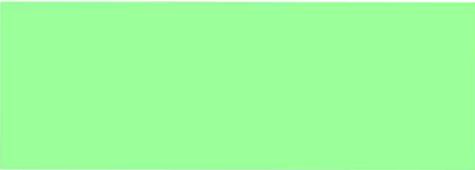




U.S. Citizenship
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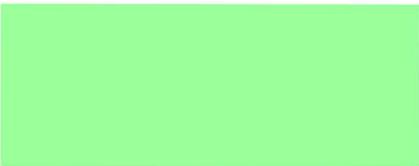


Date: **MAY 06 2013** Office: TEXAS SERVICE CENTER FILE:

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: On June 21, 2012 the Administrative Appeals Office (AAO) dismissed the appeal and affirmed the decision of the Director, Texas Service Center (the director). The petitioner has now filed a motion to reopen and a motion to reconsider the AAO's decision. The motions will be granted, and the appeal will be reopened and reconsidered. Upon reconsideration, the appeal will be dismissed, and the AAO's previous decision will remain undisturbed.

The petitioner is a construction and restoration company. It seeks to employ the beneficiary permanently in the United States as an ornamental stone restorer, DOT job code 861.381-038 (stonemason), pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). We dismissed the appeal and denied the petition, finding that the petitioner has failed to demonstrate that it is the successor-in-interest to [REDACTED].² We also found that the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date.

On motions to reopen/reconsider, counsel for the petitioner maintains that that [REDACTED] and the petitioner merged in 2004 and became one company and submits additional evidence to show that the petitioner is the successor entity to [REDACTED]. Counsel urges the AAO to consider the additional evidence.

Counsel also argues that by hiring the beneficiary, the petitioner would generate more than sufficient income to pay the beneficiary's proffered wage. Finally, counsel offers the owner's individual federal tax returns for the years 2001 through 2011 and urges the AAO to consider the owner's income as reflected in the tax returns as evidence of the petitioner's ability to pay.

¹ 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.

² [REDACTED] was the company that initially filed the Form ETA 750 Application for Alien Employment Certification with the DOL for processing on April 30, 2001. The petitioner – the entity that filed the Form I-140 – is [REDACTED]. The AAO in its earlier decision dated June 21, 2012 held that [REDACTED] and the petitioner are two distinct and separate entities. The AAO identified that the Employer Identification Number (EIN) for [REDACTED] is [REDACTED], while the EIN for the petitioner is [REDACTED]. Further, the physical location of the two companies are different ([REDACTED] maintained an office address at [REDACTED], Elmhurst, NY; the petitioner's office address is at [REDACTED] Brooklyn, NY).

The record shows that the motions are properly filed, timely and supported by new evidence. The AAO conducts this 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 in this proceeding.³

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. 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. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Here, the motions state new facts and are supported by corroborating documentary evidence. They also state the reasons for reconsideration. Additionally, counsel in her brief cites several decisions of the Board of Alien Labor Certification Appeals (BALCA) to show that personal financial resources of the shareholder of a corporation can be considered in determining the company's ability to pay. Therefore, the motions are granted, and the appeal will be reopened and reconsidered.

Upon *de novo* review, we conclude that the petitioner is not the successor-in-interest to [REDACTED]. To show that the petitioner is the petitioning successor, the petitioner originally submitted:

- A sworn statement signed on November 29, 2004 by [REDACTED] the owner of [REDACTED] who stated that [REDACTED] and [REDACTED] merged to expand their business and exposure in the restoration field; that no skilled workers were fired or suspended due to the merger; and that after the merger, the merged company retained the same employees and working conditions.

On motions to reopen/reconsider, counsel submits the following additional evidence:

- A copy of the business status report from the New York State Department of State, Division of Corporations, showing that [REDACTED] was established on June 6, 1997 and was dissolved as of August 1, 2007;
- A copy of the business status report from the New York State Department of State, Division of Corporations, showing that the petitioner [REDACTED] was incorporated on January 14, 2003 and has been an active business since then;

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- A copy of Internal Revenue Service (IRS) Form 2553, Election by a Small Business Corporation, filed by [REDACTED] and [REDACTED] effective January 1, 2005;⁴ and
- A letter dated June 9, 2004 addressed to [REDACTED], a client, announcing the merger of the petitioner and [REDACTED].

