

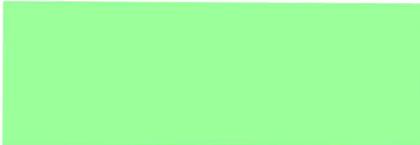
U.S. Department of Homeland Security

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

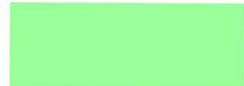


Date:

**MAY 02 2013**

Office: NEBRASKA SERVICE CENTER

FILE:



IN RE:

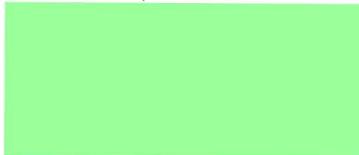
Petitioner:

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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on April 9, 2012, the AAO dismissed the appeal. Counsel to the petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion to reopen is granted, however, the previous decision of the AAO will be affirmed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The director determined 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. The director denied the petition accordingly.

The record shows that the motion to reopen and motion to reconsider is properly filed. 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.

A motion to reopen must: (1) state the new facts to be provided in the reopened proceedings; and (2) be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO finds that the petitioner has met the requirements for a motion to reopen by stating new facts and providing evidence in support of the petitioner's motion.

The director denied the petitioner's immigrant visa petition, finding that the petitioner had not demonstrated its ability to pay the beneficiary's proffered wage from the priority date onward. The AAO dismissed the petitioner's appeal on April 9, 2012, finding that the petitioner had not overcome the director's initial finding, and additionally that the petitioner had not established that there was a successor-in-interest to the labor certification employer.

On motion, counsel checked Box D in Part 2 on Form I-290B, indicating that his brief and/or additional evidence was attached.<sup>1</sup> In Part 3, counsel explains that the basis for the motion is the petitioner's submission to the Internal Revenue Service (IRS) of amended tax returns for years 2004, 2005, 2006, 2007 and 2008. Counsel states that the petitioner did not "indicate the proper income for the corporation for the years 2004 – 2008. The IRS became aware of this and the corporation filed the proper taxes for the relevant tax years." Attached to the motion are tax returns for 2004, 2005, 2006, 2007, and 2008, in the name of [REDACTED]. As noted in the AAO decision, the petitioner has not established that [REDACTED] is the successor-in-interest to the petitioner and labor certification employer, [REDACTED]. On motion, counsel has not addressed whether [REDACTED] is the successor-in-interest to the petitioner. Further, on motion, the

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<sup>1</sup> In a letter, dated May 8, 2012, attached to Form I-290B, counsel states that "I will submit a statement in support of this motion within 30 days of the due [sic] of May 10, 2012." To date, no additional statement or evidence has been received by this office.

petitioner has not provided any documentation to establish that [REDACTED] is the successor-in-interest to the petitioner. Therefore, the petitioner has not overcome a basis of the AAO's prior decision.

In addition, the AAO cannot determine whether the tax returns provided are relevant to the instant matter, as the amended tax returns bear the name of [REDACTED] and are not in the name of the labor certification employer. Without evidence documenting that [REDACTED] is the successor-in-interest to the petitioner, these tax returns cannot be accepted as evidence of the petitioner's or its successor's, if any, ability to pay the beneficiary's proffered wage.

Further, the evidence in the record does not establish that these tax returns are a true representation of the tax returns filed with the IRS. On the tax returns the petitioner submitted on motion for the years 2004, 2005, 2006 and 2007, the "amended return" block is checked on page 1. However, that same block is left blank on the 2008 return. As noted above, the corporate name on the amended tax returns is not the same as the petitioner's name. The petitioner previously submitted "initial" tax returns for [REDACTED] for the years 2001 – 2007, which indicated the following net income:

- In 2004, the Form 1120S stated net income of \$26, 233.
- In 2005, the Form 1120S stated net income of \$18,386.
- In 2006, the Form 1120S stated net income of \$82,920.
- In 2007, the Form 1120S stated net income of \$105,884.

On the amended tax returns for [REDACTED] the stated net income is as follows:

- In 2004, the amended Form 1120S stated net income of \$296,566.
- In 2005, the amended Form 1120S stated net income of \$369,961.
- In 2006, the amended Form 1120S stated net income of \$346,802.
- In 2007, the amended Form 1120S stated net income of \$316,730.
- In 2008, the Form 1120S stated net income of \$131,420.<sup>2</sup>

Even if the evidence in the record demonstrated that [REDACTED] was the successor-in-interest to the petitioner, the petitioner has offered no explanation for the dramatic increase in net income on the amended returns of [REDACTED]. While counsel states that "the IRS became aware" that the previous returns were not accurate, the petitioner has not provided evidence of the correspondence from the IRS documenting the finding. The claim that these amendments were required by the IRS, without evidence of the audit or other correspondence with the IRS, casts doubt on counsel's assertion and on whether the amended returns were filed with the IRS. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). Without evidence that the amendment to the tax returns were required by the IRS, the sudden amendment of four years of tax returns only after the AAO's prior decision casts doubt on their credibility. *Id.* A petitioner may not make material changes to a petition in an effort to make a

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<sup>2</sup> As noted, the tax return for [REDACTED] submitted on motion for year 2008 does not indicate whether it is an amended return.

deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Additionally, there is no evidence that [REDACTED] filed the amended tax returns with the IRS. The amended returns are unsigned and there are no indicia that the petitioner or his tax preparer submitted the amended returns to the IRS or that they were received and accepted by the IRS. Further, the returns are not certified copies. The AAO views the petitioner's amended tax return as questionable, specifically with regard to the significant increases in the petitioner's net income without any explanation from the petitioner detailing the reasons for the amendments. *See Matter of Ho*, 19 I&N at 591 (doubt cast on the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence). In any future filings, USCIS requires that the petitioner submit IRS-certified copies of the amended returns to establish that the amended returns were actually received and processed by the IRS. *Id.* at 591-92 (the petitioner must overcome inconsistencies with independent, objective evidence). 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)). Thus, the AAO will not examine the amended version of [REDACTED] taxes as submitted on motion.

As there is no new evidence to be considered regarding the petitioner's ability to pay the beneficiary's proffered wage, the petitioner has not overcome the grounds for the director's denial and the second ground of the AAO's prior decision. The petitioner has not established its continuing ability to pay the beneficiary's proffered wage from the priority date onward.

The motion 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. Here, that burden has not been met.

**ORDER:** The motion to reopen the previous decision of the AAO is granted. The previous decision of the AAO, dated April 9, 2012, will not be disturbed. The petition remains denied.