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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

[redacted]

B6

Date: JUL 0 2 2012 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
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:

[redacted]

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,

Elizabeth M. Cronick

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was approved by the Director, Vermont Service Center, on September 26, 2003, but the approval was later revoked by the Director, Texas Service Center, on March 20, 2009. The petitioner has appealed the decision to revoke the approval of the petition to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The appeal will be remanded to the Texas Service Center director for further action, consideration, and the entry of a new decision.

The petitioner is a landscaping company. It seeks to permanently employ the beneficiary in the United States as a landscape gardener, pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] As required by statute, the petition is submitted along with an approved Application for Alien Employment Certification (Form ETA 750). The director of the Texas Service Center ("the director") revoked the approval of the petition, finding that the petitioner failed to follow the regulations set by the United States Department of Labor (DOL) when applying for labor certification on behalf of the beneficiary. The director also concluded that the beneficiary did not have the requisite experience in the job offered before the priority date.

On appeal, counsel for the petitioner,[2] contends that the director did not have good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. He states that the director only made vague, unsubstantiated allegations of fraud or material misrepresentation relating to other petitions and petitioners, and that neither the Notice of Intent to Revoke (NOIR) nor the Notice of Revocation (NOR) contained specific adverse information relating to the petition or the petitioner in the instant proceeding. In addition, indicates that the director improperly applied a clear and convincing standard when determining the beneficiary's qualifications to the present case.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

[2] has been suspended from practice of law before the Immigration Courts, Board of Immigration Appeals (BIA), and Department of Homeland Security (DHS) for a period of three years from March 1, 2012 to February 28, 2015. The petitioner is currently represented by The record contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by the petitioner and and ., on September 1, 2009. The representations of will be considered in this matter.

F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

Section 205 of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1155, states:

> The Secretary of Homeland Security may, at any time, for what [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] under section 204. Such revocation shall be effective as of the date of approval of any such petition.

The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho,* 19 I&N Dec. 582, 590 (BIA 1988).

However, the regulation at 8 C.F.R. § 205.2 states:

> (a) *General.* Any Service[4] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice** to the petitioner on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this Service [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

> (i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by the Service [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceedings

Matter of Arias, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime,* 19 I&N Dec. 450 (BIA 1987) provide that:

> A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of

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[3] 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).

[4] The Service here refers to U.S. Citizenship and Immigration Services or USCIS.

> issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, the director wrote in the Notice of Intent to Revoke (NOIR):

> The Notice of Intent to Revoke indicates the USCIS is in receipt of information revealing the existence of fraudulent information in the petitions with Alien Employment Certificates (ETA 750) and/or the work experience letters in a significant number of cases submitted to USCIS by counsel for the petitioner in the reviewed files [referring to the petitioner's former attorney of record,

The director advised the petitioner in the NOIR that the instant case might involve fraud since the petition was filed by who was under USCIS investigation at the time for submitting fraudulent Form ETA 750 labor certification applications and Form I-140 immigrant worker petitions. The director generally questioned the beneficiary's qualifications. The director also specifically stated that in many of the other petitions filed by the respective petitioners had not followed DOL recruitment procedures. Because of these findings in other cases and since filed the petition in this case, the director on February 10, 2009 reopened the matter by issuing the NOIR. The director advised the petitioner in the NOIR to submit additional evidence to demonstrate (a) that the beneficiary had at least two years of work experience in the job offered before the labor certification application was filed with the DOL and (b) that the petitioner complied with all of the DOL recruiting requirements.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR. However, the director's NOIR was deficient in that it did not give the petitioner notice of the derogatory information specific to the current proceeding. In the NOIR, the director questioned the beneficiary's qualifications and indicated that the petitioner had not properly advertised for the position. The NOIR neither provided nor referred to specific evidence or information relating to the petitioner's failure to comply with DOL recruitment or to the beneficiary's lack of qualifications in the present case. The director also did not specifically state that the petitioner needed to submit, for instance, copies of the in-house postings or other evidence to show that the petitioner complied with the DOL recruitment procedures. The director did not state which recruitment procedures were defective. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995). Because of insufficient notice to the petitioner of specific derogatory information relating to this petition, the director's decision will be withdrawn.

