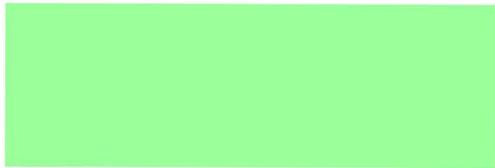




U.S. Citizenship
and Immigration
Services

(b)(6)



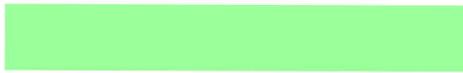
DATE: **AUG 11 2014**

OFFICE: NEBRASKA SERVICE CENTER FILE:



IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for 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:



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.

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for further investigation and review.

The petitioner is an information technology consultancy firm. It seeks to employ the beneficiary permanently in the United States as a systems engineer/architect pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability¹ and members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The Form I-140, Immigrant Petition for Alien Worker was filed on May 1, 2008. It was filed by [REDACTED] signed the Form I-140, Immigrant Petition for Alien Worker. The ETA Form 9089 supporting the filing also reflects in Part C that the employer is [REDACTED]

The year it commenced business is stated as 1999 and the federal employer identification number (FEIN)² on the Form I-140 and on the ETA Form 9089 is [REDACTED]. While the instant petition was pending, counsel submitted another Form I-140 on behalf of a different petitioner seeking to amend the pending petition. Counsel asserts that this petitioner is the successor-in-interest to [REDACTED]. The new Form I-140 states that the successor-in-interest is [REDACTED]. The petition is signed by [REDACTED] and dated April 9, 2010. It indicates that this company was established on April 8, 2002 and its FEIN is [REDACTED]. An accompanying letter dated April 16, 2010 signed by [REDACTED] as CEO/COO of [REDACTED] states that [REDACTED] (successor-in-interest of [REDACTED]) wishes to amend the I-140 for [the beneficiary] which was earlier filed by [REDACTED] on May 1, 2008.”

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The priority date is the date the ETA Form 9089, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). A petitioner must establish that the beneficiary has the education, training, and experience required by

¹There is no indication in this case that the petitioner is requesting a visa based on the beneficiary as an alien of exceptional ability. Further, the ETA Form 9089 replaced the Form ETA 750 after new DOL regulations went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² Every U.S. employer sponsoring a foreign worker must have a valid FEIN. *See* 20 C.F.R. § 656.3(1).

the labor certification and that it has had the continuing ability to pay the proffered wage from the priority date forward. *See* 8 C.F.R. 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this matter, [REDACTED] must also establish that it is the successor-in-interest to [REDACTED]. In this case, the priority date is January 8, 2008 and the proffered wage is \$90,800 per year.

The director denied the decision on July 7, 2010, finding that the petitioner had failed to comply with the Board of Alien Labor Certification Appeals (BALCA) Field Memorandum 48-94 (May 16, 1994) in explaining why it is not possible to predict where work sites will be at the time the application was filed and had failed to establish that the beneficiary would be employed at the Santa Clara, California primary worksite identified on Part H. of the labor certification.

On appeal, the petitioner, through counsel, asserts that the petitioner complied with the BALCA Field Memorandum 48-94. That memo provides that applications which involved job opportunities in various locations in the U.S. that cannot be predicted should be filed with the local Employment Service office having jurisdiction over the area in which the employer's main or headquarters office is located.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).³

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.

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

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree

³The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary. We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

The job qualifications are found on Part H of the ETA Form 9089. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered.

In this matter, Part H reflects the following minimum requirements:

- H.4. Education: Minimum level required: Master's.
- 4-B. Major Field Study: Computer Science, Engineering, Math or equiv.
- 7. Is there an alternate field of study that is acceptable?
The petitioner checked "no" to this question.
- 8. Is there an alternate combination of education and experience that is acceptable?
The petitioner checked "yes" to this question.
- 8-A. If Yes, specify the alternate level of education required.
The petitioner checked "Bachelor's" to this question.
- 8-B. If applicable, indicate the number of years experience acceptable in question 8.
The petitioner stated 6 (years).
- 9. Is a foreign educational equivalent acceptable?
The petitioner listed "yes" that a foreign educational equivalent would be accepted.
- 6. Experience: 12 months in the position offered,
10. or 12 months in the related occupation of Systems Analyst or equiv.
- 14. Specific skills or other requirements:

Experience in: Oracle Business Intelligence, Informatica, DAC, Windows, Unix, Oracle, SQL Server, TeraData, SQL Navigator, Toad, MS Visio, Erwin and MS Project. Relocation Possible.

