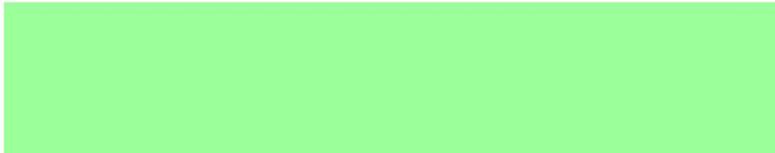


(b)(6)

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: **DEC 05 2013** 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 (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.

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** On January 29, 2003, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, with the Vermont Service Center (VSC), which was approved on March 8, 2004. The Director, Texas Service Center (the director) however, revoked the approval of the petition on May 16, 2009 and the petitioner subsequently appealed the director's decision to the Administrative Appeals Office (AAO). The AAO withdrew the director's decision and remanded the matter for further action, including the entry of a new decision. The director has now issued that decision and has certified it to the AAO. The AAO will affirm the director's decision.

The petitioner is a specialty market. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as an Indian specialty cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. §1153(b)(3)(A)(i).<sup>2</sup> In his July 30, 2013 decision, the director found that the petitioner had failed to establish that it was the entity that had filed the underlying Form ETA 750, Application for Alien Employment Certification, or its successor-in-interest and, therefore, had failed to establish that it was entitled to use the labor certification in support of the instant Form I-140 petition. He further determined that the evidence of record did not establish the petitioner's ability to pay the beneficiary the proffered wage. The director revoked the approval of the petition accordingly.

#### Certification to the AAO

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation provides: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

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<sup>1</sup> This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the U.S. Department of Labor (DOL). On May 17, 2007, DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

<sup>2</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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.

The director certified his decision to the AAO in light of his finding that the Form ETA 750 underlying the visa petition was not valid, a conclusion not reached by the AAO in its remand. As previously noted, the director's July 30, 2013 revocation of the approval of the instant Form I-140 was based, in part, on his determination that the record failed to establish the petitioner as the same business that had filed the Form ETA 750 or its successor-in-interest. He concluded, therefore, that the petitioner could not use the Form ETA 750 filed on July 2, 1996 to support the immigrant visa petition it had filed on January 29, 2003. As the AAO, based on the petitioner's failure to establish it was still in business, had found that the approval of the Form I-140 petition was subject to revocation under 8 C.F.R. § 205.1(a)(iii)(D), the director submitted his decision for AAO review.

Petitioner as Entity Filing the Form ETA 750

As stated by the director in the Notice of Intent to Revoke (NOIR) issued to the petitioner on May 22, 2013, the record reflects that the Form ETA 750 was filed with DOL by [REDACTED] located at [REDACTED]. Based on a search of the database maintained by the Secretary of the Commonwealth (Massachusetts), Corporations Division, New [REDACTED] was formed on November 15, 1993 and assigned Identification Number: [REDACTED] (Old Federal Employer Identification Number (FEIN): [REDACTED]). These same records also indicate that [REDACTED] was involuntarily dissolved on August 31, 1998.

The instant Form I-140 petition was filed by [REDACTED] which is also located at [REDACTED]. However, the records held by the Massachusetts Secretary of the Commonwealth establish the petitioner as a separate and distinct business entity, formed on July 1, 1996, with an Identification Number of [REDACTED] (Old FEIN: [REDACTED]). Accordingly, the petitioner in this matter is not the business entity that filed the labor certification.

Petitioner as Successor-in-Interest

A labor certification is valid only 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, it must establish that it is a successor-in-interest to that entity. Although U.S. Citizenship and Immigration Services (USCIS) has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer, 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 INS Commissioner in 1986.

*Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, *Dial Auto* claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

*Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest"). With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>3</sup> *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.

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 demonstrate that the job opportunity is the same as that originally

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<sup>3</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).

offered on the labor certification. Third, the petitioning successor must prove by a preponderance of evidence that it is eligible for the immigrant visa in all respects.