As mentioned in the AAO decision, a valid successor-in-interest relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner – must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the petitioner) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Here, the record contains no evidence of any documents effectuating the merger, i.e. merger documents or agreements or a new Employer Identification Number (EIN) in a statutory merger.⁵ We also note that the letter dated June 9, 2004 addressed to [REDACTED] is not signed, making it difficult for us to determine whether or not the letter was actually typed and sent in 2004 or that the merger did occur in 2004.

Further, based on the public records provided by the New York Department of State, Corporations Division, the two companies continued to operate after [REDACTED] the principal

⁴ We note that the petitioner, by filing the IRS Form 2553, elected to be taxed as an S Corporation effective January 1, 2005.

⁵ According to IRS website, a newly born corporation will be required to obtain a new EIN if the new corporation is created after a statutory merger, i.e. Company A + Company B = Company C. A merging corporation, however, will not be required to obtain a new EIN if the surviving corporation uses the existing EIN after a corporate merger, i.e. Company A + Company B = Company B. *See* <http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Do-You-Need-a-New-EIN%3F> (last accessed April 25, 2013).

owner of both entities, stated that the two companies merged in 2004, suggesting that there was no merger in 2004 as claimed by [REDACTED].⁶

When initially filing the Form I-140 petition in May 2005, counsel for the petitioner at the time, [REDACTED], indicated in his letter dated May 4, 2005 to U.S. Citizenship and Immigration Services (USCIS) that the DOL was aware of the merger between [REDACTED] and the petitioner and asked that the petition be accepted with all of its accompanying evidence, including the federal tax returns of [REDACTED]. To show that the DOL had knowledge of the merger before certifying the Form ETA 750, [REDACTED] submitted the DOL's Notice of Findings (NOF) dated October 28, 2004 along with the response and the corroborating documents as requested by the DOL, including the November 29, 2004 sworn statement from [REDACTED]. The record shows that the DOL certified the Form ETA 750 on March 15, 2005.

In the decision, the director did not address the successor-in-interest issue and considered the federal tax returns of [REDACTED] as evidence of the petitioner's ability to pay.

We disagree with the director's decision to accept that the petitioner is the successor-in-interest to [REDACTED]. A review of the DOL's NOF and the response and evidence provided by [REDACTED] does not establish that the DOL was aware of the merger. When sending out the NOF, the DOL was mainly interested in finding out whether or not [REDACTED] was a credible company, and not a fraudulent business created to obtain immigration benefits for alien beneficiaries.⁷ Further, DOL did not change the name of the employer on the Form ETA 750 from [REDACTED] to [REDACTED]. The labor certification was issued to [REDACTED] and not to the petitioner.

The petition in this case is therefore technically not accompanied by a valid labor certification, and the appeal should be denied and the petition dismissed for this reason. See 8 C.F.R. § 204.5(l)(3); see also 8 C.F.R. § 204.5(a)(2), which states, "A petition is considered properly filed if it is accompanied by any required individual labor certification."

With respect to the petitioner's ability to pay, the regulation at 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

⁶ The record contains various copies of contracts, work orders, and IRS Forms W-2 Wage and Tax Statements authorized and issued by the two entities ([REDACTED]) in 2005, after the claimed merger.

⁷ In the NOF, the DOL stated that [REDACTED] the attorney who represented [REDACTED] in the filing of the Form ETA 750, had been suspended by the Board of Immigration Appeals from practicing law in the State of New York, and that in view of [REDACTED] current suspension it is necessary for the DOL to determine the legitimacy of the Form ETA 750.

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). The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The priority date in this case is April 30, 2001. The rate of pay or the proffered wage stated on the Form ETA 750 is \$28.61/hour or \$59,508.80 per year. We found in our previous decision dated June 21, 2012 that the petitioner could not have the continuing ability to pay the proffered wage from April 30, 2001, as the petitioning company was not established until January 2003. However, even if we were to consider the tax returns of [REDACTED] as evidence of the petitioner's ability to pay, the AAO would still have not been able to conclude that both [REDACTED] and the petitioner had sufficient net income and net current assets to pay \$59,508.80/year from April 30, 2001.

On motions to reopen/reconsider, citing *Far East International, Inc.*, 93-INA-22 (Dec. 21, 1993), counsel urges the AAO to consider the owner's income as evidence of the petitioner's ability to pay. USCIS (legacy INS) has traditionally held that it may not "pierce the corporate veil" and look to the assets of the corporation's owners to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 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."