Nevertheless, the petition is currently not approvable as the petitioner has not overcome the burden of proving by a preponderance of the evidence:

(1) That the recruitment procedures were followed,

(2) That the beneficiary is qualified to perform the services of the position, and
(3) That the petitioner has the continuing ability to pay the proffered wage from the priority date.

The AAO will return the petition to the director for the issuance of a new Notice of Intent to Revoke (NOIR) consistent with the analysis below. 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).

1. **Recruitment Procedures**

On appeal, notes that the fact that the Form ETA 750 labor certification was approved by the DOL shows that that the petitioner has conducted an adequate test of the labor market, in compliance with the DOL recruitment procedures. He also contends that the DOL's decision to certify the labor certification is not subject to *de novo* review by the director.

To demonstrate that the petitioner fully complied with the DOL recruitment requirements, . submitted copies of the following evidence in response to the director's NOIR:

- Copies of the newspaper tear sheets for the position of landscape gardener, published in the *Cape Cod Times* for three Sundays on January 25, 2001; February 11, 2001; and February 18, 2001.

Upon review, the director concluded in the Notice of Revocation (NOR) that three pieces of evidence (the newspaper tear sheets submitted above) do not establish that the petitioner followed the DOL's recruitment regulations.

As indicated earlier, the director in the NOIR did not specifically notify the petitioner to submit any evidence to demonstrate that the petitioner complied with the DOL recruitment procedures. Without specifying or making available evidence specific to the petition in this case, the petitioner can have no meaningful opportunity to rebut or respond to that evidence. *See Ghaly v. INS, id.*

Additionally, since there was no requirement to keep such records, USCIS may not make an adverse finding against the petitioner, if, the petitioner for instance claims it no longer has the documentation.[5] The AAO acknowledges that before 2005, employers filing a Form ETA 750

[5] However, the AAO acknowledges the authority and interest of USCIS to request such documentation pursuant to our invalidation authority at 20 C.F.R. § 656.31(d) and the interest of the petitioner in proving its case by retaining and submitting such documentation to USCIS particularly in response to a fraud investigation. Further, the petitioner must resolve

were not required to maintain any records documenting the labor certification process once the labor certification had been approved by the DOL. *See* 45 Fed. Reg. 83933, Dec. 19, 1980 as amended at 49 Fed. Reg. 18295, Apr. 30, 1984; 56 Fed. Reg. 54927, Oct. 23, 1991. Not until 2005, when the DOL switched from paper-based to electronic-based filing and processing of labor certifications, were employers required to maintain records and other supporting documentation, and even then employers were only required to keep their labor certification records for five (5) years. *See* 69 Fed. Reg. 77386, Dec. 27, 2004 as amended at 71 Fed. Reg. 35523, June 21, 2006; *also see* 20 C.F.R. § 656.10(f) (2010).

The DOL at the time the petition was filed accepted two types of recruitment procedures – the supervised recruitment process and the reduction in recruitment process. *See* 20 C.F.R. § 656.21 (2001). Under the supervised recruitment process an employer must first file a Form ETA 750 with the local office (State Workforce Agency), who then would: date stamp the Form ETA 750 and make sure that the Form ETA 750 was complete; calculate the prevailing wage for the job opportunity and put its finding into writing; and prepare and process and Employment Service job order and place the job order into the regular Employment Service recruitment system for a period of thirty (30) days. *See* 20 C.F.R. §§ 656.21(d)-(f) (2001). The employer filing the Form ETA 750, in conjunction with the recruitment efforts conducted by the local office, should then: place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication and supply the local office with required documentation or requested information in a timely manner. *See* 20 C.F.R. §§ 656.21(g)-(h) (2001).

