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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
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Services

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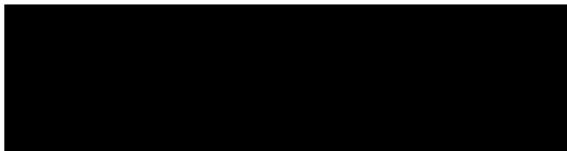
Date: **MAR 16 2012** Office: TEXAS SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 employment-based immigrant visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The AAO will grant the motion but affirm the previous decision of the director and the dismissal of the appeal. The petition remains denied.

The petitioner is an investigation service. It sought to employ the beneficiary permanently in the United States as a security consultant.¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it was the successor-in-interest to the original petitioner on the labor certification. The director also determined that the petitioner failed to show that it had the continuing ability to pay the beneficiary the proffered wage² and denied the petition accordingly on October 2, 2007.

The AAO concurred with the director's conclusions and additionally found that the petitioner had failed to establish that the beneficiary possessed the requisite two years of experience in the job offered. The AAO dismissed the appeal on January 9, 2009.³

¹ Section 203(b)(3)(A)(i) of the Act 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

In this case, the priority date was established by the Form ETA 750 as December 4, 2000. The proffered wage as set forth on the Form ETA 750 is \$20.00 per hour, which amounts to \$41,600 per year. If an employment-based petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

³ The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.

Counsel has filed a motion to reopen and reconsider styled as an appeal on Form I-290B. Additional material that was omitted on appeal has been submitted with the motion. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits evidence related to the petitioner's ability to pay the proffered wage and reasserts that the petitioner is the successor-in-interest to the original petitioner, that the petitioner has demonstrated its financial ability to pay the proffered wage and that the petitioner has established that the beneficiary has the required two years of experience in the job offered. The AAO accepts counsel's filing as a motion to reopen and reconsider, but for the reasons set forth below affirms the dismissal of the appeal.

Successor-in-interest

The Form I-140 petitioner, [REDACTED] Riverside, California 92509 asserts that it is the successor-in-interest to the employer listed on the Form ETA 750 labor certification. It is identified as [REDACTED] North Hollywood, California 91601. The owner of the original entity was [REDACTED] and the entity operated as a sole proprietorship until [REDACTED] April 2005 death. Subsequently, in 2006, the present owner took over operation of the company.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*").⁴

2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (the AAO's *de novo* authority is well-recognized). The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

⁴ *Matter of Dial Auto* is 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).

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests. *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application. For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole 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.

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

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning 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 petitioner must establish the successor's 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.

In this case, as stated in the prior AAO decision, the petitioner failed to establish that it had acquired the essential rights and obligations of the predecessor entity, rather than just operating under a similar name. The petitioner provided no evidence that it had purchased the assets of the initial business or other evidence to establish that it is a successor-in-interest. The copies of website pages that the petitioner submitted from its website, which reference the prior owner, as well as the current owner are insufficient to establish that the petitioner acquired the essential rights and obligations of the predecessor.

Additionally, the petitioner failed to submit evidence of the predecessor entity's ability to pay the proffered wage of \$41,600 as of the priority date, but instead indicated that it did "not have access to the tax returns of the prior owner." As required by *Matter of Dial Auto*, to establish that a petitioner is the successor-in-interest to the employer specified on the labor certification, the petitioner is required to demonstrate that the original employer had the continuing ability to pay the proffered wage from the priority date until the date of transfer, which here would be, at a minimum, from 2000 to 2005. As no financial documentation related to the predecessor entity's ability to pay the proffered wage was provided, which covered 2000, 2001, 2002, 2003, 2004 and 2005, the petitioner has not established that the predecessor (or the asserted successor) can pay the beneficiary the proffered wage, or that it is the successor-in-interest to Backstreet Investigations in order to continue processing under the certified labor certification.

Ability to Pay the Proffered Wage Pursuant to 8 C.F.R. § 204.5(g)(2)

As hereinabove noted, the regulation at 8 C.F.R. § 204.5(g)(2) obliges a petitioner to establish its ability to pay the proffered wage from the priority date onward until the beneficiary obtains permanent residence status. In a successor-in-interest context, as noted above, this means demonstrating that the predecessor business could pay the proffered wage beginning at the priority date until the date of transfer. Eligibility for approval, as well as the regulation at 8 C.F.R. § 204.5(g)(2) also requires that the continuing ability to pay be carried forward by the successor petitioner.

the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business. *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

As set forth in the AAO's prior decision, the petitioner is structured as a sole proprietor, which is indistinguishable from the individual owner. Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For that reason, individual household expenses are submitted by the sole proprietors.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

