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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

[redacted]

B4

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: MAR 09 2011

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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 $630. 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 preference visa petition was initially approved by the Director, Nebraska Service Center. On further review of the record, the director determined that the petitioner was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with a notice of his intention to revoke (NOIR) the approval of the preference visa petition, and his reasons therefore. The director ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a New York corporation that seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Upon further review of the record, the director determined that the Form I-140 was not approvable based on two grounds: 1) the petitioner failed to establish that it had been doing business for one year prior to filing the Form I-140 per 8 C.F.R. § 204.5(j)(3)(i)(D); and 2) the petitioner failed to establish that the beneficiary was an employee of the foreign entity.

On appeal, counsel disputes both grounds cited as reasons for the revocation. Counsel properly points out that the director did not include the second ground as a basis for the intended adverse decision when issuing the NOIR and that the revocation therefore cannot be based upon a ground that was not previously cited. The

AAO agrees with counsel's reasoning and hereby withdraws the second ground as a basis for the revocation. Although counsel indicates that a brief and/or other supporting evidence will be submitted within 30 days of the appeal, there is no evidence that the record has been supplemented in any way. As such, the record will be considered complete and a decision will be issued based on the record as currently constituted.

The primary remaining issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that it was doing business for one full year prior to filing the Form I-140.

The regulation at 8 C.F.R. § 204.5(j)(2) defines doing business as "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office."

In the present matter, the primary factor that resulted in the revocation was the director's finding that the petitioner filed its Form I-140 on July 30, 2007, which was less than one year since October 27, 2006, the petitioner's date of incorporation. The director determined that the petitioner could not have been doing business for at least one year as of the date the Form I-140 was filed if the petitioner did not have a corporate existence for the full one-year time period.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) rejected the initial filing of the petitioner's Form I-140 and that July 30, 2007 therefore could not be deemed as the official filing date. Counsel contends that the date the petitioner resubmitted the Form I-140, which he claims took place on October 29, 2007, should be deemed the official filing date. Counsel's argument, however, is not persuasive, as the date offered by counsel as the official filing date—October 29, 2007—was not stamped on the Form I-140 nor was this shown as the official priority date on the front page of the Form I-140. As July 30, 2007 is the only date that was clearly stamped and shown as the priority date on the front of the Form I-140, it will be deemed the official filing date. *See* 8 C.F.R. § 103.2(a)(7). As such, the AAO will explore counsel's argument on appeal where he asserts that the petitioner meets the criteria of 8 C.F.R. § 204.5(j)(3)(i)(D) by virtue of being the successor-in-interest to a previously existing company that had been doing business for well beyond the one-year period prior to the date the instant Form I-140 was filed. Specifically, counsel asserts that the petitioner is the success-in-interest to A Plus Express (N.Y.), Inc.

The record shows that in support of the Form I-140, the petitioner submitted the following documents:

1. A letter dated June 4, 2007 and signed by the petitioner's counsel in his claimed capacity as the petitioner's secretary and chief legal counsel. The letter is titled "Confirmation of Appointment" and is written on letterhead containing the petitioner's name followed by the letters "d/b/a" to indicate that the petitioner was authorized to do business under the name [redacted]. The letter purports to inform the beneficiary that on April 24, 2007 [redacted] gave permission to [redacted] to establish the petitioner as a wholly owned subsidiary in the United States. The letter further states that on November 2, 2006 the beneficiary was appointed president of the petitioning entity at a meeting of shareholders and that the petitioner's board of directors reached a resolution on May 28, 2007 approving the acquisition of [redacted] as the petitioner's wholly owned subsidiary. The letter indicated that until the beneficiary assumes his position as president of the petitioning entity, he would remain president of [redacted]

2. An English language translation of a document titled "Request for Approval of [SDHB]'s Application to Establish a Subsidiary Abroad," which purportedly contains the seal of Jinan Foreign Trade and Economic Cooperation Bureau dated January 21, 2007.

3. An English language translation of a document dated December 29, 2006 and titled "Approval of [SDHB] to Establish a Subsidiary Company in the United States." Although this document contains a statement from an English language translator attesting to her proficiency in the English and Chinese languages and, therefore, the accuracy of the translation, the translator's signature does not appear anywhere on the document.