Note: Employer will accept suitable combination of education, training or experience.

It is noted that, although DOL certified the ETA Form 9089, its role is limited to determining whether there are sufficient workers who are able, willing qualified and available, and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).⁴

As indicated above, the petitioner only indicated on Part H.14 of the labor certification, “relocation possible.” We requested the petitioner to provide copies of job postings and advertisements that it completed as evidence that its recruitment fairly advised any qualified U.S. workers of the job requirements as reflected on the ETA Form 9089.⁵ The petitioner provided copies of 23 online ads appearing in [REDACTED] copies of two print advertisements, copies of 18 ads that appeared to have been posted on the website of [REDACTED] 18 copies of ads that appear online on [REDACTED] and a copy of the petitioner’s Notice of Job Opportunity. The [REDACTED] and print advertisements mirrored the “relocation possible” language: 11 of the 18 Pacific West website ads contained the “relocation possible” advisement; all the [REDACTED] contained “relocation possible;” and the petitioner’s internal Notice of Job Opportunity contained “relocation possible.” Based on a review of the labor certification and the job recruitment documentation submitted, we find that the petitioner sufficiently complied with the requirements of BALCA Field Memorandum 48-94 in advising U.S. workers that relocation may be a feature of the job.

⁴ In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

⁵See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>, OFLC “Frequently Asked Questions and Answers” published by the DOL (accessed July 16, 2014).

⁶ [REDACTED] stated the correct yearly salary but described the job as 31-40 hours per week. 35 hours per week is regarded as the minimum for full-time work.

⁷ [REDACTED] correctly stated the experience required in the body of the ads but described it as “1-2” years experience in the heading above the body of the ads.

The record, however, raises the issue whether [REDACTED] has demonstrated that it is the successor-in-interest to [REDACTED] identified as the petitioner on the Form I-140 and on the ETA Form 9089 as the U.S. employer. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, 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).

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto*, a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

In *Matter of Dial Auto*, a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body 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 Elvira Auto Body's 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.

19 I&N Dec. at 482-3 (emphasis added).

Here, according to Mr. [REDACTED] as asserted in his April 16, 2010 letter, [REDACTED] is the successor-in-interest to [REDACTED]. The record contains copies of two

⁸ The record contains copies of other documents filed with the state of California that reflect that [REDACTED] had changed its name to "[REDACTED]" on September 28, 2009, then [REDACTED] changed its name to "[REDACTED]" on October 2009. State documents also reflect that [REDACTED] was formerly known as [REDACTED] a Delaware corporation. [REDACTED] filed a Name Change Certificate of Qualification with the state of California on

“Purchase Agreements” Both copies indicate that they were signed on December 14, 2009. They each have different language as preambles and each are executed by different entities as sellers. In one version, [REDACTED] is described as selling one of its two DBA’s to [REDACTED]. The dba (doing business as) is specified as its IT Solutions provider, [REDACTED]. The consideration and the individual values are redacted. It is also noted that Part 7 of the agreement states that the buyer is not assuming any immigration liabilities of the Seller prior to close of escrow. The document is signed by [REDACTED] as Seller and by [REDACTED] for [REDACTED] as the Buyer. Attachments include lists of office personal property, and a promissory note signed by [REDACTED] for [REDACTED] for 1.591 million dollars. [REDACTED] federal tax return shows that [REDACTED] is a 50% shareholder. The 2008 tax return of [REDACTED] also shows that he is a 50 % shareholder.

