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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B5

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 04 2010

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a technology provider and application development company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it qualified as a successor-in-interest to [redacted] and thus, the petitioner is not eligible to use the ETA From 9089 previously filed and certified on behalf of [redacted] Accordingly, the director denied the petition because the petition was submitted without a valid labor certification.

As set forth in the director's June 27, 2008 denial, the single issue in this case is whether or not the petitioner has established that it qualifies as successor-in-interest to [redacted] and thus, it is eligible to use the labor certification certified to [redacted] and the petition is supported by a valid labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, counsel asserts that the submitted evidence establishes the successor-in-interest relationship between the petitioner and [redacted] and thus, the petitioner is eligible to use the underlying labor certification. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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[1] 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). However, as discussed below the instant appeal will be rejected as improperly find because the labor certification was expired when the petition as filed.

> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

In this matter, the underlying labor certification application [redacted] was initially filed on [redacted] filed an I-140 immigrant petition [redacted] for the beneficiary based on the labor certification on August 24, 2006 and the petition was approved by the director on June 5, 2007. On July 27, 2007, the petitioner filed the instant amended petition as the successor-in-interest to [redacted] based on the same labor certification and the petition was denied because the director determined that the petitioner failed to establish the successor-in-interest relationship between the petitioner and [redacted]

Matter of [redacted] 19 I&N Dec. 481 (Comm. 1986) is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all U.S. Citizenship and Immigration Services (USCIS) employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of* [redacted] involved a petition filed by [redacted] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted] filed the underlying labor certification. On the petition, [redacted] claimed to be a successor-in-interest to [redacted] The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

> Additionally, the *representations made by the petitioner* concerning the relationship between [redacted] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [redacted] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [redacted] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987).* Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of* [redacted] to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of* [redacted] the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact,

true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).[2] This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of* [redacted] did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In the instant case, counsel submitted as evidence of the successor-in-interest relationship in the record of proceeding an order from the High Courts of Judicature at Madras in Chennai and at Pradesh in Hyderabad approving the Scheme of Amalgamation between [redacted] and [redacted] on March 22, 2007 and the Scheme of Amalgamation of [redacted]

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[2] The regulation at 20 C.F.R. § 656.30(d) (1987) states:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Limited with [redacted] providing that [redacted] assumes all of [redacted] rights, duties, and obligations upon the court's approval. Counsel asserts that the petitioner is a wholly-owned subsidiary of [redacted] and therefore, the court approved scheme of amalgamation between [redacted] establishes that the petitioner qualifies as the successor-in-interest to [redacted]. As evidence that the petitioner is a wholly-owned subsidiary, counsel submitted [redacted] which lists the petitioner as one of its subsidiary companies under Schedules to the Consolidated Balance Sheet and Profit & Loss Account on Page 20.

Upon a careful review of all evidence in the record, the AAO finds that the evidence in the record established that [redacted] qualifies as the successor-in-interest to [redacted] by merging the predecessor enterprise and assuring all property, rights and obligations. However, the record does not contain sufficient evidence to establish that the petitioner is the successor-in-interest to [redacted]. While counsel claims that the petitioner qualifies as the successor-in-interest to [redacted] because it is a subsidiary of [redacted] the court approved scheme of amalgamation was agreed between [redacted], the petitioner was not a part of the amalgamation, and the scheme of amalgamation does not provide any rights or obligations for the petitioner as one of [redacted] subsidiaries.

Further, the records show that the petitioner was established on February 15, 1994 as a Virginia corporation and is still active under the name of [redacted][3] however, the record does not contain any documentary evidence showing when the petitioner became a subsidiary of [redacted] and whether it is still a subsidiary of [redacted] under the name of [redacted] except for the 2006 annual report of [redacted] The records also show that [redacted] was formed in Tamilnadu under Indian law on June 29, 1999 and was registered as a foreign corporation doing business in Virginia on April 5, 2000. The predecessor enterprise, [redacted] was incorporated in [redacted], India on December 14, 1995 and registered in the state of Illinois on August 30, 2000 as a foreign corporation doing business in Illinois.[4] However, the Illinois Secretary of State official record does not contain any registration records showing that either [redacted] or the petitioner under the name of [redacted] registered in the State of Illinois as a foreign corporation doing the same business as [redacted] in Illinois.

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). Consequently, assets of its shareholders or of other enterprises or corporations including the parent

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[3] *See* Virginia State Corporation Commission official website at https://cisiweb.scc.virginia.gov/instant.aspx (accessed on September 26, 2010).

[4] *See* Illinois Secretary of State official website at http://www.ilsos.gov/corporatellc/CorporateLlcController (accessed on September 26, 2010).

company cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Similarly, even if the petitioner's subsidiary of [redacted] is established with documentary evidence, the petitioner's successor-in-interest status must be established by its own instead of its parent company. As previously discussed, the record does not contain any documentary evidence to demonstrate that the petitioner itself has assumed all property, rights or obligations of [redacted] The scheme of amalgamation between [redacted] and the petitioner's parent company did not and could not establish the petitioner's successor-in-interest status. Therefore, the petitioner failed to submit sufficient evidence to establish that it qualifies as the successor-in-interest to [redacted]

In addition, in a successor-in-interest case, the successor-in-interest entity must establish that it has the ability to pay the proffered wage from the date of successor-in-interest status established to the present as well as that the predecessor enterprise possessed the ability to pay the proffered wage from the priority date until the date the successor-in-interest entity assumed the original employer's rights and responsibilities. *Matter of* [redacted] 19 I&N Dec. 481, 482 (Comm. 1981). However, in this case, there is no evidence in the record to establish that the petitioner has become the successor-in-interest to [redacted] at any time period, therefore, the AAO cannot determine whether the petitioner possessed the ability to pay the proffered wage from the date of successor-in-interest and whether [redacted] possessed such ability until the date of successor-in-interest.

Thus, the petitioner failed to establish that it was eligible to use the underlying labor certification filed and certified on behalf of [redacted] The AAO must concur with the director's determination and find that the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

The Secretary of the Department of Homeland Security (DHS) delegates the authority to adjudicate appeals to the AAO pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv).

Among the appellate authorities are appeals from denials of petitions for immigrant visa classification based on employment, "except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act." 8 C.F.R. § 103.1(f)(3)(iii)(B) (2003 ed.).

As the petitioner failed to establish that it qualifies as the successor-in-interest to [redacted] and the petitioner is not eligible to use the labor certification, the instant petition is not accompanied by a valid labor certification, and this office lacks jurisdiction to consider an appeal from the director's decision. It is also noted that the director Thus, the appeal is rejected as improperly filed.

ORDER: The appeal is rejected as improperly filed.