In his May 22, 2013 NOIR, the director informed the petitioner that as records of the Massachusetts Secretary of the Commonwealth established it as a distinct business entity, it must prove itself a successor-in-interest to [REDACTED] to be able to use the Form ETA 750 that [REDACTED] had filed on July 2, 1996. In his notice, the director provided the petitioner with specific examples of the type of evidence required to establish a successor-in-interest relationship. The petitioner did not, however, respond to the NOIR.<sup>4</sup> Accordingly, the record does not demonstrate that the petitioner is a successor-in-interest to [REDACTED]

#### USCIS Authority to Revoke the Approval of the Petition

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 [204] of this title.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

Notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

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<sup>4</sup> While counsel for the beneficiary, [REDACTED] did reply to the NOIR, the AAO notes that the beneficiary has no legal standing in this matter as he is not an affected party pursuant to the regulation at 8 C.F.R. § 103.3(a)(1)(iii). Accordingly, Mr. [REDACTED] response was not considered by the director in reaching his decision and will not be considered here.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, pursuant to regulation, the director's May 22, 2013 NOIR notified the petitioner that the record indicated that it was not the same business entity that had filed the Form ETA 750 on July 2, 1996, [REDACTED] and that in order to use the labor certification filed by [REDACTED] Inc. in support of its Form I-140 petition, it must demonstrate that it was a successor-in-interest to [REDACTED]. The director provided the petitioner with 30 days in which to submit evidence to establish itself as a successor-in-interest to [REDACTED] specifying the types of evidence required to establish such a relationship. However, as previously indicated, the petitioner did not respond to the NOIR and the director revoked the approval of the instant Form I-140 on July 30, 2013.

#### Petitioner's Ability to Pay the Proffered Wage

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 . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining a petitioner's ability to pay the proffered wage, USCIS first considers whether the petitioner has employed and paid the beneficiary during the required period. If documentary evidence establishes that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the absence of such evidence, USCIS examines the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation of other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. Filed Nov. 10,

2011).<sup>5</sup> If the petitioner's net income during the period time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where an employer's net income and current assets do not establish a consistent ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Establishing ability to pay in cases where a visa petition is filed by a successor-in-interest employer requires the successor to prove its predecessor's ability to pay the proffered wage as of the priority date until the date it acquired ownership of the predecessor and its own ability to pay the proffered wage from that date forward. Accordingly, the director in his May 22, 2013 NOIR informed the petitioner that the record did not establish its ability to pay the proffered wage and that if it was a successor-in-interest to the business entity that had filed the labor certification, it was required to submit evidence demonstrating its predecessor's ability to pay the proffered wage of \$16,640.00 a year from the July 2, 1996 priority date until the date it assumed ownership, as well as its own ability to pay the proffered wage from the date it assumed ownership onward. The director noted that, as corporations, the petitioner and the business entity that had filed the labor certification were separate and distinct legal entities, and that any assets of their shareholders or of other enterprises could not be considered in determining their respective ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). When the petitioner did not respond to the NOIR, the director revoked the approval of the petition based on the petitioner's failure to establish a continuing ability to pay the proffered wage from the July 2, 1996 priority date onward.

### Conclusion

Based on its review of the record, the AAO finds that the petitioner is not the business entity that filed the Form ETA 750 on July 2, 1996 and that it has submitted no evidence to establish itself as a successor-in-interest to that entity, despite being provided the opportunity to do so. Accordingly, the petitioner may not use the Form ETA 750 approved for [REDACTED] to support the Form I-140 it filed on January 29, 2003. A labor certification is only valid for the particular job

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<sup>5</sup> Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang. v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983).

opportunity stated on the application form. 20 C.F.R. § 656.30(c). The AAO, therefore, concurs with the director's finding that the instant visa petition is not supported by a valid labor certification and affirms his revocation of the approval of the instant Form I-140 petition for good and sufficient cause.

The AAO also concurs with the director's determination that the petitioner has failed to submit sufficient evidence to establish its ability to pay the proffered wage and affirms it as an alternate basis for revocation based on good and sufficient cause. . Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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, the petitioner has not met that burden.

**ORDER:** The director's decision is affirmed. The approval of the petition remains revoked.