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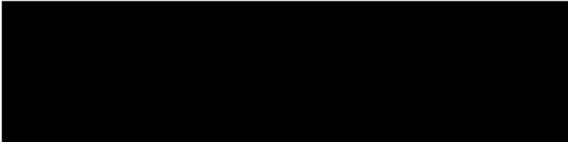
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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FILE:



Office: TEXAS SERVICE CENTER

Date: **OCT 05 2010**

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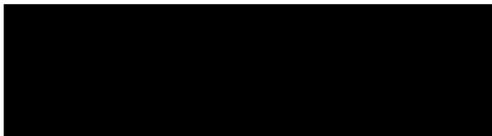
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a supply chain solutions provider. It seeks to permanently employ the beneficiary in the United States as a software engineer. The petitioner requests classification of the beneficiary as a skilled worker or professional pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is November 18, 2002, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's February 7, 2008 denial, the primary issue in this case is whether the petitioner is a successor-in-interest to [REDACTED], the company that filed the labor certification underlying the instant petition. The AAO will also consider whether petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.²

The record shows that the appeal is properly filed, 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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*, 229 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) (noting that the AAO conducts appellate review on a *de novo* basis).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On April 3, 2007, the petitioner filed the instant petition with U.S. Citizenship and Immigration Services (USCIS). The labor certification submitted with the petition was filed by a company named [REDACTED]. The petition contains a letter from the petitioner's Chief Financial Officer, stating that in March 2006, the petitioner "acquired [REDACTED] and is the successor-in-interest for immigration purposes."

On October 29, 2007, the director issued a request for evidence (RFE), instructing the petitioner to submit "a copy of the purchase agreement document or other documents that pertain to" the claimed acquisition of [REDACTED].

On November 28, 2007, in response to the RFE, the petitioner submitted the following documents to establish that it is a successor-in-interest to [REDACTED]:

- Certification executed by the petitioner's Corporate Officer, stating that in 2006, the petitioner "acquired [REDACTED] and is the successor in interest for immigration purposes to [REDACTED]."
- Press Release from the petitioner's website, dated March 6, 2006, stating that:

[REDACTED] has completed the acquisition of [REDACTED] having satisfied all of the conditions outlined in the definitive merger agreement announced in October, 2005. The merger officially closed on March 3, 2006.

* * *

Prior to the merger, both [REDACTED] and [REDACTED] offered similar, yet complementary, products and services designed to improve efficiencies, accuracy and collaboration. "By combining the two companies, we will deliver a comprehensive suite of products and services to a greater percentage of the healthcare supply chain," says [REDACTED], chief executive officer of [REDACTED]. "Eliminating redundant operations will enable [REDACTED] to devote more resources to technology development and consultation that help our customers improve current business processes."

On February 7, 2008, the director denied the petition, concluding that the petitioner failed to establish that it is a successor-in-interest to [REDACTED].

Although the petitioner has submitted evidence that it acquired the stock of [REDACTED] in 2006, this does not establish that the petitioner is a successor-in-interest to [REDACTED]. According to the California Department of State public online database at [REDACTED], [REDACTED] is still an active foreign corporation in California. If [REDACTED] is still an active, distinct, ongoing business concern, then its sole stockholder is not a successor-in-interest. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and

shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Accordingly, on July 28, 2010, the AAO issued a Request for Evidence (RFE) instructing the petitioner to submit evidence that it is a successor-in-interest to [REDACTED] and address [REDACTED] post-acquisition business activities in California.

Also, in a successor-in-interest case, the petitioner must establish that the predecessor entity possessed the ability to pay the proffered wage from the priority date until the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). However, the evidence in the record does not establish that [REDACTED] possessed the ability to pay the \$93,000.00 proffered wage from the November 18, 2002 priority date until the alleged March 3, 2006 merger date.⁴ Accordingly, the RFE also requests that the petitioner submit copies of [REDACTED] annual reports, federal tax returns, or audited financial statements for 2002, 2003, 2004, 2005 and 2006, as well as any Forms W-2, Wage and Tax Statement, issued to the beneficiary by [REDACTED] during this period as evidence of its ability to pay the proffered wage.

Further, beyond the decision of the director, evidence in the record also did not establish that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981).

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS

⁴ The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

"does not err in applying the requirements as written." *Id.* at *7.

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the position of has the following minimum requirements:

EDUCATION

Grade School: 0 years

High School: 0 years

College: 0 years

College Degree Required: None

Major Field of Study: None

TRAINING: None

EXPERIENCE: "5*" years in the job offered or as a Software Consultant, Systems Analyst, or Database Specialist

OTHER SPECIAL REQUIREMENTS: "*Experience designing and implementing database software applications, including database schema design, Database Triggers, Stored Procedures, Oracle and data modeling."

Based on the use of the asterix on Form ETA 750, the labor certification appears to require an individual with five years of experience designing and implementing database software applications, including database schema design, Database Triggers, Stored Procedures, Oracle and data modeling.

The experience letters in the record of proceeding are not sufficient to establish that the beneficiary has five years of experience in each special requirement. Accordingly, the RFE instructed the petitioner to submit employment experience letters that establish that the beneficiary possesses five years of experience "designing and implementing database software applications, including database schema design, Database Triggers, Stored Procedures, Oracle and data modeling." The RFE also states that, if the petitioner contends that the labor certification does not require five years of experience in each of the special requirements, the petitioner should provide the signed, detailed written report of the good faith efforts to recruit U.S. workers prior to filing the labor certification as required by the regulation at 20 C.F.R. § 656.21(b)(1) in effect at the time the labor certification was filed with the DOL.⁵ This report includes the methods of recruitment, the number of U.S. workers responding to the recruitment, the number of interviews conducted with U.S. workers, the lawful job-related reasons for not hiring each U.S. worker who applied for the position, the wages and working conditions offered to the U.S. workers, and a copy of all advertisements and notices used to recruit U.S. workers for the offered position. *Id.* The RFE also requests that the petitioner include copies of all resumes received in response to the recruitment.

⁵ The current regulatory scheme governing the labor certification process went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The instant labor certification was filed prior to March 28, 2005 and is therefore governed by the prior regulations.

The RFE afforded the petitioner 45 days to submit a response. *See* 8 C.F.R. § 103.2(b)(8)(iv). The RFE states that if the petitioner does not respond to the RFE, the AAO will dismiss the appeal without further discussion. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

To date, the AAO has not received a response to the RFE. Thus, the petitioner has not established that: it is a successor-in-interest to the entity that filed the labor certification; the beneficiary possesses the qualifications required to perform the offered position; and the claimed predecessor entity possessed the ability to pay the proffered wage. 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)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 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) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.