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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Texas Service Center and came before the Administrative Appeals Office (AAO) on appeal. This decision was affirmed and the appeal was dismissed by the AAO on September 23, 2011. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO, dated September 23, 2011, will be affirmed, and the petition will remain denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). As set forth in the director's decision issued on June 16, 2008, the director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onward. The director denied the petition accordingly. The petitioner appealed the director's decision to the AAO. The AAO affirmed the director's decision on September 23, 2011, and further held that the petitioner had not established a valid successor relationship between the original entity that filed the labor certification and the instant petitioner, and that the petitioner had not established its ability, or the ability of its predecessor, to pay the proffered wage as of the priority date for the years applicable to each entity from the priority date onward. The AAO also determined that the petitioner had not established that the beneficiary was qualified for the instant position and that the searches of several databases did not reflect any evidence that the petitioner is an active business in the state of New Jersey.

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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The AAO will consider the filing as a motion to reopen under 8 C.F.R. § 103.5(a)(2). 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." The petitioner submitted the beneficiary's W-2 Form for 2009, multiple pay stubs from 2009 and 2010, and an updated experience letter from the co-owner of Abruzzi Pizza.[1]

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[1] The AAO notes that counsel submitted Form I-290B, Notice of Appeal or Motion, on October 28, 2011, indicating that the petitioner was filing a "motion to reopen" the AAO's decision. The motion contains a brief statement from counsel in Part 3, and is accompanied by a two page letter from counsel. On December 1, 2011, counsel submitted "supplemental material in support of motion to reopen and/or reconsider." However, a motion to reopen must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). The instructions to Form I-290B, which are incorporated by reference into the regulations, do not permit additional time for the submission of a brief or additional evidence. *See* 8 C.F.R. § 103.2(a)(1). Therefore, the AAO need not consider this

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Successor-In-Interest

The labor certification was filed on April 30, 2001 under the name The Form I-140 was filed on December 10, 2007 by , trading as As discussed in the AAO's decision, both entities possessed different Federal Employer Identification Numbers, and was not incorporated until August 29, 2005. Therefore, must establish that it is a successor-in-interest to the labor certification employer, . *See Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm'r 1986). Counsel asserts on motion that the petitioner, , trading as is the successor-in-interest of because "the record shows that the petitioner is located at the same premises, uses the same trade name and employs the same staff as the original employer who filed the alien labor certification."

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[2] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application. *See e.g., Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984).

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets or asset transaction, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property – to another business organization. The purchase of assets from a predecessor will only result in a

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later filed brief or evidence in consideration of the petitioner's motion. However, as discussed above, even if the AAO were to consider the later submitted evidence, the petitioner failed to overcome the grounds laid out in the AAO's prior decision.

[2] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.[3] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

The evidence in the record does not demonstrate that the essential rights and obligations of were transferred to, and assumed by, [4] The petitioner did not submit any additional evidence with its motion to reopen documenting that the petitioner assumed the essential rights and obligations of the labor certification employer in order to overcome the grounds laid out in the AAO's decision. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Therefore, the petitioner has not established that Top C Enterprises, Inc. is a successor-in-interest to

Ability to Pay the Proffered Wage

The AAO's decision found that the petitioner, on appeal, had not overcome the director's initial finding that it had not established its ability to pay the beneficiary's proffered wage from the priority date onward.

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $10.00 per hour or $20,800.00 annually.

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[3] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

[4] The State of New Jersey Business Registration Certificate in the record, dated December 22, 2005, does not state a trade name for

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As the AAO discussed in its decision, even if the petitioner establishes a successor-in-interest relationship, which the record does not support, would still need to demonstrate its ability to pay the proffered wage from the priority date until the date the successor-in-interest relationship would have taken effect, which would appear in this case to be as early as August 30, 2005. The record demonstrates that , was incorporated in the state of New Jersey on August 30, 2005. Therefore, the petitioner would need to demonstrate that had the ability to pay the proffered wage from April 30, 2001 until August 30, 2005 and that had the ability to pay the proffered wage from August 30, 2005 onward. The record contains the first page of the tax returns and Schedule L for for 2001, 2002, 2003, 2004, and 2005. The record also contains the tax returns for) for 2006 and the first page of the tax return and Schedule L for 2007.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it, or , employed and paid the beneficiary less than the full proffered wage from the priority date onward.