The other document is also signed on December 14, 2009, has identical language in the agreement but the preamble is different and the parties are different. The preamble now describes the agreement to be between [REDACTED] (Formerly known as [REDACTED] as the Seller and [REDACTED] as the Buyer. The recitals are similar to the other version except in this version, [REDACTED] signs for [REDACTED]. It is noted that none of the signatures stated the job title of the signer. It is also noted that the 2009 tax

November 4, 2009. The FEIN claimed on the labor certification and Form I-140 by [REDACTED] California is [REDACTED]. This same FEIN was also used by [REDACTED] on its 2008 federal tax return. Additionally, [REDACTED] have used [REDACTED]. The petitioner has not provided any Internal Revenue Service (IRS) document verifying which entity was assigned this number, or that both companies validly have the same FEIN. Similarly, covering the time period of employment from August 17, 2007 to July 31, 2010, [REDACTED] petitioned the beneficiary on the non-immigrant Form I-129 using the [REDACTED] FEIN. However, both [REDACTED] issued the Form W-2 to the beneficiary under FEIN [REDACTED].

It is also noted that online California corporation records reflect one entity called [REDACTED] which has been registered in the state of California. On April 1, 2009, through a Statement and Designation by Foreign Corporation, [REDACTED] identified itself as being organized in the state of Iowa with the address of its principal executive office as [REDACTED]. A Certificate of Surrender of Right to Transact Intrastate Business was also filed in California on behalf of this company on December 21, 2012.

return of [REDACTED] reflects that [REDACTED] is the sole owner. No explanation has been offered why two different versions of the Purchase Agreement have been provided. As the record contains two separate agreements with no explanation, we cannot make a determination which one, if either, is valid. 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 *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

An appellant may establish a valid successor relationship 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 including whether the predecessor possessed the ability to pay the proffered wage for the relevant periods.⁹

On remand, the director should address whether all three conditions described above have been satisfied including whether the transaction transferring ownership of [REDACTED] has been fully described and documented; whether the job opportunity remains the same as originally offered on the labor certification; and whether the successor has shown that it is eligible for the immigrant visa in all respects including whether the predecessor possessed the ability to pay the proffered wage for the relevant periods.

The director should also address on remand whether the petitioner has established that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). As the director noted, the ETA Form 9089 states that the beneficiary has been employed by [REDACTED] from October 11, 2004 until the present. The beneficiary signed the ETA Form 9089 on April 22, 2008. It is claimed on the ETA Form 9089 that he has been employed by [REDACTED] full-time as a systems analyst. His supervisor is stated to be [REDACTED]. An employment verification letter dated April 16, 2010 is contained in the record, signed by [REDACTED]. He states that the beneficiary is a full-time employee of [REDACTED] and that he is a programmer analyst.¹⁰

It is noted that the record contains a second letter, dated June 17, 2010, signed by [REDACTED] CEO/COO of [REDACTED]. In this letter, Mr. [REDACTED] states that the beneficiary has been working for [REDACTED] as a Systems Engineer/Architect at a facility in Atlanta, Georgia owned by [REDACTED]. Mr. [REDACTED] states that this employment began in March 2010. The letter then

⁹ As the claimed predecessor-in-interest to the asserted successor [REDACTED] ability to pay the proffered wage must be demonstrated from the priority date of January 8, 2008 until the change in ownership occurred.

¹⁰ The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence relating to qualifying experience or training shall consist of letters from the employer or trainer and should include the name, address, title of the writer as well as a specific description of the duties performed by the alien or the training received.

contains a description of the beneficiary's duties and states that the beneficiary reports periodically to ([REDACTED]). The letter states that [REDACTED] supervises and controls the beneficiary's employment.

Additionally, the labor certification states that the following special skills are required: Oracle Business Intelligence, Informatica, DAC, Windows, Unix, Oracle, SQL Server, TeraData, SQL Navigator, Toad, MS Visio, Erwin and MS Project. On remand the director may also review whether the record establishes that the beneficiary possessed the required special skills as of the priority date of January 8, 2008. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In view of the foregoing, we remand the petition for further investigation and review. The director may request, and the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.