4. A document purporting to be an approval notice issued by the [redacted] permitting [redacted] to set up the petitioning entity as [redacted] wholly owned subsidiary. The document contains two unexplained dates. One date—April 26, 2007—is affixed to the bottom left hand corner of the document and indicates that this is the date of the document. Another date—April 23, 2007—appears below the Seal of the Ministry of Commerce of the People's Republic of China.

5. A document purporting to be an approval notice issued by the [redacted] permitting [redacted] to set up a wholly owned subsidiary in the United States. The official government seal is shown as stamped on June 29, 2007.

6. A purported translation of the Ministry of Commerce of the People's Republic of China's consent allowing [redacted] to set up a U.S. subsidiary. The date below the seal is marked as April 30, 2007.

7. Minutes that were taken at a May 28, 2007 board of directors meeting where it was resolved that [redacted] would be wholly owned by the petitioner and would be a division within the petitioning entity.

8. An English language translation of [redacted] resolutions dated May 25, 2007 conveying similar information as was conveyed in No. 7 above.

It is noted that the documents discussed in Nos. 2, 4, 5, and 6, above, were not accompanied by a statement from the translator certifying the document as complete and accurate. *See* 8 C.F.R. § 103.2(b)(3).

Additionally, the record shows that in the petitioner's June 10, 2008 response to a request for evidence (RFE), the petitioner resubmitted a number of the documents listed above and also provided numerous additional supporting documents including, but not limited to, [redacted] tax returns covering tax periods from June 1, 2006 through May 31, 2007 and from June 1, 2007 through May 31, 2008, respectively, 2007 IRS Form W-2s issued by the petitioner, the petitioner's 2006 tax return, and quarterly federal tax returns for various quarters in 2007 issued by the petitioner and by [redacted]

On January 30, 2009, the director issued a notice of intent to revoke approval of the petition based on the petitioner's failure to establish that it was doing business for one year prior to filing the Form I-140. The director expressly rejected the petitioner's successor-in-interest claim, pointing out that both the petitioner and [redacted] are currently active business entities according to the New York State Division of Corporations.

In response, counsel submitted a letter dated February 28, 2009 in which he pointed out that the petitioner acquired 100% of [redacted] shares by virtue of SDHB's transfer of such shares to the petitioner. Counsel stated that just because [redacted] has not been dissolved does not mean that it is actively doing business, regardless of its active status with the New York State Division of Corporations. Counsel added that [redacted] stopped all business operations in August 2007 and further claimed that the petitioner has continued to carry on with all of [redacted] business at the same business address.

The petitioner also provided a sworn affidavit from the beneficiary and a letter from the petitioner's accountant as supporting evidence. In the affidavit, which was executed on February 28, 2009, the beneficiary stated that he is the chairman and president of [redacted], the petitioner, and [redacted] He further stated that after [redacted] acquired all ownership to [redacted] and subsequently transferred that interest to its wholly owned subsidiary, i.e., the petitioner, the petitioner continued to carry out [redacted]'s business operation at the same location and with the same employees and therefore became [redacted]'s successor-in-interest.

In the accountant's letter dated February 23, 2009, [redacted] stated that the State Department of New York Division of Corporations does not require corporate filing to establish a change in a company's ownership and further added that unless a company is actively dissolved, the Division of Corporations would continue to show [redacted] as an active corporation even if it was acquired by or merged into another company.

Additionally, the petitioner provided photocopies of original stock certificates issued by [redacted] and the new stock certificates, which purportedly void the transfers made in the original certificate nos. one and two and replace those transfers with new transfers made to the petitioner via certificate no. three.

On May 24, 2009, the director issued the final decision revoking approval of the petition based on the conclusion that the petitioner failed to establish compliance with 8 C.F.R. § 204.5(j)(3)(i)(D), which requires the petitioner to establish that it had been doing business for one full year prior to filing the Form I-140. The director determined that the petitioner failed to provide adequate documentation showing that it became the successor-in-interest of a previously existing company. The director concluded that the petitioner did not provide sufficient evidence showing that it has assumed all of the rights, duties, obligations, and assets of the original entity in order to establish itself as a successor-in-interest.

Although counsel maintains the petitioner's original successor-in-interest claim, no evidence is submitted on appeal and thus counsel fails to overcome the director's findings.

