



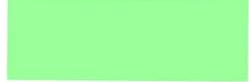
U.S. Citizenship  
and Immigration  
Services

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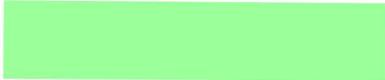


DATE: **AUG 01 2013**

OFFICE: NEBRASKA 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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, on January 21, 2010. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal on May 8, 2013. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motions will be granted; the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is an interior specialty contractor. It seeks to employ the beneficiary permanently in the United States as a civil engineering technician. The petitioner requested that the petition rely on an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL) for [REDACTED]

In the director's decision, the director determined that the petitioner had not established that it was the successor-in-interest to the entity that filed the labor certification. The director denied the petition accordingly. On appeal, the AAO found that the petitioner had failed to establish it is the successor-in-interest to [REDACTED] the entity that filed the labor certification. Beyond the decision of the director, the AAO also found the petitioner failed to establish that the beneficiary was qualified for the position offered.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. 8 C.F.R. § 103.5(a)(3). On motion, the petitioner asserts that the AAO "misappreciated the facts and circumstances on the issue of whether or not [REDACTED] is the successor-in-interest to the entity that filed the labor certification, [REDACTED]." The petitioner also asserts that the AAO erred in determining that the beneficiary was not qualified for the position offered.

The record shows that the motion to reconsider is properly filed and timely. However, as set forth below, following consideration, the petition remains denied and the AAO's decision of May 8, 2013 is affirmed. The remaining 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.

In its May 8, 2013 decision, the AAO found that there was no evidence in the record that [REDACTED] was the successor-in-interest<sup>1</sup> to [REDACTED] the company that filed the labor

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<sup>1</sup> USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") 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. Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, 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

certification. The record on appeal contained a "Master Sale Agreement" (MSA) dated June 1, 2006 listing [REDACTED] as the seller, and [REDACTED]<sup>2</sup> and [REDACTED] as the buyers. The AAO determined that the agreement failed to mention [REDACTED] at all, and the evidence indicated solely a transfer of 100% stock of [REDACTED] to these two individuals. The sale agreement makes no mention of [REDACTED] and the record includes no evidence of what the buyers of [REDACTED] did with the purchased assets.

The AAO also acknowledged a letter dated May 18, 2009 from [REDACTED] stating that he purchased [REDACTED] and is the owner of [REDACTED]. While the record and letter established that [REDACTED] is one of two shareholders in both companies, the letter failed to establish that the two companies were one company and legally merged. Rather, the letter indicated that the two companies continued to be two separate legal entities as of the letter's signing.

Therefore, the AAO found that the MSA indicates that [REDACTED] is a shareholder in [REDACTED] but there is no evidence that [REDACTED] is the successor-in-interest to [REDACTED]. The AAO determined that [REDACTED] and [REDACTED] purchased the assets and stock of [REDACTED] individually, and then invested those assets into [REDACTED] another entity that they already owned individually. Nothing in the record demonstrates that the stock, assets, or ownership of [REDACTED] were transferred to [REDACTED] but rather that the stock and assets were transferred to two individuals.<sup>3</sup> It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec.

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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 *Matter of Dial Auto*, 19 I&N Dec. at 482.

<sup>2</sup> It is noted that [REDACTED] is also identified in the record as "[REDACTED]" and "[REDACTED]"

<sup>3</sup> The AAO notes that the MSA indicates certain assets and liabilities of [REDACTED] were transferred out of [REDACTED] and into a separate limited liability company, [REDACTED] (the LLC), "effective immediately prior to the Effective Time" of the MSA. Pursuant to the MSA, \$2,563,683.61 of [REDACTED] total assets (\$5,651,270.20) were transferred to the LLC, while \$3,085,586.59 remained in the entity when its stock transferred pursuant to the MSA. Likewise, \$897,754.46 in liabilities and \$1,667,929.15 in equity were transferred to the LLC of [REDACTED] total liabilities (\$2,233,341.05) and equity (\$3,417,929.15). The MSA suggests that approximately 54.6% of [REDACTED] assets and 54.6% of its liabilities and equity remained at the time of the stock transfer on May 31, 2006.

631 (Acting Assoc. Comm'r 1980). Because the record of proceedings lacked any evidence of the petitioner's ownership of, or the merger or acquisition of, [REDACTED] the AAO concluded that the petitioner had not established a successor relationship to [REDACTED].