In this case, however, counsel is not suggesting that we examine the personal assets of the owner of [REDACTED] and the petitioner, but, rather, the financial flexibility that the employee-owner has

in setting his own salaries based on the profitability of his corporation. A review of the owner's individual tax returns reveals that the owner's salaries/compensation received from his companies () from 2001 through 2011 were flexible depending on the profitability of the business. Therefore, we will consider the owner's compensation as evidence of the petitioner's ability to pay.⁸

The table below shows the owner's compensation and his obligation to pay the beneficiary's proffered wage from 2001 through 2011:

<i>Tax Year</i>	<i>Owner's Compensation – in \$⁹</i>	<i>Proffered Wage – in \$</i>
2001	96,800	59,508.80
2002	88,800	59,508.80
2003	98,500	59,508.80
2004	129,350	59,508.80
2005	172,700	59,508.80
2006	146,800	59,508.80
2007	140,000	59,508.80
2008	140,000	59,508.80
2009	140,000	59,508.80
2010	140,000	59,508.80
2011	172,000	59,508.80

The record does not reflect that () would be able to forgo part or most of his compensation to pay \$59,508.80/year.¹⁰ We note that from 2001 to 2008 he had to support two people (himself and his spouse) and three people (plus a child) from 2009 onward. The record does not include his personal monthly expenses, i.e. mortgage, car payment, credit card payment, food, utility bills, insurance on car, health and property, etc., to demonstrate that it is realistic for him to give up part of his officer compensation to pay the proffered wage of the beneficiary.

⁸ For determining the ability to pay we will accept compensation paid to () by () and the petitioner as evidence of the petitioner's ability to pay, as both companies are owned fully or partly by (). Compensation received by the wife of () however, will not be considered as evidence of the petitioner's ability to pay, per *Sitar v. Ashcroft, id.* () does not appear to own any part of neither () nor the petitioner, and therefore, she has no legal obligation to pay the beneficiary's proffered wage).

⁹ The owner's compensation is from the IRS Form W-2 Wage and Tax Statement submitted by () along with his individual tax returns. We do not consider the compensation of the other owner of the petitioner. The federal tax returns submitted show that the petitioner was owned by () as 30% owner and () as 70% owner.

¹⁰ If he were to pay the full proffered wage out of his compensation, he would have to take between 34% (in 2005) and 67% (in 2002) of his full compensation.

For instance, in *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983), the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. Without a more fully developed record concerning family expenses, the AAO cannot determine that [REDACTED] is making a realistic offer to pay the beneficiary's wage out of his compensation from his company. See *Motherland Voyages, Inc.*, 96-INA-00425, 1998 WL 121437 (Bd. Alien Lab. Cert. App. Feb. 25, 1998) (While the Employer has a large amount of personal funds, he has not demonstrated that those funds are at the disposal of the incorporated business to pay employee salaries). 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 motions, counsel urges the consideration of the beneficiary's proposed employment as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion.

The AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.¹¹ Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as an ornamental stone restorer (stonemason) will significantly increase the petitioner's profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

Counsel also indicates that the petitioner has enough cash flow existing and anticipated to pay the proffered wage of the beneficiary. Specifically, counsel states that the company has resources to obtain additional capital or loans as needed to generate additional income.

We acknowledge that the petitioner has been in a competitive business at least since 1997 when he founded [REDACTED]. No evidence, however, has been submitted to demonstrate how additional capital or loans would significantly improve the petitioner's profitability. We generally cannot accept a line of credit or loans as evidence of the petitioner's ability to pay, unless the petitioner demonstrated that the line of credit or the loan was available at the time the petitioner filed the petition or that the line of credit would augment, instead of weaken, the petitioner's overall financial position. More specifically, if the petitioner chooses to rely on the line of credit as evidence of the ability to pay, it has to submit documentary evidence, such as a detailed business plan and audited cash flow statements, to show that the line of credit will augment the petitioner's overall financial position. The record contains no business plan or audited cash flow

¹¹ Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

statement. Nor does it include evidence to show that the line of credit or the loan was available at the time of filing the petition (the line of credit was available in 2003). There is no indication in the record that the petitioner specifically borrowed money or obtained a line of credit to pay the beneficiary's wage. Thus, the petitioner's line of credit will not be considered as evidence of its ability to pay.

In summary, we find that the petitioner has not demonstrated that it is a petitioning successor. Further, after reviewing the additional evidence, we are not persuaded that the petitioner and its owner have the ability to pay the proffered wage from the priority date and continuously until the beneficiary receives permanent lawful residence. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 motions to reopen/reconsider are granted; upon reconsideration, the appeal is dismissed.