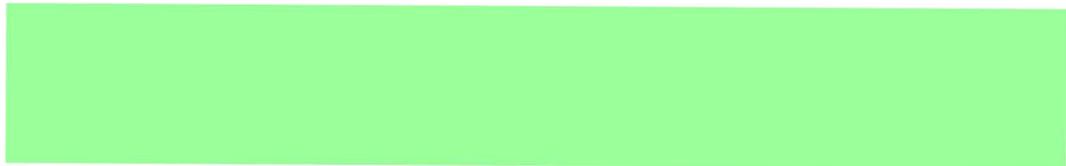




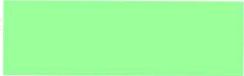
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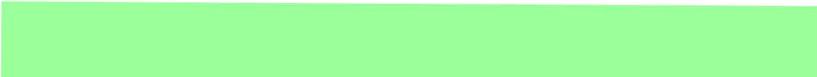
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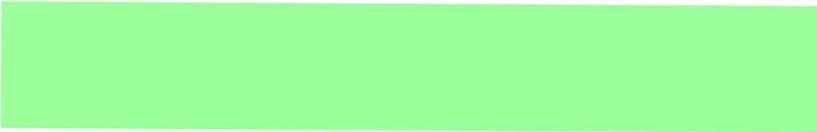


DATE: SEP 30 2014

OFFICE: TEXAS SERVICE CENTER

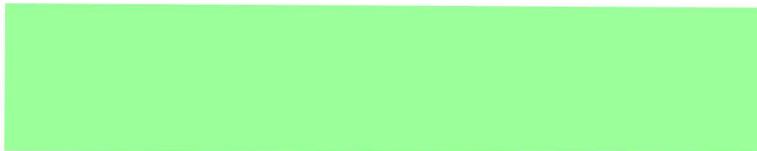
FILE: 

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 initially approved by the Director, Texas Service Center. On further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. The director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the preference visa petition. The director subsequently revoked approval of the petition. 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 describes itself as an IT Solutions Provider. It seeks to employ the beneficiary permanently in the United States as a Senior Programmer Analyst 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 June 3, 2010. It was filed by [REDACTED] (Successor-in-interest of [REDACTED]” at [REDACTED] [REDACTED] signed the Form I-140, Immigrant Petition for Alien Worker. The ETA Form 9089 supporting the filing reflects in Part C that the employer is [REDACTED] [REDACTED] The year it commenced business is stated as 1999 and the federal employer identification number (FEIN)² on the ETA Form 9089 is [REDACTED] also signed the ETA Form 9089, although [REDACTED] is the name listed as the CEO. The FEIN on the Form I-140 is [REDACTED] The petition is signed by [REDACTED] and dated May 25, 2010. It indicates that this company was established on April 8, 2002 and it employs 47 workers. A transmittal letter dated May 27, 2010 from counsel characterizes the petitioner as “[REDACTED] (successor-in-interest of [REDACTED] DBA [REDACTED]” [REDACTED]

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 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.

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).

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 July 22, 2009 and the proffered wage is \$82,435 per year.

The director initially approved the petition on July 22, 2010. Upon further review, he issued a NOIR on May 23, 2012, determining that the filings from [REDACTED] such as the instant matter were fraudulent and noting that there was a discrepancy between the beneficiary's address and the claim on the ETA Form 9089 that he was employed by [REDACTED] located in [REDACTED] Iowa. The director also noted that evidence relating to the petitioner's ability to pay the proffered wage was required and permitted the petitioner thirty days to respond.

On February 20, 2013, the director revoked the petition's approval. He determined that the petitioner's response failed to overcome the grounds for revocation. He described some of the relationships between the petitioner as the successor-in-interest to [REDACTED] in Iowa. The director concluded that the indictment of the owners and conviction of [REDACTED] (which shared direction and ownership at times with [REDACTED], dba [REDACTED] for making a false statement to a government agency pursuant to 8 U.S.C. § 1001(a)(3) was sufficient to make a finding of fraud. The director also indicated that investigators had spoken to [REDACTED] as CEO of the petitioner during a site visit on June 8, 2010. Mr. [REDACTED] stated that he received and signed documents at home and that he could not provide the investigators with the number of the petitioner's employees or identify the petitioner's gross income. The director additionally noted that the primary work location stated on the ETA Form 9089 was the petitioner's address in [REDACTED], California and that the petitioner's submission of the non-immigrant labor condition application (ETA 9035) could not be used to establish other locations of the intended work. The director further summarizes discrepancies in the beneficiary's work history attested to in the instant matter where the ETA Form 9089 states that the beneficiary worked for [REDACTED] from August 17, 2007 until an unknown date (beneficiary's date of signing was May 7, 2010). However, on another ETA Form 9089, filed in support of another employer's Form I-140, the beneficiary's employment is claimed to be with [REDACTED] from February 1, 2005 until February 1, 2010. The director also notes other contradictions between the beneficiary's addresses as given on the documents in the record such as the ETA Form 9089, pay vouchers and his 2009 Form W-2. The director concludes that the petitioner has fraudulently misrepresented the beneficiary's eligibility for the benefit sought.