Under the reduction in recruitment process, the employer could, before filing the Form ETA 750 with the local office, conduct all of the recruitment requirements including placing an advertisement in a newspaper of general circulation and posting a job notice in the employer's place of business. *See* 20 C.F.R. §§ 656.21(i)-(k).

Here, the record reflects that the petitioner conducted the recruitment by placing advertisements in the local newspapers on January 25, 2001; February 11, 2001; and February 18, 2001. The petitioner filed the Form ETA 750 with the DOL for processing on April 9, 2001. Based on the evidence submitted and the stated facts above, it appears that the petitioner requested a reduction in recruitment, which was allowed at that time. The record is not sufficiently developed to conclude that the petitioner failed to follow the DOL's recruitment procedures.

The AAO, however, notes that there is an anomaly in the recruitment process which casts doubt on the *bona fides* of the recruitment. A review of the record reveals that the petitioner signed the Form ETA 750 on December 26, 2000 or 30 days before it initially advertised the position in the newspapers (as noted above the first advertisement was placed in the newspapers on January 25, 2001). By signing the Form ETA 750, the petitioner essentially stated to the DOL under a penalty of perjury attestation clause that the recruitment effort was complete and yielded no qualified United States workers.

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inconsistencies in the record, if any, by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The petitioner, therefore, could not certify to the DOL that no U.S. workers were available, willing, or able to perform the duties of the position on March 13, 2001 when it had not even begun the recruitment process. The statement on section 21 of the Form ETA 750A, describing the petitioner's recruitment efforts which included "newspaper ads, internal posting, www.jobfind.com, word of mouth" could not yet have occurred, as the newspaper advertisements had not yet been published on December 26, 2000 – the date the petitioner signed the Form ETA 750A. Thus, the petitioner's attestation that recruitment had been completed as of December 26, 2000 could not be true. This anomaly suggests that [redacted] (the petitioner's attorney at the time) might have been impermissibly involved in the recruiting process if the petitioner, for instance, merely signed the Form ETA 750 and let [redacted] take over the recruitment efforts (such as placing the ad and interviewing U.S. candidates).

The DOL regulation at 20 C.F.R. § 656.21 (2001) required, at the time of recruitment in this case, that the employer clearly document, as a part of every labor certification application, its reasonable, good faith efforts to recruit U.S. workers without success. Such documentation should include the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade, or technical schools; labor unions; and/or development or promotion from within the employer's organization. The documentation should also identify each recruitment source by name; give the number of U.S. workers responding to the employer's recruitment; give the number of interviews conducted with U.S. workers; specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and specify the wages and working conditions offered to the U.S. workers. The petitioner in the instant case cannot make the statement that no qualified workers are available without having submitted the results of recruitment to the DOL.[6]

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*,

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[6] *See* 20 C.F.R. § 656.21(i)(1) (2001), which states:

> To request a reduction of recruitment efforts pursuant to this paragraph (i), the employer shall file a written request along with the Application for Alien Employment Certification form at the appropriate local Job Service office. The request shall contain:
>
> (i) Documentary evidence (which shall include, but is not limited to, a pre-application notice posted consistent with § 656.20(g) of this part) that within the immediately preceding six months the employer has made good faith efforts to recruit U.S. workers for the job opportunity, at least at the prevailing wage and working conditions, through sources normal to the occupation; and
>
> (ii) Any other information which the employer believes will support the contention that further recruitment will be unsuccessful.

