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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 26 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. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary permanently in the United States as a Japanese specialty cook. The record contains a duplicate copy of Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> 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 also noted that the petitioner submitted tax returns for a different entity for 2003 and 2004.

On appeal, 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, an affidavit, correspondence, mortgage records, immigration information regarding another beneficiary of a Form I-140 immigrant petition filed by the petitioner and copies of 2005 through 2013 reviews of Shogun of Japan Steakhouse restaurants.

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.

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<sup>1</sup> The record of proceeding does not contain the original Form ETA 750. The petitioner indicates that it never received the document from the DOL. The AAO received a duplicate copy of the labor certification from the DOL on January 4, 2013.

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 a sole proprietorship to corporation [REDACTED] was *bona fide* and the petitioner and its predecessor have had the ability to pay the proffered wage since the September 5, 2003 priority date. Therefore, the petitioner's motion qualifies for reconsideration.

### Ability to Pay

Here, the Form ETA 750 was accepted on September 5, 2003. The proffered wage as stated on the Form ETA 750 is \$22,000 per year. The Form ETA 750 states that the position requires two (2) years of experience as a Japanese chef.

In the instant case, [REDACTED] has not established that it or its predecessor employed and paid the beneficiary the full proffered wage continuously from the priority date. On motion, [REDACTED] submits Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, issued to the beneficiary for 2009 through 2012, reflecting payment of at least the proffered wage in all those years. While [REDACTED] submitted paystubs for the beneficiary of another Form I-140 immigrant petition the petitioner filed, [REDACTED] has failed to provide independent, objective evidence of payment of that beneficiary's proffered wage of \$24,000.00 in any year.<sup>2</sup>

In the instant case, the sole proprietor, [REDACTED], supported a family of three in 2003 and 2004. The proprietor's tax returns reflect that his adjusted gross income was \$132,894 (line 34) in 2003 and \$110,350 (line 36) in 2004. On motion, counsel provided examples of the sole proprietor's household expenses or other financial obligations in 2003 and 2004, estimating that the sole proprietor's expenses averaged \$2,000.00 to \$2,200.00 per month (at most \$26,400.00 per year). As such, it has been established that the sole proprietor could support himself and his family on \$86,894.00 in 2003 and \$64,350.00 in 2004, which is what remains after reducing the proprietor's adjusted gross income by the amount required to pay the proffered wages to the instant beneficiary and the other beneficiary. Therefore, the petitioner has established that its purported predecessor had the ability to pay the proffered wage from the priority date to December 31, 2004.

The submitted Forms 1120 for [REDACTED] reflect net income of \$118,999 in 2005; \$170,559 in 2006; \$76,619 in 2007; \$282,946 in 2008; \$306,405.00 in 2009<sup>3</sup>; \$118,373.00 in 2010; \$154,833.00

<sup>2</sup> [REDACTED] did provide evidence that the other beneficiary became a lawful permanent resident on October 28, 2004. Therefore, the petitioner need only establish that it paid the other beneficiary the proffered wage in 2003 and 2004.

<sup>3</sup> The tax records reflect that as of 2009, the petitioner is 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 November 20, 2013) (indicating that Schedule K is a summary schedule of

in 2011; and \$243,236.00 in 2012. Thus, [REDACTED] had sufficient net income to pay the proffered wage for the instant beneficiary from 2005 through 2012.

As such, counsel has established on motion that the sole proprietorship and [REDACTED] had the ability to pay the proffered wage(s) as of the priority date; however, counsel has failed to establish on motion that the sole proprietorship and [REDACTED] are the entity which filed the labor certification and the successor-in-interest to the entity which filed the labor certification in the instant case.

### Successor-In-Interest

The employer listed on the Form ETA 750 is [REDACTED] located at [REDACTED]. The address where the alien will work is listed as [REDACTED]. On the petition, the petitioner listed its name as [REDACTED] d/b/a [REDACTED] with Federal Employer Identification Number (FEIN) [REDACTED] located at the [REDACTED] address and incorporated on May 15, 2001.

