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FILE: EAC 05 131 53301 Office: VERMONT SERVICE CENTER Date: **APR 10 2007**

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Kevin S. Poulos for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a mason contractor.¹ It seeks to employ the beneficiary permanently in the United States as a mason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.² The director determined that the petitioner had not established that it was the successor-in-interest to the original employer identified on the Form ETA 750 or that a second company [REDACTED] was the successor-in-interest to the original employer identified on the Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

As set forth in the director's denial, the issues in this case are whether or not the petitioner that filed the instant I-140 petition is the successor-in-interest to the original employer listed on the Form ETA 750 and whether or not a second company for which federal income tax returns were submitted to the record was the subsequent successor-in-interest to the petitioner that filed the I-140 petition.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by Citizenship and Immigration Services (CIS), a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.³ See, e.g., *Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985).

With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate the financial ability of the predecessor enterprise to have paid the proffered wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal⁴. On appeal,

¹ On the I-140 petition, the petitioner appeared to indicate that it was established on November 21, 2002, from a predecessor company, [REDACTED]

² The Form ETA 750 submitted with the I-140 petition identified the petitioner as [REDACTED]

³ See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

⁴ 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).

counsel submits a letter from [REDACTED] his letter, [REDACTED] states that the beneficiary currently works for him and receives his wages from [REDACTED] [REDACTED] also states that the beneficiary worked for him also under [REDACTED] which currently does not conduct business and has not done so since 2002. [REDACTED] states that since he ceased doing business as [REDACTED] he does business under [REDACTED] of which he is a 100 percent owner, and as [REDACTED] in which he is a 50 percent partner. Counsel also submits a certification of formation for [REDACTED] dated October 4, 1999, as well as Forms 1065, U.S. Return of Partnership Income for [REDACTED] for tax years 2002, 2003, and 2004.

The record also contains copies of the original petitioner's U.S. Corporate tax form, Form 1120 for tax year 2001 beginning April 1, 2001 and ending March 31, 2002. This document indicates the original petitioner had ordinary income of \$27,560 in tax year 2001, and net current assets of \$442,551.

In response to the director's Notice of Intent to Deny (NOID) the petition, counsel also submitted W-2 forms for the beneficiary for tax years 2002, 2003, and 2004. These documents indicated that the beneficiary earned \$4,196 from the original petitioner in tax year 2002, and \$414 from the original petitioner in tax year 2003. The remaining W-2 forms establish that the beneficiary's other wages were received from either Best Construction Company, or Innovative Masonry L.L.C. in tax years 2002, 2003, and 2004.

Counsel also submitted a letter from [REDACTED] dated June 14, 2005, that identified [REDACTED] as the owner of [REDACTED] (the original petitioner), as well as [REDACTED] Construction Inc. [REDACTED] also indicated that [REDACTED] was a partial owner of both Best Construction Company, Inc.,⁵ and [REDACTED] in accompanying letters [REDACTED] stated that he was 100 percent president of [REDACTED] Inc., and [REDACTED] and that he was "50 percent treasurer" of [REDACTED]. A letter dated June 14, 2005 and written by [REDACTED] was also submitted. In his letter, [REDACTED] identified the two officers for [REDACTED] as [REDACTED] "50 percent president" and [REDACTED] "50 percent treasurer."

Both the accountant and [REDACTED] stated that [REDACTED], the original petitioner, had gone out of business. The record also contains a letter from [REDACTED] to counsel dated March 21, 2005, that states that as of November 2002, [REDACTED] was no longer in business and that as of November 2002, the new company name was Salem Construction. Finally the record contains a Certificate of Incorporation for Salem Construction, Inc. dated November 21, 2002, that indicates the sole director of this corporation is [REDACTED].

In a letter dated June 14, 2005, submitted with the above-described documents in response to the director's NOID, counsel stated that [REDACTED] is a successor in interest company to [REDACTED] Company, Inc. and that this company had paid the beneficiary a salary of \$55,132 in tax year 2004. Counsel states that the petitioner's owner would like to continue the beneficiary's petition utilizing [REDACTED] as the petitioner. Counsel also examined the original petitioner's U.S. corporate income tax return for tax year 2001, and noted that the original petitioner had a net income of \$27,560, depreciation

⁵ In one of his letters submitted to the record in response to the director's NOID, [REDACTED] noted that Best Construction Company, Inc. had the following officers: [REDACTED]

⁶ As stated previously, the record also contains the corporate tax returns for [REDACTED] for tax years 2002, 2003, and 2004.

expenses of \$55,592, current assets of \$705,437, and current liabilities of \$262,886. Counsel states that the petitioner clearly had the ability to pay the proffered wage.⁷

On appeal, counsel refers to his letter of June 14, 2005 and to his assertions with regard to the original petitioner's ability to pay the proffered wage, and to the desire of the owner of the original employer to use another business in which the owner is 50 percent owner as the current employer. Counsel states that the original employer had the ability to pay the proffered wage as of the priority date and that since the original petitioner was no longer in business, that either [REDACTED] as successors-in-interest to [REDACTED] could continue to petition for the beneficiary.

Counsel's assertions as to the ability of the businesses owned by the claimed owner of the original employer to assume the eligibility of the Form ETA 750 are not persuasive. The record contains no evidence that either of the businesses identified in the record, namely [REDACTED] or [REDACTED] L.L.C., has assumed the rights, duties, and obligations of the predecessor company. Furthermore the fact that the original employer's corporate income tax return for tax year 2001 identifies [REDACTED] as the 100 percent owner does not establish that the petitioner's owner's additional assets, namely two other businesses, can be assumed to be successors-in-interest to the original employer. 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. 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Although the record contains a letter from [REDACTED] that appears to state the original employer (and applicant of the Form ETA 750) changed its name, no further evidentiary documentation is found in the record to further substantiate this assertion. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore both the original employer's owner and counsel did not assert that the original employer had changed its name, but rather asserted that the original employer was not longer conducting business as of November 2002. The corporate tax returns submitted to the record for both the original employer, [REDACTED], and [REDACTED] also indicate distinct employer identification numbers for the two businesses.⁸ The corporate tax returns for [REDACTED] identify its EIN number as 22-3685743. Thus, this third business is distinct from either the original employer or Salem Construction, Inc.

Based on the evidence submitted to the record, the petitioner has not submitted sufficient evidence to establish any successor-in-interest relationship between either the original employer, and Salem Construction

⁷ It is noted that although the director's NOID addressed the question of multiple beneficiaries with pending petitions as of the priority date of the instant petition, counsel did not address this issue in his response to the NOID.

⁸ [REDACTED] Employer Identification number (EIN) is [REDACTED], while [REDACTED] Construction Company, Inc.'s EIN is [REDACTED]

Company, Inc. or between the original employer, [REDACTED] and [REDACTED]. Without the establishment of such a relationship, the current petitioner cannot establish that it is the successor in interest, or that [REDACTED] is the subsequent successor in interest to the original employer. The evidence submitted does not establish that the current petitioner identified on the I-140 petition is a successor-in interest to the original employer, or that a third company identified by counsel and the current petitioner's owner, is the successor-in-interest to the original employer. Thus, the director's decision shall be affirmed. The petition is denied.

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 appeal is dismissed.