an S corporation. The record contains incorporation articles for [REDACTED] reflecting that the business is a limited liability corporation. The tax returns submitted by counsel are inconsistent with the type of business counsel claims is the petitioner’s successor-in-interest and calls into question the legitimacy of the tax returns. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

³According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁴ The Forms 1120S of record list [REDACTED] as 100% shareholder.

pertinent years, counsel failed to submit evidence to show that officer compensation payments were not fixed by contract or otherwise. Without such evidence, the AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, there is no evidence in the record to establish that the officers were willing and able to forgo payment of compensation.

The Forms W-2 and tax returns in the record reflect the following amounts:

NAME	COMPANY	2009	2010	2011	2012
	INC.				
	LLC	\$8,400.00	\$13,200.00	\$14,400.00	\$14,400.00
	INC.	\$10,000.00			
	LLC	\$12,500.00	\$27,500.00	\$30,000.00	\$30,000.00
TOTAL WAGES PAID		\$30,900.00	\$40,700.00	\$44,400.00	\$44,400.00
COMBINED WAGES ON TAX RETURNS		\$16,000.00	\$0.00	\$14,400.00	UNKNOWN ⁵
COMBINED OFFICER COMPENSATION ON TAX RETURN		\$20,900.00	\$40,700.00	\$30,000.00	UNKNOWN ⁶
COMBINED NET INCOME ON TAX RETURN		(\$20,475.00)	\$6,754.00	\$14,422.00	\$20,191.00

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, the purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

⁵ The 2012 tax returns for [REDACTED] do not include pages 1 and 2.

⁶ See above footnote.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In the instant case, as discussed above, the petitioner failed to establish its ability to utilize wages paid to others to pay the proffered wage from the priority date. Additionally, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, the petitioner has not established that it had the continuing ability to pay the proffered wage.

As such, counsel has failed to establish on motion that the petitioner and [REDACTED] had the ability to pay the proffered wage as of the priority date.

Successor-In-Interest

The employer listed on the ETA Form 9089 is [REDACTED] Federal Employment Identification Number (FEIN) [REDACTED] located at [REDACTED] commencing business in 2006. On the petition, the petitioner listed its name as [REDACTED] Inc., FEIN [REDACTED] located at [REDACTED]

The record contains the following relevant documents regarding [REDACTED]:

- 2007, 2008 and 2009 IRS Forms 1120S, U.S. Corporation Income Tax Returns, for [REDACTED] FEIN [REDACTED], and incorporation date on the tax returns of August 11, 2006.
- A letter dated June 29, 2012, from [REDACTED] stating that she established [REDACTED] in Maryland on August 11, 2006 and opened for business on September 1, 2006. She states that in light of a January 2009 remodeling of the store, her attorney recommended that the business change its name from [REDACTED] on October 22, 2008. She states that [REDACTED] and [REDACTED] are both owned by her, during separate periods.
- A June 28, 2012 screen print-out from the Commonwealth of Virginia State Corporation Commission indicating that [REDACTED] has been active since October 22, 2008.
- [REDACTED] valid from January 1, 2012 to March 1, 2013.
- [REDACTED] issued November 22, 2006.
- December 4, 2013 screen shots from the Maryland Department of Assessments and Taxation, Business Services, reflecting that [REDACTED] was incorporated on August 11, 2006, and was forfeited on October 3, 2011, for failure to file a property return for 2010.
- Screen shots from the Maryland Department of Assessments and Taxation, Business Services, reflecting that [REDACTED] trade name on April 18, 2011 and the trade name expired on September 29, 2011.

Applying the analysis set forth in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") to the appeal and first motion to reopen and reconsider, the AAO found that the petitioner had not established a valid successor-in-interest relationship for immigration purposes.⁷ As discussed in the AAO's decision, the petitioner had not documented the transaction transferring the assets, liabilities, duties and obligations of the petitioner to [REDACTED]. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On motion, counsel states that [REDACTED] are both companies owned by [REDACTED] engage in the same massage services and are located at the same address. Counsel states that the successor company, [REDACTED] assumed the assets, liabilities, lease and operation of [REDACTED]. Counsel contends that [REDACTED] credit card account, trade name and business equipment between October 2008 and August 2009 clearly indicates that [REDACTED] are the same business entity. In support, counsel submitted the following:

- An October 22, 2008 receipt from the Commonwealth of Virginia's State Corporation Commission acknowledging filing of articles of organization for a limited liability company, [REDACTED]
- The October 22, 2008 Articles of Organization for [REDACTED]
- The Commonwealth of Virginia's State Corporation Commission Certificate of Organization for [REDACTED]
- Undated Articles of Amendment of the Articles of Formation of [REDACTED] adding a sixth Article stating that the company is formed as the successor-in-interest to [REDACTED], a Virginia Corporation, and that all shares of said corporation are to be exchanged for membership interests in [REDACTED]. The Articles of Amendment are executed in the name of the company by the manager of the company effective October 23, 2008.
- Undated Resolution of [REDACTED] a Maryland Corporation, Consented to by [REDACTED] a Virginia Limited Liability Company stating that a meeting of the Board of Directors of the Corporation, the Officers of the Corporation and the sole shareholder of the Corporation occurred on October 23, 2008. The resolutions listed include that the company is formed as the successor-in-interest to the corporation; the Articles of Organization of the company shall specify that the company is a successor-in-interest to the corporation; and all issued and outstanding shares of stock in the corporation are to be exchanged for a like amount or acceptable amount of membership interests in the company.

⁷ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

- Undated Stock Exchange Agreement of [REDACTED] a Virginia Corporation, Together with Membership Interest Exchange Agreement of [REDACTED] a Virginia Limited Liability Company. The agreement states that all issued and outstanding shares of stock in the corporation are cancelled and retired and exchanged into all issued and outstanding membership interests of the company.
- A letter dated August 13, 2013, from [REDACTED] stating that they are the owners of [REDACTED], established in Maryland in September 2006. They state that [REDACTED] changed its name to [REDACTED] in February 2009. They state that [REDACTED] are owned by the same individuals.
- 2009 through 2012 IRS Forms 1120S for [REDACTED] and an incorporation date of October 22, 2008 on the tax returns.
- July 31, 2009, and August 31, 2009 Credit Card Merchant Statements for [REDACTED] account number ending in ([REDACTED])
- September 30, 2009, and October 30, 2009 Credit Card Merchant Statements for [REDACTED]
- August 1, 2009 and September 1, 2009 [REDACTED], phone number [REDACTED]
- Specialty Lease Agreement dated May 21, 2008 between [REDACTED] for the term September 1, 2008 through August 31, 2009.
- Lease Agreement dated August 13, 2009, between [REDACTED] from July 1, 2009 to June 30, 2019.
- IRS Form 941-V Payment Voucher, 2009 3rd Quarter, for [REDACTED]
- IRS Form 941-V Payment Voucher, 2009 3rd Quarter, for [REDACTED]

Counsel fails to establish that a valid successor-in-interest relationship exists between the entity which filed the labor certification and the instant Form I-140 immigrant petition, [REDACTED]. While counsel contends that [REDACTED] is the successor-in-interest to [REDACTED], there are multiple inconsistencies within the tax and financial records, the testimony of [REDACTED] and the relevant corporate and company documents. The AAO notes that prior counsel and [REDACTED] refer to a name change of [REDACTED] rather than a restructure of the business from a corporation to a company. While [REDACTED] is a limited liability company, the tax returns submitted for this entity reflect an S corporation. The amendments and resolutions submitted on appeal regarding the nature of the transfer of ownership from [REDACTED] is a Virginia, not a Maryland Corporation and business records for [REDACTED] reflect that these amendments were not filed with the Commonwealth of Virginia until September 5, 2013.

A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically

be treated as a sole proprietorship by the Internal Revenue Service (IRS) unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership by the IRS unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the record includes no Form 1065 or other evidence that [REDACTED] is treated as a LLC for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.⁸ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Further, while the tax records reflect that [REDACTED] concluded business on July 31, 2009, and the amendments and resolution claim that [REDACTED] was dissolved and all stock cancelled effective October 22, 2008, [REDACTED] was never dissolved, was only forfeited in October 2011 and was still the owner of the trade name "[REDACTED]" until September 2011. Further, quarterly tax vouchers, credit card bills and phone bills reflect that [REDACTED] was operating as a business through at least October 2009. Moreover, while counsel contends that [REDACTED] utilization of [REDACTED] credit card through 2009 reflects that the two entities are the same, the credit card statements clearly reflect that [REDACTED] have different account numbers. The evidence in the record establishes that [REDACTED] are separate entities which, while owned and operated by the same individual and in the same location, continued to operate simultaneously and there was no official transfer of assets or liabilities from one to the other outside the amendment and resolution filed in 2013.

It is incumbent upon 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).

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."

⁸ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

(b)(6)

[REDACTED]

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NON-PRECEDENT DECISION

Therefore, on motion, [REDACTED] has failed to establish a valid successor-in-interest and consequently, is unable to establish that the petitioner and [REDACTED] have the ability to pay the proffered wage.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motions are granted. Upon reopening and reconsideration, the AAO's previous decision, dated August 7, 2013, is affirmed. The petition will remain denied.