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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 2 1 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Rachel DiFiore for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (TSC), and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be dismissed.

The petitioner is a construction contractor. It seeks to employ the beneficiary permanently in the United States as a secretary. The petition was accompanied by a copy of a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL) that had been previously filed by the business entity, The TSC director determined that the petitioner, had not established that a *bona fide* job offer existed because the evidence in the record did not demonstrate that the petitioner is a valid successor-in-interest to the employer listed on the original labor certification. The TSC director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 TSC director's April 19, 2012 denial, the primary issue in this case is whether or not the petitioner, was a valid successor-in-interest to the business entity, the employer listed on the original labor certification.

On appeal, the petitioner asserts that the petitioner, was a successor-in-interest to the business entity, the employer listed on the original Form ETA 750. The petitioner contends that the corporate assets of both the petitioner, and the business entity, as well as the personal assets of the owner of these businesses, had been readily available to pay the proffered wage to the beneficiary since the priority date of April 30, 2001, and should be considered in determining the petitioner's continuing ability to pay the proffered wage. The petitioner includes copies of previously submitted documentation in support of the appeal.

The original employer identified in the Form ETA 750 filed on April 30, 2001 was an S corporation incorporated in the state of New York, wholly owned by The original Form ETA 750 listed the business address of

[1] The AAO sent a fax to prior counsel's office on May 16, 2013 asking for the submission of a new, properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, verifying current legal representation of the petitioner on appeal. The AAO received no response. The AAO then called prior counsel's office on June 4, 2013, and prior counsel stated that he would be submitting an updated Form G-28 to the AAO, which the AAO never received. The AAO also attempted to call the petitioner's business, but the public number as listed on various Internet websites was not in service. In accordance with the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28] must be filed with an appeal filed with the Administrative Appeals Office." This regulation applies to all appeals filed on or after March 4, 2010. *See* 75 Fed. Reg. 5225 (Feb. 2, 2010). The AAO will accordingly recognize the petitioner as being self-represented in this matter.

as ' ' in , New York. The record contains the Forms 1120S, U.S. Income Tax Return for an S corporation, of the business entity, , for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008. These Form 1120S tax returns list the Federal Employee Identification Number (FEIN) of , as A review of the evidence in the record and the official website of the Secretary of State of New York at reveals that the business entity, had been dissolved on January 14, 2010. The evidence in the record and this same website reflect that the petitioner, , a separate and distinct New York S corporation that is also wholly owned by was incorporated on November 17, 2003, and is currently active through the date of this decision. The record contains the petitioner's Form 1120S tax returns for 2007, 2008, and 2009, all of which list its business address as " in , New York and FEIN as On June 24, 2010, the petitioner, , filed the Form I-140 petition accompanied by a copy of the labor certification previously filed by the dissolved business entity, .

Here, the original Form ETA 750 was accepted for processing by the DOL on April 30, 2001. The proffered wage is listed as $13.50 per hour or $28,080.00 annually on the Form ETA 750 based upon a forty hour week. The Form ETA 750 states that the position requires two years of experience in the offered job of secretary. The Form I-140 petition, in the instant case was subsequently filed on June 24, 2010.

It must be determined whether the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c). Consequently, the only way for the petitioning corporation to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that it is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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

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. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the

date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

In the instant case, the record contains an affidavit dated December 23, 2010 and signed by who stated in pertinent part:

> …I am the sole owner of I was the sole owner of I created in 1999. A copy of the incorporation receipt from the New York State Department of State is attached at Tab B. I created in 2003. A copy of the incorporation receipt from the New York State Department of State is attached at Tab B. assumed the rights, duties, obligations and assets of and continues to operate the same type of business.

In his affidavit, also noted that all of his personal assets as well as the corporate assets of both the business entity, , and the petitioner, , were available to pay the proffered wage of $28,080.00 per year to the beneficiary since the priority date of April 30, 2001.

On appeal, the petitioner reiterates claim that the petitioner, was a successor-in-interest to the business entity, However, the record is absent any independent evidence that the petitioner, is a valid successor-in-interest to the business entity listed as the employer on the original Form ETA 750, While it is evident that wholly owned both the petitioner, , and the business entity, the record does not contain any documentation demonstrating that the petitioner, , assumed the rights, duties, obligations and assets of the dissolved business entity, Without such independent evidence, the unsupported assertions of and the petitioner cannot be considered as sufficient to establish that the business entity, had been succeeded by the petitioner, 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)).

