



U.S. Citizenship  
and Immigration  
Services

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DATE: NOV 01 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]  
[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:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in the petitioner case. All of the documents related to this matter have been returned to the office that originally decided the petitioner case. Please be advised that any further inquiry that the petitioner might have concerning the petitioner case must be made to that office.

If the petitioner believe the AAO inappropriately applied the law in reaching its decision, or the petitioner have additional information that the petitioner wish to have considered, the petitioner 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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed as moot.

The petitioner describes itself as a wholesale tropical plant nursery. It filed a petition seeking to employ the beneficiary permanently in the United States as a horticulture worker I. 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).<sup>1</sup>

The petition was accompanied by a Form ETA 750, Application for Alien Employment Certification ("labor certification"), approved by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001.<sup>2</sup>

The director's decision denying the petition concluded that the petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date and continuing until the beneficiary becomes a legal permanent resident.

The record shows that the appeal is properly filed 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.<sup>3</sup>

On August 7, 2012, the AAO issued a Notice of Intent to Dismiss and Derogatory Information ("NOID"), informing the petitioner that according to the Washington Secretary of State, Corporations Division, the petitioner's status became inactive on March 12, 2012. The AAO also informed the petitioner that if it was no longer in business, then no *bona fide* job offer exists, and the petition and appeal are therefore moot.

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<sup>1</sup> 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.

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

<sup>3</sup> 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).

In response to the NOID, counsel stated that while the AAO is correct that the petitioner can no longer offer a *bona fide* job offer to the beneficiary, another company, [REDACTED] can give the beneficiary a *bona fide* job offer, by porting the beneficiary to [REDACTED]. In short, counsel claims that the petition is still “approvable” due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*<sup>4</sup> to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 “shall remain valid” with respect to a new job offer for purposes of the beneficiary’s application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a “same or similar” job. A plain reading of the phrase “will remain valid” suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term “remains valid” was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. See *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Since there is no evidence in the record that Botanical Designs is a successor-in-interest to the now-defunct petitioner,<sup>5</sup> the instant petition cannot be approved.<sup>6</sup> The petition is moot because the

<sup>4</sup> The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by [REDACTED] May 12, 2005, provides that if the initial petition is determined “approvable”, then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and II-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

<sup>5</sup> 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 labor certification employer,

permanent employment set forth on the labor certification is no longer being offered to the beneficiary by the petitioner or a successor-in-interest.

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.

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then 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 petitioner may establish a valid successor relationship 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. There is no evidence in the record establishing any of these three conditions.

<sup>6</sup> Even if the instant appeal were considered on the merits, it would be dismissed. The evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, through an examination of wages paid to the beneficiary, its net income, or net current assets. *See* 8 C.F.R. § 204.5(g)(2). It is noted the social security number listed on the W-2 Forms issued to the beneficiary, and what is listed on the beneficiary's personal tax returns are different, and the record contains no explanation for this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, the wages paid to the beneficiary from 2001 through 2005 would not be considered for the ability to pay analysis.