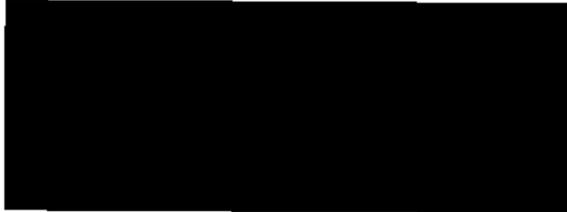


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



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Date: **AUG 09 2012** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 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,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal on November 5, 2010. The matter is again before the AAO on appeal.¹ The motion to reconsider will be granted. The prior decision of the AAO will be affirmed. The petition will remain denied.

The petitioner operates a concrete business. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (priority date – April 30, 2001), approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage of \$31,720 per year beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the motion to reconsider is properly filed. 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.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

Counsel states, on motion, that the petitioner has established the ability to pay the proffered wage from the priority date onward. Specifically, counsel notes that the AAO stated that the petitioner had the ability to pay the proffered wage for years 2002 through 2007 based upon the W-2 wages paid to the beneficiary. Counsel states that if the proffered wage were prorated for 2001 from the April 30, 2001 priority date through the end of the year, the petitioner paid wages exceeding that sum (as stated by the petitioner, 2001 wages paid - \$28,851.73; priority wage prorated from April 30, 2001 - \$19,520). The AAO does not agree. The AAO will not consider 12 months of income or earnings towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. The W-2 Form alone is insufficient for this purpose.

¹ The petitioner filed an appeal to the November 5, 2010 decision of the AAO dismissing the petitioner's appeal to the director's decision denying the petition. As noted on the cover letter of the AAO's November 5, 2010, the petitioner had the right to file a motion to reopen or motion to reconsider the AAO decision. There is no administrative review/appeal of the AAO's final decision. This appeal, however, meets the requirement of a motion to reconsider and shall be considered as such.

Additionally, the record contains multiple discrepancies, which must be addressed before any of the W-2 Statements can be definitively accepted. The portion of the AAO decision accepting the W-2 Statements is withdrawn until this issue is resolved. Both Form I-140 and Form I-485 state "none" for the beneficiary's social security number. The petitioner submitted W-2 Statements for the beneficiary, which list a social security number beginning with a "4." The beneficiary's tax returns submitted do not list a social security number starting with the number 4, but instead list a tax identification number starting with the number 9.² Adding to the discrepancy is that the beneficiary does not list that he was ever employed with the petitioner on the Form ETA 750B, but lists on the Form G-325A filed with his Form I-485 that he has been employed with the petitioner since November 1997. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. Counsel suggests that the beneficiary's 2001 W-2 Statement represents wages paid after the priority date. From the record, based on the issue with the social security number, it is unclear that the W-2 Statements are properly attributable to the beneficiary, and whether the beneficiary has or has not worked for the petitioner. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). 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. *Id.*, at 591. These discrepancies must be resolved before any of the W-2 Statements can be definitively accepted.

It is further noted that the petitioner must establish its continuing ability to pay the proffered wage. Counsel stated that W-2 Forms for 2008, 2009 and 2010 would be submitted within 30 days of its December 29, 2010 appeal brief. The petitioner has not provided this evidence or copies of tax returns for those years to establish the ability to pay the proffered wage for those years.

Additionally, it should further be noted that the AAO noted in its November 5, 2010 decision dismissing the petitioner's appeal that the petitioner had filed other Form I-140 petitions, and that the record did not contain sufficient information to determine the wages owed to those workers and whether the petitioner could pay the wages of all other sponsored workers. Despite this finding by the AAO, the petitioner did not address and did not submit any additional information with its motion to establish its ability to pay the proffered wages of the additional workers. Based on the sole proprietor's tax returns submitted, without evidence of any wages paid to the other workers, information related to their priority dates, or proffered wages, the sole proprietor's adjusted gross income would not clearly support his ability to pay other workers, the remainder of the beneficiary's proffered wage in 2001, and his household expenses. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves

² Additionally, the W-2 Form for 2000 submitted with the beneficiary's Form I-485 (Application to Register Permanent Residence or Adjust Status) contains his hand written name and a typed address. The Form W-2 for 2001 is illegible with the recipient's name printed over other text. These issues add to the question of the veracity of the W-2 Statements.

and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established the continuing ability to pay the proffered wages of the present beneficiary or the other sponsored workers from their respective priority dates and the petition must be denied. Without satisfactorily addressing the other workers and the issue set forth above concerning the discrepant claims of employment and social security number, the AAO is unable to make a favorable finding on the petitioner's behalf based on *Sonegawa*.

Additionally, the petitioner notes in this filing that its new name is [REDACTED]. In any future filings the petitioner would need to demonstrate that the new entity is the proper successor-in-interest to Guzman's Concrete in order to continue processing under the present labor certification.³

³ 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 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. 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.

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*, 19 I&N Dec. 481.

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.

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests. *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.

For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole

In visa petition proceedings, the burden of proving eligibility remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is granted and the petition is reopened for reconsideration. The previous decision of the AAO dated November 5, 2010 is affirmed. The petition remains denied.

proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.