Without evidence that the petitioner, , is a valid successor-in-interest to the business entity listed as the employer on the original Form ETA 750, it is not possible to ensure that the job opportunity remains the same as originally certified.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability

> to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As previously noted, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $13.50 per hour or $28,080.00 annually based upon a forty hour week.

On appeal, the petitioner contends that the corporate assets of both the petitioner, , and the business entity, , as well as the personal assets of the owner of both of these businesses, had been readily available to pay the proffered wage to the beneficiary since the priority date of April 30, 2001, and should be considered in determining the petitioner's continuing ability to pay the proffered wage.

As noted above, the evidence in the record of proceeding and information from the official website of the Secretary of State of New York confirm that the petitioner, , with FEIN is a separate and distinct New York S corporation from the dissolved business entity, , with FEIN 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). 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." In addition, it is unlikely either the dissolved business entity, or the petitioner, would convert business assets including construction equipment and real estate that are needed to conduct daily business activities in order to pay the proffered wage. Furthermore, pledge of his personal assets is unenforceable and it is unlikely he would have converted personal assets such as his primary residence to pay the proffered wage. As the record does not contain documentary evidence demonstrating that the petitioner, , is the valid successor-in-interest to the business entity, it cannot be concluded that the petitioner has established its continuing ability to pay the proffered wage since the priority date of April 30, 2001.

The petitioner, , has not met any of the three conditions discussed above needed to establish that a valid successor relationship existed between it and the business entity,

The next issue to be examined in this proceeding and one not noted by the TSC director in either the notice of intent to deny or the notice of denial, is whether the Form ETA 750 labor certification was expired when the petitioner, , filed the Form I-140 petition with USCIS on June 24, 2010.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts)

All Form I-140 petitions based on approved labor certifications must be filed within 180 days of the labor certification approval.[2] All permanent labor certifications approved on or after the effective date of July 16, 2007, will expire 180 calendar days after certification, whether the original application was filed under the PERM or pre-PERM regulations, unless the employer uses the approved labor certification prior to expiration in support of an I-140 petition with USCIS. Likewise, all labor certifications approved prior to July 16, 2007 expired in 180 calendar days, unless filed in support of an I-140 petition with USCIS prior to the expiration date. Therefore, all labor certification applications approved prior to July 16, 2007 must have been filed in support of an I-140 petition by January 12, 2008.

The Form I-140 petition filed by the petitioner, with USCIS on June 24, 2010, was filed well after January 12, 2008. Therefore, the Form ETA 750 labor certification approved by the DOL on April 30, 2001, was expired when it was submitted in support of the Form I-140 petition filed on June 24, 2010. Consequently, the Form I-140 petition cannot be approved for this additional reason.

The final issue to be examined in this proceeding is whether the Form ETA 750 approved by the DOL was invalidated for fraud or willful misrepresentation in a prior and separate proceeding.

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

> (b) Expiration of labor certifications. For certifications resulting from applications filed under this part and 20 CFR part 656 in effect prior to March 28, 2005, the following applies:
> (1) An approved permanent labor certification granted on or after July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of the date the Department of Labor granted the certification.
> (2) An approved permanent labor certification granted before July 16, 2007 expires if not filed in support of a Form I-140 petition with the Department of Homeland Security within 180 calendar days of July 16, 2007.

The employer listed on the original Form ETA 750 is the business entity, , which previously submitted a separate Form I-140 petition, on behalf of the beneficiary in the instant case on June 8, 2007. A review of the Form ETA 750 reveals that it was prepared by Part 15., of the Form ETA 750 listed the beneficiary's relevant work experience as a secretary employed by the business entity, , from January 2000 to March 2001 and as a secretary employed by , in , New York, from January 1997 to December 1999. The ETA Form 750 was signed by both as president of the business entity, , and the beneficiary on March 7, 2001, with both individuals attesting to the truthfulness and correctness of the information contained therein under penalty of perjury.

