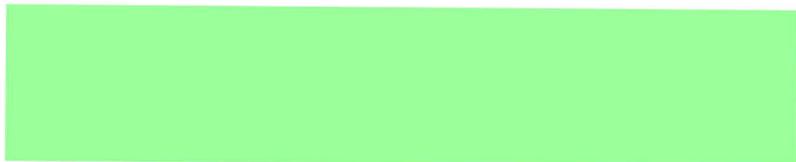


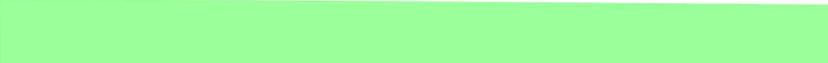


**U.S. Citizenship  
and Immigration  
Services**

(b)(6)



DATE: **AUG 30 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

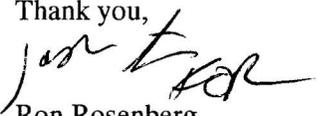
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:  


**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  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO) on March 1, 2013. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a [REDACTED]. It seeks to permanently employ the beneficiary in the United States as an international sales manager. 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). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 15, 2002. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner has not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary gains lawful permanent residence. The AAO subsequently dismissed the appeal, affirming the director's finding and concluding that the petitioner also did not establish that a *bona fide* continuing job offer exists, or that the beneficiary was qualified for the position.<sup>1</sup>

On motion, counsel states that the beneficiary, according to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), ported to a new employer, [REDACTED] on December 6, 2012.<sup>2</sup> 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>3</sup> to be approved despite the fact that

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<sup>1</sup> 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).

<sup>2</sup> The beneficiary did not join [REDACTED] payroll until March 1, 2013, according to a letter from [REDACTED] dated March 27, 2013, which was submitted on motion. On appeal, the petitioner submitted a letter dated December 6, 2012 from [REDACTED] stating its intent to hire the beneficiary.

<sup>3</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 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*

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).

The AAO notes that the instant petition was initially denied by the director for failure to establish that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date onward. Therefore, as the instant petition has not been approved, the petitioner must demonstrate its continuing eligibility for the benefit sought, including its continuing ability to pay the beneficiary the proffered wage. In its dismissal of the appeal, the AAO notified the petitioner that the record indicated that the petitioning company was sold in its entirety and ceased to exist as an operational business in August 2007. In a statement dated March 22, 2013 submitted on motion, the petitioner’s sole owner confirms that the petitioner is no longer doing business, stating that the petitioner is “not currently operational since it was sold in August 2007.” Therefore, as the petitioner ceased to exist as an operational business in August 2007, a *bona fide* continuing job offer no longer existed as of that date, unless the company that bought the petitioner would qualify as a successor-in-interest. A valid successor relationship may be established 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, including demonstrating its ability the beneficiary the proffered wage from the date of sale onwards. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986).

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*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.

On motion, the sole owner of the petitioner states that he “sold [the petitioner’s] assets and transferred employees to [purchasing company]” and that “to best of my ability to recall, [the beneficiary] was asked by [the purchasing company] to work with the company as the same with all the other employees at the time in the same capacity he was hired by my company.” The petitioner fails to support this statement with evidence of the purchasing company’s intent or eligibility to be a successor-in-interest. While a letter from [redacted] is included in the record, no evidence from the purchasing company, [redacted] is included. The petitioner’s sole owner also alleges that the petitioner’s employees were “transferred to [redacted] that was the remanufacturing company under the same ownership as [redacted]. The company was sold in the 7 figure range in order to augment their existing toner and recycling distribution business.” There is no evidence in the record to establish that [redacted] would qualify as a petitioning successor. Furthermore, there is no evidence in the record to establish that the unidentifiable company [redacted] would qualify as a later successor-in-interest.<sup>4</sup> 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)). Therefore, the evidence in the record does not satisfy the conditions described above to establish a successor relationship.

The petitioner has failed to establish that it had the ability to pay the beneficiary the proffered wage, that a continuing *bona fide* job offer exists in accordance with the terms of the labor certification, or that a valid successor relationship exists. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c)(2). As the job opportunity stated on the labor certification no longer exists, the instant Form I-140 is not supported by a valid labor certification and therefore must be denied. Furthermore, as no successor-in-interest has been established and the petitioner filed the appeal, the appeal appears moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner’s business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

The record also does not establish that the beneficiary is qualified for the position offered. The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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<sup>4</sup> It is noted that the Form I-290B states “brief attached”, but no brief was submitted. Rather, counsel resubmitted a copy of a portion of a prior appeal brief regarding the company’s ability to pay. Counsel asserts that he is submitting evidence of a successor relationship, but this evidence is not present in the record. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In the instant case, the labor certification states that the offered position requires two years of experience as a manager, international sales. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an international sales manager with [REDACTED] from February 1997 to January 2000. According to the evidence in the record, it appears that there was a relationship between [REDACTED] and the petitioner. Specifically, the petitioner submitted: a company profile printed in [REDACTED] which states that the petitioner has an office in [REDACTED] a support letter from [REDACTED] states that the beneficiary was “the International sales manager of our branch in [REDACTED]” and invoices from the petitioner showing products shipping from the petitioner to [REDACTED]. The AAO also notes that the petitioner sponsored the beneficiary for L-1 status from December 6, 2000 to November 2, 2003. In order to be eligible for L-1 status, a beneficiary must have been employed with a qualifying related company for at least one year in the three years prior to the L-1 issuance. In this case the L-1 was issued on December 6, 2000 and the three year period began December 6, 1997. During this time period the beneficiary reports that he was working at [REDACTED] (from February 1997 to January 2000). Therefore, [REDACTED] and the petitioner appear to be the same business or related companies.

In dismissing the appeal, the AAO stated that this evidence in the record indicated that [REDACTED] was related to the petitioning company and that as such beneficiary’s prior qualifying experience was with a branch of the petitioning entity and in the same capacity as the proffered position. In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, if the beneficiary’s experience was gained with the petitioner and was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position.

On motion, the petitioner states “[the petitioner], had absolutely no corporate connection with [REDACTED] and no corporate connection was ever indicated or stated. [REDACTED] was the sole distributor to [REDACTED]. I had no ownership interest whatsoever in [REDACTED].” Conversely, the owners of [REDACTED] had no ownership in my company, [the petitioner].” However, the petitioner offers no evidence to corroborate this statement or to rebut the information in the record. 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)). Therefore, the petition must also be denied because the evidence in the record does not establish that the beneficiary had the required 24 months of qualifying experience in the job offered at the time of the priority date.

The petition will remain denied for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met.

(b)(6)

*NON-PRECEDENT DECISION*

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**ORDER:** The motion to reopen is granted and the decision of the AAO dated March 1, 2013 is affirmed. The petition will remain denied.