As discussed in the AAO's prior decision, the petitioner submitted Forms 1099-MISC showing amounts that paid the beneficiary wages for 2001, 2002, 2003, 2004, and 2005 and that . paid the beneficiary for 2006, 2007, and 2009:

- 2001 - $5,400.00
- 2002 - $6,037.00
- 2003 - $15,600.00
- 2004 - $9,575.00
- 2005 - $9,250.00

- 2006 - $8,100.00
- 2007 - $6,900.00
- 2009 - $1,155.00

Thus, even if the successor-in-interest relationship could be established, which it has not been, for these years the petitioner must establish the ability of to pay the difference between the proffered wage and wages paid to the beneficiary for 2001 through August 30, 2005 and the ability of to pay the difference between the proffered wage and wages paid from August 30, 2005 onward. Those amounts are:

- 2001 - $15,400.00
- 2002 - $14,763.00
- 2003 - $5,200.00
- 2004 - $11,225.00
- 2005 - $11,550.00

- 2006 - $12,700.00
- 2007 - $13,900.00
- 2009 - $19,645.00

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.[5] 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).

In the AAO's decision, it stated that the tax return documentation for reflects low or negative net income and low or negative net current assets for 2001, 2002, 2003, 2004, and 2005, which could not establish its ability to pay the difference between the proffered wage and the wages paid to the beneficiary for 2001, 2002, 2003, 2004, and 2005. The petitioner did not submit any additional evidence regarding ability to pay the proffered wage during these years with its motion to reopen to overcome the basis for the AAO's dismissal of the petitioner's appeal.

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[5] *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).

The tax return documentation for reflects net current assets in the amount of $48,017.00 and $31,828.00 for 2006 and 2007, respectively, which would establish its ability to pay the difference between the proffered wage and the wages paid to the beneficiary for 2006 and 2007 if were the proper successor-in-interest to which has not been established. As the record does not contain tax returns from . for 2008 and 2009, the AAO cannot determine whether it possessed the ability to pay the beneficiary's proffered wage in those years. However, as stated above, even if the successor-in-interest relationship is established, the petitioner has not demonstrated the claimed predecessor's ability to pay the difference between the proffered wage and the wages paid to the beneficiary from 2001 through August 30, 2005.

Counsel argues that the AAO failed to take into account the letter from the petitioner's accountant, which references depreciation as part of the corporate loss for 2007. The AAO addressed this letter from the petitioner's accountant in its September 23, 2011 decision and stated why this did not establish the petitioner's ability to pay the beneficiary's proffered wage. With respect to depreciation, the court in *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009), noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." Therefore, the letter from the petitioner's accountant does not establish the petitioner's ability to pay the proffered wage from the priority date onward.

On motion, counsel argues that the totality of the circumstances shows that the "petitioner had the resources to pay the proffered wage pursuant to the test established in *Matter of Sonegawa*." The AAO stated in its decision that there is no evidence in the record to establish that the petitioner's circumstances were similar to those in *Sonegawa*. On motion, the petitioner has not provided any additional evidence regarding its financial circumstances. Therefore, the petitioner failed to establish

that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that had the ability to pay the proffered wage from the priority date continuing onward despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

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

Additionally, as noted in the AAO's decision dated September 23, 2011, the petitioner, does not appear to be an active business in the State of New Jersey. The petitioner did not address the issue or provide any evidence on motion to resolve this issue. This casts doubts on the petitioner's continuing operation and whether there continues to be a *bona fide* job offer. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.*

The AAO also noted several discrepancies in the experience statement provided by the co-owner of and on motion, the petitioner provided another letter from this same co-owner, attesting to the beneficiary's employment with from September 1999 to April 2001. However, even if the AAO were to consider this evidence to overcome the issues raise, this period of employment lasted only one year and seven months and does not demonstrate that the beneficiary had the necessary two years of experience working in a restaurant as required by the terms of the labor certification. Therefore, the petitioner has not established that the beneficiary had the necessary experience for the instant position as required by the labor certification. It should additionally be noted that neither letter submitted established that the beneficiary has the required special skills that it is "[u]seful to have knowledge of neighborhood languages and cuisine (Italian, Eastern European) [and that it is] useful to have knowledge of CPR" listed on the Form ETA 750, Box 15.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not met that burden. The previous decision of the AAO will be affirmed.

ORDER: The motion to reopen is granted, and the decision of the AAO dated September 23, 2011 is affirmed. The petition remains denied.