19 I&N Dec. at 591-592. It is incumbent upon 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. *Id.*

On remand, the director should in the new NOIR request to explain why he signed the Form ETA 750 before he advertised the position in the newspaper and to outline what specific steps he took to conduct good faith recruitment, e.g. how the company advertised in a newspaper of general circulation, and identifying the recruitment source within the company by name. The director should also ask the petitioner how many candidates were interviewed; and if so, whether and how it conducted interviews and determined that no U.S. candidate was eligible for the position; and specifying the job related reason for not hiring each U.S. worker. In addition, the director should specifically ask the petitioner about the frequency of contact with and to describe his role in the recruiting process and whether was involved in the interview and rejection (or hiring) process. The director should also ask for copies of the in-house posting notice and any other objective, independent evidence to establish that the petitioner actively participated in the recruitment process and followed the DOL requirements to ensure that no United States worker was qualified, willing and available to take the position. If such evidence is unavailable, the petitioner should explain why it cannot be obtained.

2. **<u>The Beneficiary's Qualification</u>**

On the Form ETA 750, part B, the beneficiary represented that he worked as a landscape gardener for a company in Brazil called from April 1997 to September 1999. Submitted along with the Form ETA 750 and the Form I-140 petition was a recommendation letter dated January 24, 2001 from stating that the beneficiary worked as a landscape gardener at his commercial establishment, (Landscaping) from April 1997 to September 1999.

In response to the director's NOIR dated February 10, 2009 the petitioner submitted the following evidence to demonstrate that the beneficiary worked as a landscape gardener for at least two years before April 9, 2001 (the priority date):

- A signed statement dated March 2, 2009 from stating that the beneficiary worked as a landscape gardener at his company, – ME;
- A copy of the business registration of – ME with CNPJ number 39.629.431/0001-57;[7] and

[7] Businesses that are officially registered with the Brazilian government are given a unique CNPJ number. CNPJ (Cadastro Nacional da Pessoa Juridica) is similar to the federal tax ID or employer ID number in the United States.

- A signed statement dated February 25, 2009 from the beneficiary stating that he worked for Landscaping, , from April 1997 to September 1999.

Upon review of the evidence submitted, the director in the Notice of Revocation (NOR) stated that the identity of could not be independently verified.

Consistent with *Matter of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date – which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL – the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, the Form ETA 750 was filed and accepted for processing by the DOL on April 9, 2001. Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two years of work experience in the job offered.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the beneficiary is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In adjudicating the appeal, the AAO finds that neither the recommendation letter dated January 24, 2001 nor the signed statement dated September 19, 2008 from complies with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), in that neither includes a description of the beneficiary's work experience or the training received.[8] Simply stating that the beneficiary worked as a landscape gardener is not sufficient for purposes of describing the experience or the training received by the beneficiary and does not establish the reliability of the assertion.

The AAO also notes that the beneficiary, according to his Biographic Information (Form G-325) which he filed along with his Application to Register for Permanent Residence or Adjust Status (Form I-485), lived in the city of Vitoria, ES, Brazil, from 1984 to December 1999. according to the evidence submitted, is located in Mantenopolis, ES. According to

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[8] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) provides:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

http://www.distancecalculator.globefeed.com, the straight line distance between the city of is about 181.67 km (roughly 112.89 miles) (last accessed May 16, 2012). Based on these stated facts we conclude that it is not likely that the beneficiary lived and worked in Mantenopolis, ES, between 1997 and 1999.

As noted above, it is incumbent upon 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. at 591-592.

On remand, the director should issue a new Notice of Intent to Revoke (NOIR) and inform the petitioner about the deficiency in the letter of employment and the inconsistencies between the Form G-325 and the letter of employment reflecting an approximately 230 miles round-trip commute each day. The director should give the petitioner a reasonable period of time to respond. The director should also advise the petitioner to submit independent objective evidence, such as copies of the beneficiary's paystubs, payroll records, tax documents, or financial statements or other evidence, i.e. Brazilian booklet of employment and social security, to show that the beneficiary had the experience in the job offered and that he qualified for the job before the priority date.

The director is not limited from requesting and the petitioner from submitting other evidence not mentioned above.

3. **The Petitioner's Ability to Pay**

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2).

