

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: **DEC 13 2012**

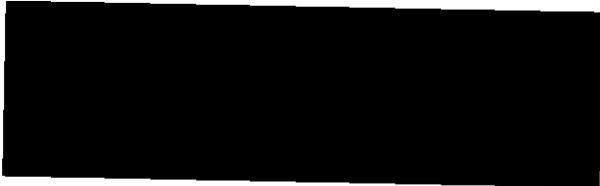
Office: NEBRASKA SERVICE CENTER

FILE: 

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 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was initially approved by the Director, Nebraska Service Center. The director, however, revoked the approval of the immigrant petition, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The AAO remanded the appeal as being untimely filed to the director. The director reconsidered the previous decision and affirmed the revocation. The matter is now before the AAO on appeal. The appeal will be dismissed.

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 petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a project manager. The petition was filed for classification of the beneficiary under section 203(b)(3) of the Immigration and Nationality Act (the Act). As required by statute, the petition was accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the United States Department of Labor (DOL).

The petitioner's Form ETA 750 was filed with DOL on July 2, 2002 and certified by DOL on July 24, 2003. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on December 18, 2003, which was approved on October 20, 2004.

As set forth in the director's revocation, the issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. On appeal, the AAO has identified additional issues regarding the visa petition, including whether the job offer was *bona fide*.

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.¹

The record shows that the appeal is 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.

Before reaching the merits of the director's decision, the AAO notes that in a response to the Notice of Intent to Dismiss and Derogatory Information (NOID/NODI) sent by the AAO to the petitioner on August 27, 2012, counsel for the petitioner stated that the petitioner had been dissolved and that another entity, Macomb Builders LLC, was the sponsoring employer.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

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 1981) ("*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.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved 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).

In *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . ." *Id.* (emphasis added).

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

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.² *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.³

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁴ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three

² Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes “consolidations” that occur when two or more corporations are united to create one new corporation. The second group includes “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a “shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

³ 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 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.

⁴ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

conditions. In this case, 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.

Evidence of transfer of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations of the predecessor necessary to carry on the business. To ensure that the job opportunity remains the same as originally certified, the successor must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, in this case the claimed successor on appeal must support its claim with all necessary evidence, including evidence of ability to pay. The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its own ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the appealing party has not established a valid successor relationship with the petitioner. In response to the AAO's NOID/NODI, the petitioner submitted the Michigan Department of Licensing and Regulatory Affairs (LARA) statement showing that the petitioner, Macomb Builder Inc. was dissolved on July 15, 2011⁵ and the LARA statement that Macomb Building LLC was currently active. The petitioner also submitted the LARA filing endorsement and Macomb Building LLC's Articles of Incorporation. However, no evidence concerning the transfer of ownership from the petitioner to Macomb Building LLC was submitted.

The petitioner also submitted a September 20, 2012 letter from [REDACTED] owner of Macomb Building LLC, stating that the company intends to employ the beneficiary and notes that Macomb Builder, Inc. was owned by his brother and has been dissolved. Although [REDACTED] stated that the position offered to the beneficiary would be the same, no evidence was submitted to support this assertion. 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

⁵ The AAO's NOID/NODI stated that the petitioner as listed, Macomb Builders, Inc. was dissolved on July 15, 2001. In response, counsel stated that a typographical error had been made on the labor certification application and Form I-140 petition in that the petitioner's name was actually Macomb Builder, Inc. with Federal Employer Identification Number (FEIN) of 38-3279819. The AAO accepts that Macomb Builder Inc. is the petitioner as the FEIN listed on the petitioner corresponds to that for Macomb Builder, Inc.

(Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

As a result, we are unable to conclude that Macomb Building LLC is the successor-in-interest to the petitioner, Macomb Builder, Inc. Accordingly, the petition must be denied because the appellant has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer. Therefore, even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the dissolution of the petitioner. See 8 C.F.R. § 205.1(a)(iii)(D).⁶

Concerning the marriage fraud finding that forms the basis of the director's revocation decision, section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides for the following:

Notwithstanding the provisions of subsection (b)⁷ no petition shall be approved if:

⁶ Counsel submitted a letter dated September 24, 2012 stating that the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) applied to the instant matter. AC21 allows an application for adjustment of status to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid prior to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

The terms of AC21 require that the Form I-140 be valid in order to apply to the beneficiary's application for permanent residence. As described in this decision, the Form I-140 is not valid and, therefore, the terms of AC21 would not apply to the instant case.

