

(b)(6)

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

DATE: **OCT 10 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [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:

SELF-REPRESENTED

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 the petitioner,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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.

The petitioner describes itself as a Thai restaurant. It filed a petition seeking to employ the beneficiary permanently in the United States as a manager of culinary operations. 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).¹

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 May 4, 2004.²

The director's decision denying the petition concluded that the petitioner failed to establish that the beneficiary met the minimum requirements of the labor certification.

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.³

According to the Georgia Secretary of State, the petitioner's corporate status was dissolved on July 9, 2005. This is acknowledged by the statement of the petitioner's former president and shareholder in a letter dated April 9, 2009. The petitioner's former owner stated that at the time the labor certification was submitted to the DOL, he had two business entities: [REDACTED] d/b/a [REDACTED] and [REDACTED] d/b/a [REDACTED]. On appeal, the petitioner's former owner stated that, in 2006, the Georgia Department of Transportation advised the petitioner of a planned highway project that would require it to move from its location at [REDACTED]. The

¹ 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.

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

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).

petitioner submitted the notice from the Georgia Department of Transportation and copies of internet news updates as evidence of the highway project.

However, the relevance of this highway project is unclear, because [REDACTED] was dissolved on July 9, 2005. Despite the dissolution of the business, the present petition was filed in the name of [REDACTED] on November 30, 2007. A petition filed by a non-existent business cannot be approved because there was no *bona fide* job offer with the petitioner at the time of filing.⁴

The beneficiary is currently serving as manager of culinary operations for [REDACTED] at [REDACTED]. On appeal, the appellant states that, in order to preserve the beneficiary's permanent residence processing, it was invoking the portability provision of the American Competitiveness in the Twenty-First Century Act of 2000 ("AC21").

The portability provisions of AC21 do not permit the approval of an *immigrant petition* despite the fact that the petitioner has not demonstrated its eligibility. AC21 allows an *application for adjustment of status*⁵ 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.

⁴ Further, there is no evidence in the record that [REDACTED], the appellant, is a valid successor-in-interest to the petitioner pursuant. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*"). It is noted that the Georgia State Secretary of State shows [REDACTED] is also in non-compliance for failure to register as an active corporation.

⁵ 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 William Yates, 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 H-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.

The AAO will not approve a petition where the initial petitioner has not demonstrated its eligibility pursuant to 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 the petitioner, [REDACTED], was not in existence at the time of the petition was filed with USCIS, no *bona fide* job offer existed with the petitioner. In addition, the appellant has not established that it is a successor-in-interest to the petitioner. Therefore the appeal is dismissed.⁶

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.

⁶ Even if the instant appeal were considered on the merits, it would be dismissed on multiple grounds. The evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification. *See* 8 C.F.R. § 103.2(b)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The evidence in the record also 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. *See* 8 C.F.R. § 204.5(g)(2).