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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

DATE: **JUL 18 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 request 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 employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a specialized care facility. It seeks to employ the beneficiary permanently in the United States as a technician working with autistic patients. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification) approved by the U.S. Department of Labor (DOL).

The director's decision denying the petition concluded that the petition could not be approved in the requested skilled worker or professional classification, and that the petitioner also failed to establish that it is the same entity as the employer that filed the labor certification.

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.²

The instant petition was filed on July 27, 2007. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional or a skilled worker. On appeal, the petitioner claims that it made a typographical error on Form I-140 and that it intended to check Part 2.g. indicating that it was filing the petition for an unskilled worker.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² 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).

degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience.

In this case, the labor certification states that the requirements for the offered position are a high school education and six months of training in managing autistic children. Therefore the requirements of the labor certification are not sufficient for the requested professional or skilled worker classification.

There is no provision in statute or regulation that permits the AAO to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

Therefore, the director correctly concluded that the petition cannot be approved in the requested skilled worker or professional classification.

The petitioner also failed to establish that it is the same entity as the labor certification employer. 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 petitioner is a different entity than the petitioner/labor certification employer and appellant, 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).

A valid successor relationship may be established 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.

On October 22, 2008, the director sent a Request for Evidence asking the petitioner to establish its relationship with [REDACTED] the entity that filed the labor certification. The petitioner's

response, received November 3, 2008, included a letter that stated: "The Petitioner, [REDACTED] has not undergone any change of ownership. The company has merely changed names, but continues to perform the same services." On appeal, the petitioner submitted a copy of the Articles of Organization for the petitioner and the Articles of Incorporation of [REDACTED]. These documents undermine the petitioner's claim that the petitioner is the same entity as the labor certification employer. The director denied the petition accordingly.

On May 3, 2012, the AAO issued a Notice of Intent to Dismiss (NOID) the appeal in which the AAO informed the petitioner the record lacked sufficient evidence to establish its relationship with [REDACTED].

The AAO received the petitioner's response on May 31, 2012. The response states that [REDACTED] is the successor-in-interest of [REDACTED]. It is owned by the same owner, [REDACTED] and has the same address. Please refer to the letter of 3/3/2006 by the President, [REDACTED]. It conducts the same business. Its assets, liabilities, credits and business have been assumed over by [REDACTED]. The record contains the letter from [REDACTED] President of [REDACTED] however the letter does not constitute evidence of a transaction creating a successor-in-interest relationship.

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Accordingly, the director also correctly denied the petition because the petitioner failed to establish that it is the same entity or a successor-in-interest to the employer that filed the labor certification.

The AAO NOID also informed the petitioner that its corporate status had been forfeited by the Maryland Department of State. In its response to the NOID, counsel did not address that the corporate status of [REDACTED] the petitioner and appellant, has been forfeited by the State of Maryland Department of State. The response included evidence that a separate entity, [REDACTED] is in good standing with the State of Maryland. Therefore, beyond the decision of the director, since the petitioner is no longer in existence, the petition must also be dismissed as moot.

The AAO NOID also informed the petitioner that the beneficiary's name appeared differently on ETA Form 9089 than it did on the I-140 petition; that the petitioner had not established its ability to pay the proffered wage since the priority date; and that the employer identification number on the I-140 petition did not match the number contained on the petitioner's federal income tax returns for 2006 and 2007.

Counsel submitted the beneficiary's birth certificate to establish that the name as it appears on the labor certification is correct, he did not provide an explanation for her name appearing differently on the instant Form I-140. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

Therefore, the petitioner has also failed to establish that the beneficiary of the labor certification is the same individual as the beneficiary of the petition. The petitioner must also be denied for this reason.

The petitioner submitted federal income tax returns for 2006 and 2007, as well as audited financial statements that do not match the information on the tax returns. The Employer Identification Number in Box D of these federal tax returns, [REDACTED] does not match the number listed on Form I-140, Part 1, and ETA Form 9089, Part C Box 7, or [REDACTED]. 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). *See also Matter of Ho*, 19 I&N Dec. at 591-592 (BIA 1988).

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

In the NOID, the AAO instructed the petitioner to submit annual reports, federal tax returns or audited financial statements for each year from the priority date to the present. The petitioner was further instructed to provide any Forms W-2 or 1099 issued to the beneficiary from each year from the priority date. In response, the petitioner submitted Forms W-2 issued to the beneficiary in 2008, 2009, 2010 and 2011 as well as the personal federal income tax returns of the petitioner's sole owner for 2006, 2007, 2008, 2010 and 2011. The owner's personal tax returns are not relevant to the instant case. The petitioner's failure to provide its complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

³ 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).

Finally, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on 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). In this case, the labor certification requires six months of training managing autistic children. The record contains evidence of the beneficiary's training, including:

- Project ACT – Autism I: How Do I Begin? – 3 hours
- Project ACT – Autism II: M.O.D.E.L.S. For Behavior – 3 hours
- Project ACT – Autism III: Connecting the Circle of Friends – 3 hours
- Project ACT – Autism V: Sensory Sensitivity – 3 hours
- [REDACTED] – Home Health Aide – 76 hours
- [REDACTED] – Nursing Asst/Nurse Aide – 120 hours

The record contains no other evidence of the beneficiary's training in managing autistic children, further the record does not detail how many, if any, of the beneficiary's 196 hours of training at Success International School of Allied Health Science were specific to managing autistic children. Regardless, 208 total hours of training in the health care field are insufficient to meet the six months of training requirement specified in the labor certification. Therefore, the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date.

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.