The record contains an affidavit dated September 10, 2008 that is signed by the beneficiary. The affidavit is typewritten in Portuguese and accompanied by a certified English language translation. In this affidavit, the beneficiary applicant admitted that she had never worked for either or as claimed on the Form ETA 750. The beneficiary asserted that secretaries employed by the individual who prepared the Form ETA 750 made an error and that she was not able to detect this error because she did understand English at the time she signed the Form ETA 750 on March 7, 2001.

The Director, Nebraska Service Center (NSC), subsequently denied the Form I-140 petition, , filed by the business entity, , in a decision issued on February 3, 2009. The NSC director based the decision in part upon the determination that the petitioner had falsified information on the Form ETA 750 regarding the beneficiary's work experience. In addition, the NSC director invalidated the Form ETA 750 labor certification pursuant to 20 C.F.R. 653.30(d), finding that the petitioner had committed fraud or willfully misrepresented a material fact in obtaining the labor certification. The record shows that no further action was taken in the matter as no appeal to the denial of the petition was filed.

In conjunction with the instant case, owner of both the petitioner, , and the business entity, , has provided two separate affidavits dated April 26, 2010 and December 23, 2010, respectively. In both of these affidavits, acknowledged that the beneficiary had not worked as claimed on the Form ETA 750, but that secretaries employed by the individual who prepared the Form ETA 750 made this error. claims that he was not aware of this error because he did understand English well at the time he signed the Form ETA 750 on March 7, 2001.

and the beneficiary's disavowals of participation in fraud are not persuasive even though they each claimed lack of competence in reading the English language. USCIS cannot be responsible for either the petitioner's choice of individuals used to prepare supporting documents and petitions or the petitioner's failure to obtain translations of signed documents when needed. Specifically, the failure and the beneficiary to apprise themselves of the contents of the paperwork or the information being submitted constitutes deliberate avoidance and does not absolve either or the beneficiary of their responsibility for the content of the petition or the materials submitted in support. *See Hanna v. Gonzales,* 128 Fed. Appx. 478, 480 (6th Cir. 2005) (unpublished) (an applicant who signed his application for adjustment of status but who disavowed

knowledge of the actual contents of the application because a friend filled out the application on his behalf was still charged with knowledge of the application's contents). The law generally does not recognize deliberate avoidance as a defense to misrepresentation. *See Bautista v. Star Cruises,* 396 F.3d 1289, 1301 (11th Cir. 2005); *United States v. Puente,* 982 F.2d 156, 159 (5th Cir. 1993). To allow or the beneficiary to absolve themselves of responsibility by simply claiming that they had no knowledge or participation in a matter where they provided all the supporting documents would have serious negative consequences for USCIS and the administration of the nation's immigration laws. While potentially ineligible aliens might benefit from approval of an invalid petition or application in cases where USCIS fails to identify fraud or material misrepresentations, once USCIS does identify the fraud or material misrepresentations, these same aliens would seek to avoid the negative consequences of the fraud, including denial of the petition or application, a finding of inadmissibility under section 212(a)(6)(C) of the Act, or even criminal prosecution.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Furthermore, a finding of fraud may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The Form ETA 750 was signed by both as president of the business entity, , and the beneficiary on March 7, 2001, with both individuals attesting to the truthfulness and correctness of the information contained therein under penalty of perjury. The Form ETA 750 has been included as a supporting document with the filing of two separate Form I-140 petitions on the same beneficiary's behalf. Both and the beneficiary acknowledge that the listing of the beneficiary's employment history on the Form ETA 750 is false. By admission, the business entity, and the petitioner, , have sought to procure a benefit provided under the Act through fraud and willful misrepresentation of a material fact. We therefore must concur with the NSC director's finding of fraud in the prior decision dated February 3, 2009, as it relates to the business entity, , and the Form I-140 petition, , and make a finding of fraud as it relates to the petitioner, in the instant case. This finding of fraud shall be

considered in any future proceeding where admissibility is an issue. We will invalidate the Form ETA 750 pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 with a finding of fraud.

FURTHER ORDER: The AAO finds that the petitioner fraudulently and willfully mislead the DOL and USCIS on elements material to its eligibility for a benefit sought under the immigration laws of the United States. The labor certification application is invalidated pursuant to 20 C.F.R. § 656.31(d) based on the petitioner's fraudulent misrepresentation.

FURTHER ORDER: The alien employment certification, Form ETA 750, ETA case number filed by the petitioner is invalidated.