

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: NOV 01 2013

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

ON BEHALF OF PETITIONER:
[REDACTED]

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,

Elizabeth McCormack
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Texas Service Center (director). The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and motion and affirmed the director's decision to deny the petition. The matter is again before the AAO on motion to reopen and motion to reconsider. The motions will be dismissed.

The petitioner was an Indian restaurant.¹ It sought to employ the beneficiary permanently in the United States as an Indian Specialty Cook. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States 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 and that the beneficiary did not satisfy the minimum level of experience stated on the ETA Form 9089. The director denied the petition accordingly. The AAO affirmed this determination on appeal. The AAO concluded that the record did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In addition, the evidence submitted did not establish that the beneficiary met the minimum requirements of the offered position as set forth in the labor certification. The AAO further determined that the job offer no longer existed due to the petitioner going out of business. Accordingly, the appeal was also dismissed as moot. The AAO indicated that a different company, [REDACTED] had not been established to be a successor-in-interest to the petitioner.

The petitioner filed a motion on April 10, 2013. The AAO dismissed the motion on May 28, 2013 for failing to meet applicable requirements.

The instant motion was filed on July 8, 2013 by [REDACTED]. The regulation at 8 C.F.R. § 103.5(a)(2) provides, in 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. 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. 8 C.F.R. § 103.5(a)(3). On motion, the petitioner fails to submit new evidence and/or present arguments supported by precedent decisions establishing that the previous decision was in error based on the facts of record at the time of the initial decision. Thus, the motions to reopen and to reconsider are dismissed.

¹ Public records indicate that the petitioner's corporate status was dissolved on August 31, 2012. (NYS Department of State, Division of Corporations, Entity Information, accessed October 3, 2013). Only a U.S. employer desiring and intending to employ the beneficiary may maintain an immigrant petition for the instant classification. 8 C.F.R. § 204.5(c). Therefore, if a petitioner terminates its business and no longer plans to employ the beneficiary, the petition and appeal before this office have become moot. See 8 C.F.R. § 205.1(a)(iii)(D) (a petition approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case). The instant motions are therefore moot.

The AAO determined in its prior decision that the petitioner had not established that [REDACTED] became a successor-in-interest to the petitioner, which is now out of business. For reasons explained below, the evidence submitted on motion does not overcome this determination. Only an affected party or its attorney may file a motion to reopen or reconsider. 8 C.F.R. § 103.5(a)(1)(iii)(A). A motion that does not meet an applicable requirement must be dismissed. 8 C.F.R. § 103.5(a)(4). As the instant motion was not filed by an affected party, it must be dismissed.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. See *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The AAO will nevertheless address the arguments raised on motion.

On appeal, the AAO found that [REDACTED] was not a successor-in-interest to the petitioner. A claimed successor may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm'r 1986) (*Matter of Dial Auto*). Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. See *Matter of International Contractors, Inc.*, 89-INA-278 (BALCA Jun. 13, 1990). Third, the petitioning successor must prove that it is eligible for the immigrant visa in all respects. See 8 C.F.R. § 204.5(l)(3). The burden is on the petitioner to establish each of the three elements by a preponderance of the evidence. See 8 U.S.C. § 1361; see also *Matter of Chawathe*, 25 I&N Dec. 369, 374-76 (AAO 2010).

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Matter of Dial Auto*, 19 I&N Dec. at 482.

On motion, counsel asserts that the petitioner simply changed its name to [REDACTED] and restructured the corporation to remove one shareholder and to become a C corporation for tax purposes. The documents of record relating to the claimed transfer of ownership in the record are a lease modification and extension agreement; an application for liquor permit; an application for retail permit submitted in

response to the AAO's November 16, 2011 Request for Evidence (RFE); and a letter from the petitioner's certified public accountant (CPA) dated April 4, 2012. The CPA states that the change in business name was merely a restructuring of the same company, which primarily consisted in modifying and extending the lease agreement and obtaining the liquor license by application. These documents show only the modification of lease obligations and the transfer of alcohol stock and sales authority. The CPA also states that renovated the restaurant and kept the employees of the petitioner. Nevertheless, the record does not contain any documentation of the transfer of assets and liabilities from the petitioner to . The list of employees under the petitioner and under and any agreement between the two companies are not in the record. The record does not establish that any of the assets or obligations necessary to the business have been transferred, e.g., inventory (other than alcohol), equipment, goodwill, employee obligations, or food service contracts. On motion, the petitioner does not submit any further documentation of the transfer of assets and liabilities from the petitioner to . 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)).

Further, on motion, the petitioner does not establish that it is eligible for the visa in all respects, namely that the petitioner and together had the ability to pay the beneficiary from the priority date forward, and that the beneficiary was qualified to perform the duties of the occupation as of the priority date. For this additional reason, the petitioner has not established that is its successor-in-interest.

As the AAO noted in the decision dismissing the appeal, a labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). is a different entity than the petitioner/labor certification employer, and has not established that it is a successor-in-interest to that entity. Thus, the petition is not supported by a valid labor certification, and must be denied. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

The petitioner also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The ETA Form 9089 was accepted on January 5, 2007. The proffered wage as stated on the ETA Form 9089 is \$12.85 per hour (\$26,728 per year).