In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the

circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As noted earlier, the record shows that the Form ETA 750 was received for processing on April 9, 2001 by the DOL. The rate of pay or the proffered wage set by the DOL on the Form ETA 750 is $11.08 per hour or $20,165.60 per year (based on a 35-hour work per week). Therefore, the petitioner is required to demonstrate the ability to pay $11.08 per hour or $20,165.60 per year from April 9, 2001 and continuing until the beneficiary receives lawful permanent residence. The petitioner has already submitted copies of the following evidence to demonstrate the ability to pay:

- A copy of the Form 1040, U.S. Individual Income Tax Return, of for the year 2001; and
- A copy of the beneficiary's Form W-2 for 2004.[9]

Upon review, the AAO finds that the evidence submitted above is not sufficient to demonstrate that the petitioner has the continuing ability to pay the proffered wages of the beneficiary from the priority date.

We note that under Schedule C (Profit or Loss from Business) of individual tax return, listed his employer identification number as This number is different from the IRS Tax # that listed in the Form I-140 petition and from the Employer's Identification Number (EIN) on the beneficiary's 2004 W-2.[10]

If the petitioning business) changed its business structure or if the business was acquired by another business during the beneficiary's qualifying time period, the petitioner must establish that the successor entity is a successor-in-interest to the original petitioning business.

A valid successor relationship for immigration purposes is established if it satisfies three conditions. First, the job opportunity offered by the new organization (the petitioner) must be the same as originally offered on the labor certification. Second, both the predecessor and the new company must establish eligibility in all respects by a preponderance of the evidence. The predecessor company is required to submit evidence of the ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor company is completed. The claimed successor – the petitioner –

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[9] The wage paid in 2004, according to the FormW-2 submitted, is $31,999.50, more than the annual proffered wage of $20,165.60; however, we cannot consider this compensation without further evidence since the Form W-2 was issued by a company called (Employer's Identification Number Without additional evidence, the petitioner and appear to be two and distinct separate entities.

[10] The IRS Tax Number or the Employer's Identification Number on the Form I-140 petition and the beneficiary's W-2 is

must also demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the new organization (the petitioner) must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the original petitioning company.

Evidence of transfer of ownership must show that the new organization (the successor entity) not only purchased assets from the predecessor company, but also the essential rights and obligations of the predecessor company necessary to carry on the business in the same manner as the predecessor company. The new organization must further continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

On remand, the director should issue a new NOIR requiring the petitioner to demonstrate the financial ability to pay the beneficiary's proffered wage from April 9, 2001 until the beneficiary obtains lawful permanent residence. The acceptable evidence to demonstrate that ability, pursuant to 8 C.F.R. § 204.5(g)(2) are:

- Forms W-2 or 1099-MISC issued to the beneficiary during the relevant period from the priority date; and/or
- The petitioner's annual reports, federal tax returns, or audited financial statements during the relevant period from the priority date.

To establish successorship, the director should request the following evidence:

- Evidence of transfer of ownership or assumption of rights, duties, and obligations between the petitioner and its successor business(es);
- Evidence showing that the nature of the current business did not change when the petitioner changed the structure of the business organization or when the petitioner was bought by another organization; and
- Evidence showing that the beneficiary will be performing the same job duties as before the change or the acquisition.

As noted earlier, the director may request and the petitioner submit other evidence not listed above. The director may also consider the petitioner's totality of circumstances if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In summary, the director's decision to revoke the approval of the petition is withdrawn. The approval of the petition, however, may not be reinstated under the facts of record. The petition is, therefore, remanded to the director for issuance of a new Notice of Intent to Revoke (NOIR) specifically outlining the defects in the petition, as stated above. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of the response, the director shall enter a new decision.

ORDER: The director's decision to revoke the approval of the petition is withdrawn. However, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. The petition is remanded to the director for issuance of a new, detailed decision.