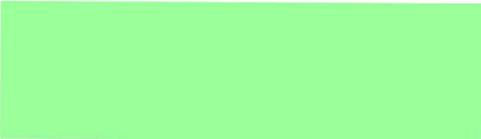
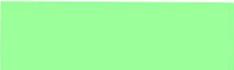




U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **SEP 05 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)(A)(i) or (ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i) or (ii)

ON BEHALF OF PETITIONER:

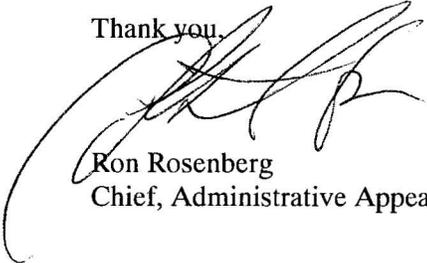


INSTRUCTIONS:

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, Nebraska Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen and reconsider. The motion to reopen, but not the motion to reconsider, the petition will be granted and the matter reopened. Upon review of the matter, the AAO's prior decision (June 20, 2013) is affirmed. The petition remains denied.

The petitioner is a sportswear business. It seeks to employ the beneficiary permanently in the United States as a shipping supervisor. 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). 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.

Beyond the decision of the director, the AAO further denied the petition on appeal on the grounds that the petitioner failed to sufficiently establish that the beneficiary met the requirements of the proffered position as stated in the certified labor certification.

The record shows that the 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 reconsider must: (1) 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; and (2) 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).

The petitioner has stated reasons for reconsideration, but has not cited to a precedent decision in support of its request for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The motion to reconsider will be dismissed.

The record shows that the motion to reopen is properly filed. The regulation at 8 C.F.R. § 103.5 provides 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." "New" facts are those that were not available and could not reasonably have been discovered or presented in the previous proceeding. A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The petitioner has stated new facts in his motion which are supported by documentary evidence. The motion to reopen will be granted.

In its initial decision, the AAO stated:

The Form ETA 750 lists the petitioner's name as [REDACTED] with an address of [REDACTED] and the Form I-140 lists the petitioner's name as [REDACTED] with an address of [REDACTED]

[REDACTED] and tax identification number of [REDACTED]

The tax returns submitted for the petitioner list the name as [REDACTED] Inc. with an address of [REDACTED] and tax identification number of [REDACTED]

For these tax returns to be considered, the petitioner must establish that [REDACTED] is the same entity as [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On motion, counsel has not provided any new evidence to resolve this inconsistency with the petitioner's name. Counsel resubmitted merger documents related to [REDACTED] and [REDACTED] but as noted, by the director in his initial decision, the merger agreement does not consider the second entity for which tax returns were submitted, [REDACTED]. The petitioner submitted nothing on appeal or with the instant motion to address this identified deficiency.

In its initial decision, the AAO stated:

The AAO also notes that there are concerns as to whether the petitioner is still in existence and therefore whether there continues to be a viable job offer.

On appeal, counsel asserts that a CNA endorsement issued on February 27, 2008 refers to [REDACTED] located at [REDACTED] and this information is evidence of the continued viability of the petitioner, that the petitioner is a "going concern" and that there is a realistic job offer to the beneficiary. The AAO notes that this document refers to the petitioner, but does not provide any evidence of its ability to pay the beneficiary the proffered wage. Additionally, the two entities referenced have separate tax identification numbers. Nothing shows that they are the same entity.

The AAO notes that New York State Department of State records reflects that [REDACTED] with an address of [REDACTED] is currently listed in active status. See [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html) (accessed June 17, 2013). The street number differs from the street number on the tax returns submitted. New York Department of State records have a second separate entity for [REDACTED] LLC. See [http://www.dos.ny.gov/corps/bus\\_entity\\_search.html](http://www.dos.ny.gov/corps/bus_entity_search.html) (accessed June 17, 2013).

Counsel asserts that [REDACTED] is a successor-in-interest to [REDACTED] and appears to cite to the same CNA endorsement that was already addressed on appeal, and determined to be insufficient. [REDACTED] failed to establish that it is a successor-in-interest to the entity that filed the labor certification, petition and appeal in the instant matter. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If [REDACTED] is a different entity than the petitioner/labor certification employer and appellant, it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods.

The AAO also notes that its concerns still exist as to whether the petitioner is still in existence and therefore whether there continues to be a viable job offer, as no new evidence has been submitted to address these concerns. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel asserts on motion that D&H Sportswear has the ability to pay the proffered wage of \$32,385.60 from the priority date onwards. In support of this claim, the petitioner has submitted tax returns and Form W-2s.

In its initial decision, the AAO found that the petitioner had the ability to pay the proffered wage in the years 2001 through 2005, although this is based on the petitioner resolving the inconsistency in its name as discussed above. However, this inconsistency has not been resolved. Therefore, the AAO cannot conclude that the petitioner has established its ability to pay the beneficiary's proffered wage in these years.

As noted in the director's decision, the petitioner's 2006 return is on a Form 1120 for 2005 with a "6" written over the "5" in 2005. It lists the calendar year as January 1, 2006 to July 31, 2006. The 2006 tax return lists the beginning and end dates of the tax year as January 1, 2006 and July 31, 2006; the cover sheet from the tax preparer indicates that the return must be mailed by August 15, 2006; and Schedule L of the 2006 return contains numerical information for beginning of the year

but no data other than zeroes for the end of the year assets and liabilities. The petitioner failed to address these issues on motion despite the issue being raised in both the director's decision, as well as the AAO's decision. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the petitioner's 2006 tax return cannot be accepted. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states, "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."

On motion, the petitioner has submitted federal tax returns and W-2 forms for 2007 through 2012. The federal tax returns are for [REDACTED] and the W-2 forms are for the beneficiary for his employment with [REDACTED] an entity with a federal tax identification number separate than what is listed on the labor certification. The W-2 forms for 2009 through 2012 reflect that the beneficiary was paid more than the proffered wage. The tax returns for 2007 through 2012 would reflect that the total income exceeded the proffered wage. However, as noted above, the record does not reflect that [REDACTED] is a successor-in-interest to the petitioner. Therefore, the tax returns and W-2 forms from [REDACTED] do not establish the ability to pay the proffered wage from 2007 through 2012.

On motion, the petitioner has not provided additional claims or evidence to establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date, but instead resubmitted a letter that was identified as deficient in the AAO's June 20, 2013 decision. Therefore, the petitioner has failed to establish that the beneficiary is qualified for the offered position.

The petition will remain 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 is granted, but not the motion to reconsider, and the petition is reopened. The previous decision of the AAO dated June 20, 2013 is affirmed. The petition remains denied.