

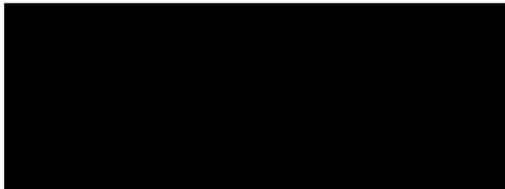
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

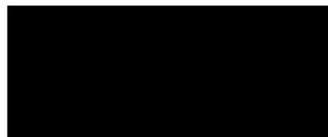


U.S. Citizenship
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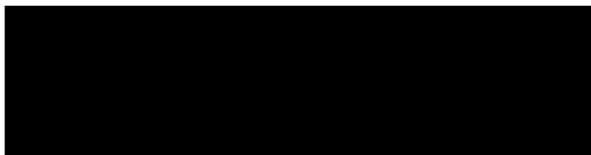


DATE: Office: NEBRASKA SERVICE CENTER
MAY 22 2012

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 with the field office or service center that originally decided your case by filing a 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner was an electric engineering firm. It sought to employ the beneficiary permanently in the United States as an electrical engineer. 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 failed to establish its ability to pay the proffered wage, and that the petitioner had failed to provide sufficient evidence to demonstrate the beneficiary's qualifications to perform the required job duties. The director denied the petition accordingly.

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.

As set forth in the director's January 8, 2008 denial, the primary issues in this case are whether the petitioner has the continuing ability to pay the proffered wage as of the priority date, and whether the petitioner has provided sufficient evidence to demonstrate the beneficiary's qualifications to perform the required job duties.

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

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 must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 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).

Here, the Form ETA 750 was accepted on July 21, 2003. The proffered wage as stated on the Form ETA 750 is \$23.47 per hour based upon a 40 hour work week (\$48,817.60 per year). The Form ETA 750 states that the position requires one year of experience in the job offered and a bachelor's degree in electrical engineering.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The petitioner indicated on the Form I-140 that it employed three workers. On the Form ETA 750B, signed by the beneficiary on February 21, 2006, the beneficiary does not claim to have been employed by the petitioner.

The record indicates that the petitioner ceased operating August 10, 2007. The record also shows that on July 20, 2006 a corporation called ██████ began operations. As a threshold issue, on April 4, 2012, this office notified the petitioner that additional evidence and information was necessary before the AAO could render a decision. The AAO requested that the petitioner provide proof that its business had not been dissolved and/or rendered inactive, and is currently in active status.

With its response to the AAO, the petitioner submitted, through counsel, a copy of the Corporate File Detail Report for ██████, the alleged successor-in-interest of the petitioner, ██████. The file also contains a copy of ██████ corporate tax returns for 2006 and 2007. On appeal, the petitioner stated that ██████ is the former ██████ with the same functions and owner, and is currently in active status.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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, United States Citizenship and Immigration Services (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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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

A corporation is a distinct legal entity which is separate from its owners and shareholders, the assets of its shareholders, and the assets of other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Therefore, the petitioner that filed the labor certification and petition is a different entity from [REDACTED] for which a 2006 and 2007 tax return was submitted as evidence of the petitioner's ability to pay the proffered wage.

The petitioner implies that [REDACTED] and/or [REDACTED] is a successor-in-interest to [REDACTED]. A petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

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

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 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 in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

The record contains no evidence to establish a valid successor relationship. There is no evidence of the organizational structure of the predecessor prior to the transfer, or the current organizational structure of the successor. The evidence does not establish that [REDACTED] or [REDACTED] acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

The fact that [REDACTED] and/or [REDACTED] is owned and operated by the by the same shareholder is not sufficient alone to establish a successor-in-interest relationship. Therefore, the evidence in the record is not sufficient to establish that the [REDACTED] or [REDACTED] is a successor-in-interest to the petitioner. As noted in the Notice of Intent to Dismiss, the current status of [REDACTED] is inactive; therefore, the petition and the appeal to the AAO have

become moot. Thus, the petition is not accompanied by a valid labor certification. 20 C.F.R. § 656.30 (c)(2); 8 C.F.R. § 204.5(l)(3).

Even if the AAO were to consider [REDACTED] as a successor-in-interest, the petitioner has failed to demonstrate its ability to pay the proffered wage; the net income amounts are less than the proffered wage, and there is no evidence in the record to show that the petitioner issued any Form W-2s or Form 1099-MISC to the beneficiary. Furthermore, the petitioner failed to provide copies of its Schedule L; and therefore, the petitioner's current net asset amounts cannot be ascertained. In fact, the record is entirely devoid of evidence relating to [REDACTED] ability to pay the proffered wage. The only tax returns in the record concern [REDACTED] (a different entity) and [REDACTED] from before the alleged transfer of ownership.

It is also noted that the petitioner has failed to demonstrate that the beneficiary meets the qualifications set forth on the Form ETA 750. According to the Form ETA 750, the position requires one year of experience as an electrical engineer. The petitioner submitted a letter from [REDACTED] in which the declarant stated that the beneficiary was employed by the company from 1997 to 2001 as director for electrical installations. Although this letter indicates that the beneficiary was employed for more than one year, the declarant fails to provide specifics with respect to a description of the beneficiary's job duties and the specific dates he was employed. It is further noted that the beneficiary did not list [REDACTED] as a former employer on the Form ETA 750B, that he signed under penalty of perjury. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Accordingly, it has not been established that the beneficiary has the requisite one year experience in the job offered. 8 C.F.R § 204.5(g)(1) and (l)(3)(ii)(A). The appeal will be dismissed for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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 at 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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.