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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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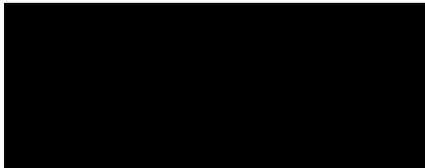
Date: **JUL 02 2012** Office: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

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 preference visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was a roofing company. It sought to employ the beneficiary permanently in the United States as a first line supervisor/manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established the continuing ability to pay the proffered wage to the beneficiary since the priority date. The director further determined that the petitioner failed to submit evidence establishing that the beneficiary possessed the required two years of experience in either the proffered position or the alternate occupation of roofer. The director denied the petition accordingly.

The AAO issued a Notice of Intent to Dismiss/ Request for Evidence (NOID/RFE) to the petitioner's owner and his former counsel on April 26, 2012, informing the parties that a review of the website at the website at http://appext9.dos.ny.gov/corp_public/CORPSEARCH.ENTITY (accessed on April 18, 2012), revealed that the petitioner, W.A.B. Roofing Corp., D/B/A Stars & Stripes Contracting, was dissolved on January 27, 2010. Therefore, the AAO requested that the petitioner provide a current certificate of good standing or other evidence demonstrating that the petitioning business is not inactive and had current business activity.

In addition, although not noted by the director in denying the Form I-140, Immigrant Petition for Alien Worker, the AAO informed the parties that it did not appear that the petition was accompanied by a valid labor certification. 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*, 299 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) (AAO's *de novo* authority is well recognized by the federal courts).

The AAO noted that a different business entity, [REDACTED], was listed as the employer seeking to employ the beneficiary in the proffered position on the Form ETA 750 that was accepted for processing by the Department of Labor (DOL) on March 21, 2001. Although the petitioner's owner's formal counsel claimed on appeal that the petitioner, [REDACTED], was the successor-in-interest to the business entity, [REDACTED], the record is absent any evidence reflecting the date of the petitioner's successorship, the purported transaction giving rise to a successorship, and the transfer of the assets and liabilities of the business entity, [REDACTED] to the petitioner, [REDACTED].

Furthermore, a review of the website at http://appext9.dos.ny.gov/corp_public/CORPSEARCH.ENTITY (accessed on April 18, 2012), revealed that the business entity, [REDACTED], continued to operate as an active business until its dissolution on January 25, 2012. Therefore, the AAO requested that the petitioner provide evidence reflecting the date of the petitioner's successorship, evidence of the purported transaction

giving rise to any claimed successorship, and evidence of the transfer of the assets and liabilities of the business entity, [REDACTED], to the petitioner, [REDACTED].

Furthermore, the AAO informed the parties that the record did not contain sufficient evidence demonstrating that the petitioner, [REDACTED], possessed the continuing ability to pay the proffered wage to the beneficiary since the priority date.

The regulation at 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.

The priority date in the instant case is March 21, 2001, and therefore, the petitioner must establish the ability to pay the beneficiary the proffered wage of \$20.62 per hour or \$42,889.60 per year from that date until the beneficiary obtains lawful permanent residence. The AAO noted that the petitioner had only submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005 and a Form W-2, Wage and Tax Statement, reflecting wages paid by the petitioner to the beneficiary in 2007. The AAO acknowledged that the record also contains copies of the business entity's, Starcross Contracting, Inc., Form 1120, U.S. Corporation Income Tax Return, for 2001, Form 1120S tax returns for 2002, 2003, and 2004, and Form W-2 statements reflecting wages paid by the business entity, [REDACTED], to the beneficiary in 2001, 2002, and 2004. Therefore, the AAO requested that the parties provide evidence that the business entity, [REDACTED], had the continuing ability to pay the proffered wage from the priority date of March 25, 2001, through the date that the petitioner, [REDACTED], succeeded the business entity, [REDACTED] in interest, and that the petitioner, [REDACTED], had the continuing ability to pay the proffered wage from the date of successorship through the present. The AAO requested that the petitioner provide its federal tax returns for 2006, 2007, 2008, 2009, 2010, and 2011. Also, the AAO requested that the parties submit any Form W-2 statements or Forms 1099-MISC, Miscellaneous Income, issued to the beneficiary by the business entity [REDACTED] in 2003, as well as any Form W-2 statements or Form 1099-MISC statements issued by the petitioner to the beneficiary since the date that the petitioner, [REDACTED], succeeded the business entity, [REDACTED] in interest through 2011. The AAO noted that every year from 2001 through 2011 must be accounted for.

Finally, part 14 of the Form ETA 750 lists the requirements for the proffered position as no education, one year of training as an apprentice, and two years of experience in either the offered job

of first line supervisor/manager or the alternate occupation of roofer. At part 15 of the Form ETA 750, the beneficiary claimed that he had been employed by the business entity, [REDACTED] as a roofer apprentice from November 1991 to January 1999, and as supervisor from January 1999 to March 19, 2001, the date the beneficiary signed the Form ETA 750B. However, the record is absent any direct and specific evidence such as an employment letter from the business entity, [REDACTED] to substantiate the beneficiary's claimed qualifications. To meet the qualifications, an employment letter must include the following: the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A). 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 (Act. Reg. Comm. 1977). The AAO requested that the parties provide an employment letter that includes a specific description of the duties performed by the beneficiary during his employment with the business entity [REDACTED]

The parties were granted thirty days to respond to the NOID/RFE issued by the AAO.

In response, the most current counsel for the petitioner's owner acknowledges that the petitioner, [REDACTED] and the business entity, [REDACTED] listed as the employer on the Form ETA 750, are both no longer active businesses. Counsel asserts that the petitioner's owner had started a new business entity, [REDACTED] and infers that this new business entity is a successor-in-interest to the petitioner, [REDACTED]

The only way for a different business entity to be able to use a labor certification approved for a particular petitioner as the employer is if that business entity establishes that it is a successor-in-interest to that petitioning predecessor and employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). A labor certification is only valid for the particular job opportunity and area of intended employment described therein. 20 C.F.R. § 656.30(c)(2).

A successor business entity may establish a valid successor relationship to the petitioning predecessor for immigration purposes if it satisfies three conditions. First, the successor business entity must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor petitioner and employer. Second, the successor business must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor business entity 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 id.* at 482.

In order to establish eligibility for the immigrant visa in all respects, the successor to the petitioning predecessor must support its claim with all necessary evidence, including evidence of ability to pay the proffered wage to the beneficiary. 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 ability to pay the proffered wage from the date of transfer of ownership from the petitioning predecessor forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

In the instant case, the record is absent any evidence that the new business entity, [REDACTED] is a successor-in-interest to the petitioner, [REDACTED]. Consequently, counsel's inference that the petitioner, [REDACTED] had been succeeded in interest by the new business entity, [REDACTED], must be considered to be without merit.

As the petitioner, [REDACTED] is no longer an active business, the petition and its appeal to this office have become moot.

Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case. Only a petitioner desiring and intending to employ the beneficiary may maintain a petition seeking to classify the beneficiary as a professional or skilled worker. 8 C.F.R. § 204.5(c).

As counsel for the petitioner's owner has acknowledged that the petitioner was dissolved and is no longer an active business, the AAO is dismissing the appeal as moot.

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.