On appeal, the petitioner, through counsel, asserts that the petitioner complied with the requirements of the ETA Form 9089 and that although unintentional mistakes were made, the petitioner has extended a *bona fide* job offer to the beneficiary. The petitioner emphasizes that the two [REDACTED] entities are separate entities and that the malfeasance of [REDACTED] should not be imputed to the California operation.

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

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 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?

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.

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 Programmer Analyst or equiv.

14. Specific skills or other requirements:

Experience in: Siebel CRM, Siebel, Oracle BI Enterprise Edition, RDBMS (Oracle, DB2, MySQL, MS SQL, Sybase), Java, JDBC, PERL, PL/SQL Stored procedures, Quest Central, TOAD, SQL Navigator, Sun Solaris, Microsoft Windows Operating Systems, UNIX, WinRunner, LoadRunner, VB.Net, Business Objects, Informatica, Web Services, XML, EAI, EIM, Siebel Tools, MS Visio, MS Project, Cognos and eScripts. Relocation Possible.

Note 1: Employer will accept an equivalency evaluation of foreign education from a college professor authorized to grant college level credits. Note 2: 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

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.*

It is left to USCIS to determine whether the offered position and the beneficiary qualify for the requested preference classification, and whether the beneficiary satisfies the minimum requirements of the offered position as set forth on the labor certification.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁵ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Upon review of the record, including evidence submitted on appeal, we concur with the director that the credibility of the assertions made by the petitioner based on documentation submitted and the past history of [REDACTED]—Iowa is in question. However, we do not conclude that there is sufficient evidence in the current record, to compel a revocation based on fraudulent misrepresentation.

As indicated above, the petitioner indicated on Part H.14 of the labor certification, "relocation possible." We find that this suggests that the location of the intended employment is subject to relocation, but on remand the director should request that the petitioner 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 9089.⁶

The record also raises the issue whether [REDACTED] has demonstrated that it is the successor-in-interest to [REDACTED]

⁵ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

⁶ See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>, OFLC "Frequently Asked Questions and Answers" published by the DOL (accessed July 16, 2014).

identified as the employer on the ETA Form 9089. 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).

According to counsel, [REDACTED] is the successor-in-interest to [REDACTED] dba [REDACTED].⁷ The record contains a copy of a "Purchase Agreement, " which was signed on

⁷ 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 November 4, 2009. The FEIN claimed on the labor certification by [REDACTED]. This same FEIN was also used by [REDACTED] at [REDACTED]. Additionally, [REDACTED]

December 14, 2009. [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] as the Buyer. However, the document was executed after [REDACTED] had changed its name to [REDACTED]. 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.⁸

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, including the experience and specific skills stated on H.14 of 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 record contains contradictions between the experience claimed on the ETA Form 9089, employment verification letters, other financial documentation, and another separate ETA Form 9089.⁹ To that end, on remand, the director should reissue its NOIR and provide the petitioner with

Corporation" have used [REDACTED]. The Internal Revenue Service (IRS) only issues to FEINs to the legal name of the corporation.

It is also noted that online California corporation records reflect one entity called [REDACTED] located at [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.

⁸ 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 July 22, 2009, until the change in ownership occurred.

⁹ 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.

specific notice that assertions made in another ETA Form 9089 may affect his decision in the instant proceeding. In order to resolve inconsistencies, the director may elect to seek additional, first-hand evidence which accounts for the locations, work sites, sub-contracts, and actual employers for whom the beneficiary worked during the relevant time periods.

Further, the employer must offer full-time, permanent employment and not be seeking to subcontract. 20 C.F.R. § 656.3. We note that the record also raises the question whether the petitioner intends to be the direct U.S. employer of the beneficiary, which the director may consider on remand.

Additionally, although not a basis for the final revocation of the employment-based petition, and despite the petitioner's assets reflected on its financial information, it is not clear that the petitioner established its ability to pay the proffered wage for this beneficiary in that USCIS electronic records indicate that the petitioner has filed at least 160 employment-based petitions, including 118 non-immigrant petitions and 40 immigrant petitions. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation.

As noted above, the petitioner asserts that it is the successor-in-interest to [REDACTED]. If the petitioner assumed the immigration related liabilities of [REDACTED] then it is not clear that all of those remaining sponsored workers transferred to the petitioner have been accounted for in the petitioner's chart submitted in response to the director's NOIR. Any sponsored workers and transferred workers from any intervening entity may also need to be accounted for in the petitioner's ability to pay the proffered wage if part of the full successorship chain.¹⁰ On remand, the petitioner should fully address all sponsored beneficiaries and provide all pertinent tax returns and financial information.

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.

¹⁰As indicated above, USCIS has not issued regulations governing successors-in-interest. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986.