⁷ Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

- (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
- (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On July 1, 2009, the director sent a Notice of Intent to Revoke to the petitioner containing the language of 204(c) above and stating that no evidence concerning the validity of the beneficiary's marriage had been submitted to demonstrate that his marriage was *bona fide*. The director allowed the petitioner 30 days to respond to the NOIR.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The director's NOIR sufficiently detailed the evidence of the record, pointing out that the beneficiary never entered into a marriage with [REDACTED] because the fictional ceremony had been conducted by undercover officers and immigration agents. In addition, the director noted that the officers recorded a payment made by the beneficiary regarding the union. The NOIR thus was properly issued for good and sufficient cause.

In response to the NOIR, the petitioner provided: an affidavit from the beneficiary, the beneficiary's marriage license and certificate, a statement from the Wayne County clerk that no such marriage license and certificate had been recorded, and documents to verify the beneficiary's education.

On December 16, 2009, the director revoked the approval of the I-140 visa petition for the following reason:

The petitioner failed to rebut the director's allegations with regards to marriage fraud or provide any proof that the beneficiary's marriage to [REDACTED] was *bona fide*. The evidence in the record is substantial and probative that the beneficiary attempted to enter marriage with [REDACTED] for the purpose of evading the immigration laws.

On appeal, counsel asserts that the beneficiary courted and married based on customary practices in his home country of Syria and intended for the marriage to be *bona fide*. Counsel also stated that the beneficiary never filed any papers or attempted to obtain any immigration benefit as a result of the marriage.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. See also *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

There is substantial and probative evidence in the record of proceeding to support a reasonable inference that the beneficiary's prior marriage was entered into for the purpose of evading immigration laws and obtaining immigration benefits. The marriage license and certificate were issued in August 1985. The beneficiary was interviewed by an Immigration & Naturalization Service Officer (INS, the precursor to DHS) on January 23, 1986. That interview revealed that even though the beneficiary had only been married for five months, he stated that he had not seen [REDACTED] "for a long while." In addition, he was unable to provide many details of how he met the person who arranged for him to meet [REDACTED] besides stating that he was a friend of a friend. The beneficiary submitted an affidavit dated March 7, 2007 stating that he met [REDACTED] twice at restaurants before marrying her; he stated that he did not "date" as the practice is understood in the United States due to his own cultural practices. The beneficiary stated that he thought that he was married to [REDACTED] and was greatly aggrieved when he found out that the marriage was not real and that his "wife" was an undercover agent. On appeal, counsel states that the beneficiary was caught in an investigation of another individual and was simply "in the wrong place at the wrong time." Counsel argues that if the beneficiary had not intended to engage in a *bona fide* marriage, he would not have gone through with a marriage ceremony as opposed to just obtaining a license and taking a few posed photographs. Counsel also states that the beneficiary "provided sufficient documentation to establish his marriage to [REDACTED]" but that "the typical evidence used to show that a marriage was not entered into for the purpose of evading immigration laws . . . is not available."

The beneficiary did not submit evidence of the nature of his marriage to [REDACTED] when interviewed in 1986, despite the interview having taken place five months after the marriage. Nor did the beneficiary submit any evidence regarding the marriage ceremony or any co-habitation or comingling of funds to demonstrate that the marriage was *bona fide* in any proceedings thereafter. The beneficiary submitted no evidence either in 1986 or in connection with the current proceedings to demonstrate that the marriage was *bona fide*. 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. at 165. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Therefore, an independent review of the documentation in the record of proceeding presents substantial and probative evidence to support a reasonable inference that the beneficiary's prior marriage was entered into for the purpose of evading the immigration laws. Thus, the director's determination that the beneficiary entered into a sham marriage in an attempt to evade the immigration laws is affirmed.

In addition to the 204(c) bar and beyond the director's decision, it is unclear that the petitioner will be the beneficiary's actual employer and was authorized to file the instant petition. 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).

The regulation at 8 C.F.R. § 204.5(c) provides that “[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act.” In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3⁸ states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

In this case, the petitioner has failed to establish what company would actually employ the beneficiary. The State of Michigan Department of Licensing and Regulatory Affairs states that the beneficiary owns a company called Damas Engineering & Contracting, which was formed in 1998. It is unclear whether the petitioner would employ the beneficiary directly⁹ or how the beneficiary would be able to work full-time for the petitioner while running his own company. Therefore, it is

⁸ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

⁹ In considering whether or not one is an “employee,” U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an “employee” of an “employer” are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

unclear that the beneficiary intends to work for the petitioner on a full-time basis as opposed to operating his separate business that may or may not do work for the petitioner and other companies. "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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The approval of the employment-based immigrant visa petition remains revoked.

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).