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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



U.S. Citizenship
and Immigration
Services

B6



FILE:



Office: TEXAS SERVICE CENTER

Date: OCT 05 2010

IN RE:

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 \$585. 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 Form I-140, Immigrant Petition for Alien Worker, was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner states on the Form I-140 that it is a painting and decorating company. However, the Form ETA 750, Application for Alien Employment Certification, which accompanies the petition lists the husband and wife owners of the painting and decorating company as the employers/labor certification applicants in this matter. At the time this appeal was filed there was no assertion in the record or any evidence in the record to indicate that the painting and decorating company is a successor-in-interest to the husband and wife employers listed on the Form ETA 750.

The director analyzed the matter as if the painting and decorating company is the intended employer in this case. The petitioner has also indicated since the filing of the Form I-140 that the painting and decorating company is the intended employer. The petitioner seeks to employ the beneficiary permanently in the United States as a construction carpenter. The petition is accompanied by a Form ETA 750 approved by the United States Department of Labor (DOL). However, the AAO would underscore that this Form ETA 750 does not support the instant petition as it was not filed by the employer listed on the Form I-140 or by an entity that the record establishes to be a successor-in-interest to that employer. The director determined that the petitioning painting and decorating company had not established that it had the continuing ability to pay the beneficiary the proffered wage from the priority date onwards. Therefore, the director denied the petition.

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 on appeal.¹

At the outset, the AAO would underscore that 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 at 145 (which states that the AAO reviews appeals on a *de novo* basis).

On August 6, 2010, this office issued a Request for Evidence (RFE). The RFE asked for documentary evidence that the petitioner in this matter is a valid successor-in-interest to the employer listed on the Form ETA 750. In response, counsel submitted a letter which indicates that the petitioner has taken on all the employees of the ETA-750 employer in this matter. She indicated also that the petitioner intended to have the beneficiary carry out the duties of the proffered position as listed on the Form ETA 750.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Here, the record 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).

Counsel's letter also claims that the petitioner/corporation is a successor-in-interest to the husband and wife employer listed on the Form ETA 750, and that it wishes to sponsor the beneficiary. Counsel did not submit any documentation to support her assertions. Counsel instead asserted that because "the corporation took on the work of its principal [the husband and wife ETA-750 employer], there are no legal documents in support."

Successor-in-interest scenarios generally involve a situation in which one company filed the labor certification on behalf of the beneficiary, but a different company is listed as the employer on the Form I-140, Immigrant Petition for Alien Worker. The petitioner listed on the Form I-140 then seeks to establish that it is a valid successor-in-interest to the business listed on the labor certification so that it may go forward with the same labor certification and sponsor the beneficiary.

The AAO finds that the record does not include sufficient evidence that the petitioner listed on the Form I-140 qualifies as a successor-in-interest to the husband and wife employer listed on the Form ETA 750.

In *Matter of* [REDACTED]² the petitioner, [REDACTED], filed an immigrant petition on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. The Commissioner held, in relevant part, that:

Additionally, the representations made by the petitioner concerning the relationship between [REDACTED] and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to [REDACTED] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide [the Immigration and Naturalization Service (INS), now USCIS], 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 [REDACTED] 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.

The INS and USCIS have, at times, strictly interpreted [REDACTED] to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's

² *Matter of* [REDACTED] is an AAO decision designated as a precedent decision by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of* [REDACTED], the petitioner had represented that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. If the petitioner's claim was untrue, the Commissioner stated that the underlying labor certification could be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (1987).³ The Commissioner also held that "[i]f the petitioner's claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved." The Commissioner determined that the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation regarding the manner in which [REDACTED] had acquired the business of [REDACTED] and of seeing a copy of "the contract or agreement between the two entities."

Thus, *Matter of* [REDACTED] did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established: if the job opportunity is the same as that originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the evidence submitted in support of the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired 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 manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

³The regulation at 20 C.F.R. § 656.30(d) (1987) states:

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

Here, the record does not contain a bill of sale showing that the stated successor purchased the original ETA-750 employer/labor certification applicants and their assets or any other documentary evidence which specifically sets forth the manner by which the stated successor acquired the ETA-750 employer's business.

The evidence submitted does not set forth the organizational structure of the predecessor prior to the transfer, (if, in fact, there was a direct transfer), or the current organizational structure of the stated successor. The record does not include documentary evidence which establishes that the stated successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The record does not include documentary evidence that the stated successor is continuing to operate the same type of business as the predecessor. The record does not include documentation which shows that the manner in which the business is controlled by the stated successor is substantially the same as it was controlled before the claimed ownership transfer. Currently in the record, there are only unsupported assertions regarding these various successor-in-interest qualifying factors, which were made by counsel. Going on record without proper supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

Therefore, the AAO finds that the evidence submitted is not sufficient to establish that the stated successor is, in fact, a successor-in-interest to the ETA-750 employer applicants. The certified job offer in this matter is to work for the husband and wife owners of the petitioning company listed on the Form I-140. The petitioning entity is a painting and decorating company. The instant petition is not approvable because: a) it is not supported by a labor certification application filed by the employer listed on the petition; b) neither is the petition supported by a labor certification for which the ETA-750 employer is an established successor-in-interest is the petitioner. The appeal must be dismissed on this basis.

The AAO need not address the director's basis of denial, (the petitioner's failure to demonstrate the continuing ability to pay the wage from the priority date onwards), as the petitioner did not submit the Form I-140 with a labor certification application that properly supports that petition; as such no priority date has been established in this proceeding. *See* 8 C.F.R. § 204.5(d)(which indicates that the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the approved Form ETA 750, which corresponds to the petition, was accepted for processing by any office within the employment system of the DOL.)

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.