On motion, the petitioner describes three claimed events that have been done to effect the merger during the transition period: 1) retention of employees of [REDACTED] into the employee roster of [REDACTED]; 2) assumption not only of the rights of [REDACTED] but also its liabilities in favor of [REDACTED]; and 3) transfer of assets.

First, the petitioner asserts that the retention of employees of [REDACTED] into the employee roster of [REDACTED] demonstrate its successor relationship to the original labor certification entity. However, the petitioner failed to submit additional evidence sufficient to establish its claim. The petitioner did not submit payroll records or employee contracts to show that the same employees worked at both companies. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner did submit the beneficiary's pay stub issued from [REDACTED] dated June 6, 2013. However, this evidence only attests to the beneficiary's employment at [REDACTED] in June 2013, and does not demonstrate that the beneficiary worked at [REDACTED] at the time of the claimed merger or that any other [REDACTED] employees were also employed at [REDACTED] at the time of the claimed merger. It is noted that on the original entity's labor certification and Form I-140, the original entity listed 220 employees; whereas, on its Form I-140, [REDACTED] states "110 average" employees. As [REDACTED] existed prior to the priority date, it is unclear how many workers it employed prior to the purported merger. However, these figures suggest that [REDACTED] employs substantially fewer workers than [REDACTED] employed.

Therefore, the petitioner fails to demonstrate its successor relationship through a retention of the original labor certification entity's employees.

Second, the petitioner contends that it assumed not only the rights, but also the liabilities of [REDACTED]. The petitioner failed to submit sufficient evidence to demonstrate its claim, such as a purchase agreement or stock transfer between [REDACTED] and the petitioner. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As discussed in the AAO's decision, the record of proceedings documents the acquisition of [REDACTED] by two individual purchasers, and not the petitioner. The record of proceedings does not document the sale or transfer of [REDACTED] or its liabilities or stock from these two individuals to the petitioner. Therefore, the petitioner fails to demonstrate its successor relationship through an assumption of both the rights and liabilities of the original labor certification entity.

Third, the petitioner submits additional evidence in support of its claim that it transferred assets to effect the merger, and its successor relationship to the original labor certification entity. The

petitioner submits copies of the following documents: 1) 2006 and 2007 consolidated financial statements of [REDACTED] and an independent accountant's review report; 2) 2006 and 2007 financial statements of [REDACTED] and an independent accountant's review report; and 3) Indiana Bureau of Motor Vehicles documents showing transfer of assets from [REDACTED] to [REDACTED]

Although the petitioner claims to submit audited financial statements for [REDACTED] and [REDACTED] for 2006 and 2007, the record reflects that they are not, in fact, audited financial statements. The petitioner submits a [REDACTED] and Affiliate consolidated financial statements and independent accountants' review report, December 31, 2007 and 2006; and [REDACTED] financial statements and independent accountants' review report, December 31, 2007 and 2006.<sup>4</sup> However, the submitted financial statements do not support the petitioner's claim as a successor-in-interest to the original labor certification entity. On its face, the fact that the two companies both continued to exist and operate during the same period of time, requiring two separate financial statements, indicates [REDACTED] and the petitioner were two separate entities.

On motion, the petitioner highlights certain notes in the financial statements to establish both companies have been consolidated. In the 2006 and 2007 consolidated financial statements of [REDACTED] Note 1 (Summary of Significant Accounting Policies) states that the "consolidated financial statements include the accounts of [REDACTED] and [REDACTED] (collectively, the Companies). The entities are brother-sister companies whose stockholders are substantially the same individuals." It further states that, "In 2006, [REDACTED] became the primary beneficiary of [REDACTED]" In the 2006 and 2007 consolidated financial statements of [REDACTED] Note 7 (Related Party Transactions) states that [REDACTED] "qualifies as a variable interest entity for which [REDACTED] is the primary beneficiary." It is noted the term "variable interest entity" indicates either 1) the equity investment at risk is not sufficient to permit the entity to finance its activities without additional subordinated financial support from other parties; or 2) [REDACTED] lacks "a controlling financial interest." See [REDACTED] (accessed July 30, 2013).

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<sup>4</sup> The financial statements in the record of proceedings do not appear to be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that the petitioner submits on motion are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the successor-in-interest relationship between the labor certification employer and the petitioner.