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

- 2003 and 2004 IRS Forms 1120, U.S. Corporation Income Tax Returns, for the [REDACTED] with FEIN [REDACTED] and incorporation date on the tax returns of May 15, 2001.
- A stock certificate number one indicating that as of October 10, 2001, [REDACTED] owns 1000 shares of [REDACTED].
- 2005 through 2008 IRS Forms 1120 for [REDACTED] with FEIN [REDACTED] and a blank incorporation date on the tax returns.
- A stock certificate number one indicating that as of December 13, 2004, [REDACTED] owns 1000 shares of [REDACTED].
- A certificate of incorporation from the office of the Secretary of State of the State of Texas indicating that [REDACTED] was incorporated on December 31, 2004 and that 1000 shares of stock are authorized.
- An affidavit dated July 3, 2009, from [REDACTED] stating that [REDACTED] was established by incorporating the existing sole proprietorship of [REDACTED] and that no change in ownership had occurred. Mr. [REDACTED] states that [REDACTED] has

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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 2009 through 2012, the petitioner's net income is found on Schedule K of its tax return returns.

<sup>3</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

- operated a [REDACTED] since its inception and at [REDACTED] by merging [REDACTED] another corporation solely owned by Mr. [REDACTED]
- A letter dated June 26, 2009, from [REDACTED] CPA, stating that Mr. [REDACTED] operated [REDACTED] FEIN [REDACTED] until 2004. Mr. [REDACTED] states that Mr. [REDACTED] opened a second restaurant, [REDACTED] Mr. [REDACTED] states that Mr. [REDACTED] started a new corporation, [REDACTED] and that [REDACTED] began operating at [REDACTED] location because the book value of [REDACTED] assets were so low.

The record also contains 2003 and 2004 IRS Forms 1040, U.S. Individual Income Tax Returns, for Mr. [REDACTED] with Schedule C, Profit or Loss from Business, listing "[REDACTED]" located at [REDACTED] with FEIN [REDACTED]

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 instant petition, the AAO found that the petitioner had not established a valid successor-in-interest relationship for immigration purposes.<sup>4</sup> It appeared evident that the sole proprietor, Mr. [REDACTED] incorporated [REDACTED] in December of 2004 and was the sole owner of the new corporation. On appeal, counsel stated that "all assets, liabilities, duties and obligations of the sole proprietorship were transferred to and assumed by the Petitioner." However, as discussed in the AAO's decision, the petitioner had not documented the transaction transferring the assets, liabilities, duties and obligations of the sole proprietorship to the corporation. 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] was established as a sole proprietorship and that, on December 31, 2004, the sole proprietorship, [REDACTED] was incorporated as [REDACTED]. Counsel indicates that [REDACTED] are different companies, both operating at [REDACTED] and that the [REDACTED] address is that of a second [REDACTED] restaurant which [REDACTED] operates. In support, counsel submitted the following:

- An affidavit dated February 26, 2013, from Mr. [REDACTED] stating that he is the sole owner of [REDACTED] which he started as a sole proprietorship and incorporated as [REDACTED] in 2004. He states that he continues to operate the business as [REDACTED] and that [REDACTED] has nothing to do with [REDACTED]. He states that he operated [REDACTED] but that it was never officially part of [REDACTED] and they were not merged together. In referring to the merger of the business in prior affidavits, he clarifies that he established [REDACTED] in 2004 from his sole

<sup>4</sup> 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 (9<sup>th</sup> 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).

proprietorship and headquartered the corporation at [REDACTED]. He states that, in 2004, he also started another [REDACTED] and that [REDACTED] exchanged stock for assets in this second location.

- A letter dated February 25, 2013, from Mr. [REDACTED] states that he advised Mr. [REDACTED] to do a tax-free incorporation of his sole proprietorship, [REDACTED] on December 31, 2004, at which time [REDACTED] took over the assets of the sole proprietorship and began operations. He states that, while [REDACTED] operates today at [REDACTED] the [REDACTED] address is related to [REDACTED] because it operates a [REDACTED] restaurant at that location.
- Correspondence dated December 21, 2004 and December 23, 2004, between [REDACTED] and Mr. [REDACTED] in which Mr. [REDACTED] expresses his wish to transfer all assets, including fixed assets and goodwill, of [REDACTED] in exchange for stock in [REDACTED] effective January 1, 2005 and [REDACTED] acceptance of such terms.