A copy of the sole proprietor's individual 2006 Form 1040 was submitted to the record and resubmitted on motion. It shows an adjusted gross income of \$2,250, which is \$39,350 less than the proffered wage without consideration of individual household expenses, which were not submitted. Despite the sole proprietor's affirmations to the contrary, his documentation does not demonstrate an ability to pay the proffered wage. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted in the AAO's prior decision, counsel also submits a letter, dated November 16, 2007, from [REDACTED] firm has familiarity with the beneficiary's work through past dealings. [REDACTED] states his willingness to commit "if [the beneficiary] is able to perform the work assigned by our company to [the petitioner], an annual contractual amount of \$200,000." [REDACTED] indicates that he has enclosed copies of quarterly wage filing and six months of bank statements. However, as noted by the AAO, the copies of this company's quarterly wage filings and bank statements were omitted on appeal.

Counsel has resubmitted a copy of [REDACTED] letter on motion. He also provides copies of Form 941, Employer's Quarter Federal Tax Return(s) for the second and third quarter(s) of 2007 for The 67 Group, as well as copies of its March through October 2007 bank statements.

As stated in the prior AAO decision, such documentation does not belong to the petitioning business and is not probative in establishing its ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept.

18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Further, the assurances of an unrelated business as to willingness to pledge funds for use of the beneficiary’s services are not dispositive in establishing the petitioner’s ability to pay the proffered wage. A petitioner must establish that it is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Moreover, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

The petitioner has not established that it has had the continuing ability to pay the proffered wage based on the evidence submitted.

Additionally, the AAO concludes that the evidence does not warrant approval of the petition based on *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner’s prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner’s clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner’s determination in *Sonegawa* was based in part on the petitioner’s sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, and the petitioner’s reputation within its industry.

Based on a review of the record, including the asserted successor’s one tax return showing a minimal adjusted gross income, and lack of other pertinent financial documentation relevant to the predecessor entity from 2000 to 2005, the AAO does not conclude that such unique and unusual circumstances as those which prevailed in *Sonegawa* merit an approval in this case.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Based on the foregoing and for the reasons set forth above and in the AAO's prior decision, the AAO does not conclude that the petitioner has established its continuing ability to pay the proffered wage from the priority date onward.

Experience

The labor certification requires that the beneficiary have two years of experience in the job offered as security consultant.⁵ As discussed in the AAO's prior decision, with this Form I-140, the petitioner failed to submit any supporting letters or evidence from past employers, which established that the beneficiary had two full-time years of experience as a security consultant as of the December 4, 2000 priority date. As noted in the AAO's decision, with the first Form I-140 petition filed, the petitioner submitted a letter dated January 14, 2005, signed by [REDACTED] stating that the beneficiary had worked for that firm "on and off" as a security consultant since 1998. Even if the letter had been submitted with the instant Form I-140 petition, the AAO found it insufficiently vague as it failed to define "on and off." Further, the beneficiary failed to list this job on the Form G-325 submitted with his Form I-485, Adjustment of Status application.⁶

On motion, counsel emphasizes that the beneficiary submitted a statement of self-employment to DOL. Counsel does not submit any additional evidence or documentation. As stated by the AAO in the January 9, 2009 decision, the beneficiary's statement to the California State Workforce Agency

⁵ The regulation at 8 C.F.R. § 204.5(i)(3) provides:

(ii) *Other documentation*—

(A) *General.* 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.

(B) *Skilled workers.* 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 individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

⁶ 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

of self-employment in Denmark as a security consultant from August 1993 to January 1998 is insufficient, standing alone, to demonstrate that he obtained two full-time years of employment experience as a security consultant as of the priority date.^{7, 8} The petitioner failed to document the beneficiary's experience in accordance with 8 C.F.R. § 204.5(l)(3). The beneficiary's own statement does not constitute sufficiently independent objective evidence that he acquired two full-time years of experience as a security consultant as of December 4, 2000. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Based on a review of the underlying record, as well as the evidence submitted on appeal and on motion, the petitioner has failed to establish that it is a successor-in-interest to the employer specified on the labor certification. It has additionally failed to establish that it has had the continuing financial ability to pay the proffered wage and has failed to demonstrate that the beneficiary possessed the required work experience set forth in the labor certification.

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.

⁷ It is noted that with another filing on the beneficiary's behalf that the beneficiary's resume claims that his self-employment as a security consultant in Denmark was from 1989 to 1996. 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. *See Matter of Ho*, 19 I&N Dec. at 591-592.

⁸ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated January 9, 2009 is affirmed. The petition remains denied.