The generally accepted definition of a successor-in-interest is: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Black's Law Dictionary 1473 (8th Ed. 2004). A mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *Id.*; *see also Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law, the purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business in the same manner with regard to the assets sold. *See generally* 19 Am. Jur. 2d Corporations § 2170 (2010).

Considering the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes. However, in order to do so, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

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 in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer.

Applying the analysis set forth above to the instant petition, the documentation submitted by the petitioner does not meet the evidentiary requirements. By definition, the actions required to establish a successor-in-interest must be more than the mere acquisition of one company's stock by another company where both companies continue to exist and do business. In the present matter, aside from repeatedly claiming to be a successor-in-interest and providing documentation of limited probative value to show that the petitioner has purchased the stock of a previously existing U.S. entity, the petitioner has not provided the requisite documentary proof. 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)). Rather, while the documents on record indicate that the petitioner may have acquired ownership interest in Apex-NY, there is little evidence to suggest that the petitioner became Apex-NY's successor-in-interest. There are a number of documents that support the AAO's finding and other documents that show the petitioner's assertions as unreliable and generally lacking in credibility.

First, the AAO points to the tax returns that were simultaneously submitted by both the petitioner and by [redacted] As previously noted, the petitioner submitted [redacted]'s tax returns for 2006 and 2007, which account for the petitioner's financial status beyond July 1, 2007 when [redacted] purportedly ceased all business activity according to the beneficiary's 2009 affidavit and the 2009 letter from the petitioner's accountant. The AAO further observes that [redacted] continued to file quarterly federal tax returns during the third quarter of 2007, despite the claim that it ceased all business activity as of July 1, 2007. The record shows that the petitioner also continued to simultaneously file quarterly and yearly tax returns during overlapping time periods and that each entity maintained its own separate employer identification number.

Second, the AAO will address statements made by the petitioner's account, Francis Lai, in the February 23, 2009 letter, which was submitted in response to the NOIR. Namely, in an effort to address the director's NOIR findings regarding the continued active status of [redacted] as shown in the New York State Division of Corporations, [redacted] stated that "the Department does not require the filing of a Certificate of Dissolution of a company after it is acquired by, or merged into, another company." However, section 905 of the New York Business Corporation Code includes the following pertinent provisions:

> (c) A certificate of merger, entitled "Certificate of merger of ..... into .... (names of corporations) under section 905 of the Business Corporation Law", shall be signed and delivered to the department of state by the surviving corporation. If the surviving corporation is the parent corporation and such corporation does not own all shares of each subsidiary corporation to be merged, such certificate shall be delivered not less than thirty days after the

> giving of a copy or outline of the material features of the plan of merger to shareholders of each such subsidiary corporation, or at any time after the waiving thereof by the holders of all of the outstanding shares of each such subsidiary corporation not owned by the surviving corporation.

Thus, assertions made by the petitioner's accountant are directly contradicted by the above relevant state law provisions. 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). Furthermore, 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. *Id.*, at 591.

In addition to the anomaly discussed above, the AAO makes note of additional anomalies that give rise to further doubts as to the reliability of the supporting evidence and the credibility of the petitioner's claim. One of the most significant inconsistencies involves the numerous foreign documents whose purported translations the petitioner submitted in support of the initial petition. Such documents included requests for and approvals of SDHB's purchase of a wholly-owned U.S. subsidiary, i.e., the petitioning entity. Despite the fact that the petitioner was established on October 27, 2006, there are numerous foreign documents that show that the request for such purchase was submitted to the appropriate foreign office on January 21, 2007, thus indicating that the U.S. entity had been established before the foreign entity requested approval to establish the entity. Another document—one that purports to approve the foreign entity's request to establish a U.S. subsidiary—shows that the request was approved on December 29, 2006, which is almost a full month prior to the date of the document that purportedly represents the foreign entity's request to set up a U.S. subsidiary.

In summary, the discrepancies and errors catalogued above lead the AAO to conclude that the evidence of the beneficiary's eligibility is not credible. Accordingly, the petitioner has not established the beneficiary's eligibility for the requested immigrant visa classification.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

In light of the numerous discrepancies and evidentiary deficiencies described above, the AAO finds that the petitioner was not eligible for the immigration benefit sought at the time the Form I-140 was filed.

Accordingly, the approval of the petition will remain revoked. 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.