On appeal, the AAO determined that [REDACTED] was not a successor-in-interest to the original petitioner. Therefore, the tax returns and financial strength of the successor were not relevant to evaluating the original petitioner's ability to pay the proffered wage. The AAO noted that the petitioner, [REDACTED] was out of business and did not submit a tax return in 2009 or beyond. Neither the petitioner nor [REDACTED] had employed the beneficiary.²

As the successor-in-interest issue had not been previously raised by the director, the AAO nevertheless reviewed the financial evidence of both the petitioner and [REDACTED]. The tax returns of the petitioner for 2007 and 2008 and of [REDACTED] for 2009 and 2010 did not establish that either corporation had sufficient net income to pay the full proffered wage for any of the relevant years. The petitioner's net current assets were insufficient to pay the proffered wage in 2007, and [REDACTED] net current assets were insufficient to pay the proffered wage in 2009 and 2010. Thus, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its and [REDACTED] net income or net current assets,

The AAO also considered the overall magnitude of the petitioner's and [REDACTED] business activities in its determination of the petitioner's ability to pay the proffered wage, and found that neither the petitioner nor [REDACTED] had not established the ability to pay the wage based on the totality of circumstances. *See Matter of Sonogawa*, 12 I&N Dec. 612.

² The record contains the beneficiary's Forms W-2 for 2008 through 2010 showing compensation received from [REDACTED]. Counsel stated that the restaurant's owner, [REDACTED] owned the petitioner, [REDACTED] and that the wages paid to the beneficiary by [REDACTED] should be considered in determining the petitioner's ability to pay the proffered wage. 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). 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." The AAO thus declined to consider the Forms W-2 as evidence of the petitioner's ability to pay the proffered wage.

On motion, [REDACTED] states that it is the successor-in-interest to the petitioner, that together the petitioner and [REDACTED] have established the ability to pay though the use of a payroll company named [REDACTED] and that USCIS should consider the totality of the petitioner's circumstances. For the reasons stated above, [REDACTED] is not the successor-in-interest to the petitioner. Thus, the financial records of [REDACTED] may not be considered. Further, no evidence is found in the record establishing that the petitioner had any relationship with [REDACTED] to pay the beneficiary for work performed for [REDACTED]. As such, the petitioner has not established its ability to pay the beneficiary the proffered wage. For this additional reason, the petition may not be approved.

The director also found that the petitioner had not established that the beneficiary possessed the experience specified on the labor certification as of the priority date.

The ETA Form 9089, section H, items 4 through 14, sets forth the minimum education, training, and experience that an applicant must have for the proffered position. Here, section H, items 4 through 14, indicates that the position requires 24 months experience as an Indian specialty cook. The beneficiary stated on the labor certification application that he worked for [REDACTED] as an Indian specialty cook from January 2003 through April 2006.

On appeal, the AAO noted inconsistencies in the signatures of the three letters signed by Mr. [REDACTED] of the [REDACTED] attesting to the beneficiary's qualifying employment experience in Nepal, which remained unexplained. In response to the AAO's Request for Evidence (RFE), the petitioner submitted a 4th letter from the [REDACTED] from a different person, [REDACTED]. The AAO found that Mr. [REDACTED] did not describe the beneficiary's duties as a cook for the hotel and did not address the inconsistencies in the previous letters from the [REDACTED].

The AAO found that in addition to the deficiencies and inconsistencies in the experience letters in the record, the beneficiary's claimed employment as a cook from January 2003 to April 2006 was inconsistent with other evidence in the record. The beneficiary claimed to be working as a steward, and not as a cook, as late as May 2006 when he traveled to work in the United States under an approved Form I-129 petition as a temporary non-agricultural worker. He also claimed in the Form G-325A submitted in support of his application to adjust status to permanent residence, to have lived from the year of his birth until May 2006 at Pokhara-8, [REDACTED] Nepal. The AAO noted that [REDACTED] is approximately 78 miles flight distance from [REDACTED] and a considerably longer trip by bus or car.³ The inconsistencies were not resolved by independent, objective evidence. Doubt cast on any aspect of the petitioner's proof may, of course, 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 (BIA 1988). The AAO affirmed the director's finding that the beneficiary did not have the required two years of experience as an Indian specialty cook.

³ See [REDACTED] (accessed on November 1, 2011).

On motion, the petitioner through counsel has offered no evidence in response to the AAO's previous findings that the beneficiary did not have the required two years of experience as an Indian specialty cook. Instead, counsel asserts that the beneficiary does possess the claimed experience and that the inconsistencies were caused in error by a previous attorney of the beneficiary. Counsel refers to a fax sent to [REDACTED] and a letter written to the State of New York Grievance Committee for the Second, Eleventh & Thirteenth Judicial Districts complaining about Mr. [REDACTED]. Both documents appear to have been signed by the beneficiary. An appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The instant appeal does not address the requirements set forth above. The claim is not supported by an affidavit of the beneficiary setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the beneficiary with respect to the actions to be taken.

Thus, the petitioner has not established on motion that the beneficiary had two years of experience as an Indian specialty cook as of the filing date of the labor certification.

The record does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, that the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification, and that the petitioner has a successor-in-interest entitled to utilize the approved labor certification. As noted by the AAO on appeal, the petition must remain denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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). The petitioner has not met that burden.

ORDER: The motions are dismissed. The previous decisions of the AAO and the director are affirmed. The petition remains denied.