The above financial statements and notes establish that the two corporations are two distinct legal entities with the same shareholders. As noted above, a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Therefore, the evidence fails to establish that the companies merged or consolidated. The evidence in the record fails to demonstrate that the petitioner is vested with the rights and obligations of [REDACTED] through amalgamation, consolidation, or other assumption of interests.<sup>5</sup> *Black's Law Dictionary* 1569 (9th ed. 2009) (defining "successor"). Because the record demonstrates that [REDACTED] continued to operate as a separate and distinct entity, the AAO affirms its previous finding that the petitioner failed to demonstrate a successor relationship with the labor certification entity.

The Indiana Bureau of Motor Vehicles documents showing transfer of assets from [REDACTED] to [REDACTED] also fails to establish a successor-in-interest relationship. 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 the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>6</sup> See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010). The Motor Vehicles documents do not indicate that the parties agree to the transfer and assumption of the essential rights and obligations of [REDACTED] necessary to carry on the business, but rather documents only the transfer of a limited set of assets. As previously noted, [REDACTED] possessed approximately \$3,085,586 in assets as of May 31, 2006, including over \$1,071,700.38 in fixed assets. This limited set of assets transferred does not appear to account for a significant portion of [REDACTED] assets. Therefore, the petitioner has failed to demonstrate its successor relationship to the original labor certification entity through a transfer of assets.

The petitioner has failed to submit evidence of the claimed events sufficient to establish a successor-in-interest relationship. Going on record without supporting documentary evidence is not sufficient

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<sup>5</sup> Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

<sup>6</sup> The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. See 19 Am. Jur. 2d *Corporations* § 2170; see also 20 C.F.R. § 656.12(a).

for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). Therefore, the petitioner has failed to demonstrate that [REDACTED] employees were transferred to [REDACTED]; that [REDACTED] assumed the rights and liabilities of [REDACTED]; and that the transfer of assets effected the merger.

Based on the above, the petitioner has not established itself as the successor entity to the original labor certification entity. Thus, the petition was filed without a valid labor certification, and the petition must be denied for this reason alone. See 20 C.F.R. § 656.30(c)(2).

Further, in its May 8, 2013 decision, the AAO noted that beyond the decision of the director, the petitioner failed to establish that the beneficiary is qualified for the position offered. The AAO noted a discrepancy in the employment end dates between the experience letter from [REDACTED] and the information on the labor certification.<sup>7</sup> It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

On motion, the petitioner asserts that the beneficiary has worked for more than 24 months required in the labor certification, and the discrepancy was "most likely an honest mistake with no intent to misrepresent or falsify." However, the petitioner failed to submit any independent, objective evidence to reconcile the discrepancy. The petitioner did not submit any additional evidence, such as an explanation from the employer, payroll records, or government records. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The petitioner has failed to reconcile the discrepancy, thus the letter is insufficient to document the beneficiary's claimed experience.

On motion, the petitioner asserts that the beneficiary possessed experience also based on other employment. The petitioner submits a copy of the beneficiary's service record from the Municipality of Zamboanguita in the Philippines as a planning assistant from June 1, 1997 through December 31, 1999. This experience is not listed on the ETA Form 9089. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted. Further, this letter does not state the beneficiary's job title or duties of the position. See 8 C.F.R. § 204.5(l)(3)(ii)(A). Thus, the letter does not meet the regulatory

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<sup>7</sup> The record contains a letter on [REDACTED] letterhead signed by the vice-president of operations, stating that the beneficiary worked for the company's engineering department from February 2000 to October 2003. The letter did not list the beneficiary's title while employed by [REDACTED] and stated that the beneficiary worked until October 2003 instead of December 2003 as stated on the labor certification.

requirements, preventing the AAO from analyzing whether the beneficiary meets the experienced required on the labor certification. Therefore, the letter is insufficient to document the beneficiary's claimed experience.

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 (9<sup>th</sup> 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). Accordingly, the AAO concluded that the petitioner had failed to establish that the beneficiary was qualified for the proffered position.

Thus, even if the petitioner had established it is the successor-in-interest to [REDACTED], the petition must still be denied as the petitioner has not demonstrated that the beneficiary meets the minimum requirements of the proffered job.

The petition will remain denied for the above stated reason. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden. Accordingly, the motions will be granted and the previous decision of the AAO will be affirmed.

**ORDER:** The motions are granted. The previous decision of the AAO, dated May 8, 2013, is affirmed. The petition remains denied.