Additionally, in response to a request for evidence (RFE) issued by the AAO on August 21, 2013, the petitioner submitted the following relevant documents:

- 2009 through 2012 IRS Forms 1120 for [REDACTED] with FEIN [REDACTED] and an incorporation date of December 31, 2004 on the tax returns.
- A letter dated September 19, 2013, from Mr. [REDACTED] stating that the IRS Forms 1120 for [REDACTED] do not list [REDACTED] because it is simply a DBA and is not listed on corporate documents.
- DBA filings for [REDACTED] located at [REDACTED] and [REDACTED] respectively, under [REDACTED] dated February 2, 2005.
- Bank Account Request for Change to Existing Account dated November 28, 2001, reflecting a bank account for [REDACTED] located at [REDACTED] with FEIN [REDACTED].
- Affidavits/Invoices for [REDACTED] dated July and August 2004.
- Bank Statements dated October to November 2003 and October to December 2004 for [REDACTED] located at [REDACTED] with account number matching the above-referenced request for change to existing account.

Business records reflect that [REDACTED] was incorporated by Mr. [REDACTED] on October 10, 2001 and was located at [REDACTED].

Counsel fails to establish that a valid successor-in-interest relationship exists between the entity which filed the labor certification, [REDACTED] and the petitioner of the instant Form I-140 immigrant petition, [REDACTED]. While counsel contends that [REDACTED] was established as a sole proprietorship on December 31, 2004, that the sole proprietorship was incorporated as [REDACTED] and that [REDACTED] has nothing to do with the entity which filed the labor certification, there are multiple inconsistencies within Mr. [REDACTED] and Mr. [REDACTED] testimony and the

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<sup>5</sup> According to the publicly available Westlaw database, [REDACTED] has since been dissolved.

relevant corporate and sole proprietorship documents.<sup>6</sup> 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). Most notably, at the time the labor certification was filed, the tax returns reflect that the sole proprietorship was operating a restaurant called [REDACTED] located at [REDACTED]; however, the job offer is for a location at [REDACTED]. Business and tax records reflect that the only business located at [REDACTED] was [REDACTED]. Furthermore, the record contains a Bank Account Request for Change to Existing Account dated November 28, 2001 reflecting that [REDACTED] was not only located at [REDACTED] in 2001, but was operating under the name [REDACTED] at the [REDACTED] location. As such, the AAO concludes that the [REDACTED] sole proprietorship incorporated as [REDACTED] in 2004 is a separate and distinct entity from [REDACTED] dba [REDACTED] of the address at which the job offer is located. Further, bank, tax and business records reflect that [REDACTED] FEIN [REDACTED] was the only business operating at both locations. As such, the record is not even clear as to whether the sole proprietorship is the entity which filed the labor certification. The petitioner now maintains that [REDACTED] was not involved in the incorporation of [REDACTED] and, as such, [REDACTED] cannot be a successor-in-interest to the entity which filed the job offer located at [REDACTED].

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

### Beneficiary's Qualifications

Additionally, beyond decision of the director and the AAO's previous decision,<sup>7</sup> the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

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<sup>6</sup> The AAO notes that Mr. [REDACTED] refers to a merger of [REDACTED] and the petitioner and Mr. [REDACTED] state that the petitioner began operating at the location of [REDACTED] because the book value of its assets was so low.

<sup>7</sup> 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 (9<sup>th</sup> 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).

In the instant case, the labor certification states that the offered position requires a minimum of two (2) years of experience in the offered position of Japanese specialty cook. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Japanese cook in a full-time capacity with [REDACTED] South Korea from May 1997 to June 2000. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A).

The record contains two letters from the beneficiary's prior employer, indicating that the beneficiary was employed with the restaurant from May 6, 1997 to June 28, 2000 as a cook at the business' sushi bar. Also included is a copy of the employer's Certificate of Business Registration showing the business to be a Japanese restaurant. The letters, however, fail to indicate whether the beneficiary was employed in a part-time or full-time capacity or sufficiently describe the beneficiary's duties.

In response to the AAO's RFE, counsel submitted a verification of employment letter dated August 31, 2013, reflecting that [REDACTED] employed the beneficiary on a full-time basis as head sushi chef from May 6, 1997 to June 28, 2000; however, this letter is the translation of the employment letter and the record does not contain the original verification letter in Korean. Further, the letter is inconsistent with the previous experience letters regarding the title of the beneficiary's position. *Matter of Ho*, 19 I&N Dec. at 591-592.

Thus, the evidence in the record does not establish that the beneficiary possessed the required two years of full-time experience set forth on the labor certification by the priority date.

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 January 31, 2013, is affirmed. The petition will remain denied.