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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: OFFICE: TEXAS SERVICE CENTER

FILE:

FEB 28 2013

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 in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you 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,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a Massachusetts corporation that operates coffee shops.¹ It seeks to permanently employ the beneficiary as a baker at its shop in Lowell, Massachusetts. 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 labor certification approved by the U.S. Department of Labor (DOL).

The director denied the petition on August 24, 2010, finding that the petitioner failed to establish the continuing ability to pay the offered wage rate since the petition's priority date. *See* 8 C.F.R. § 204.5(g)(2). The petition's priority date is June 2, 2008, the date the DOL received the labor certification. *See* 8 C.F.R. § 204.5(d).

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.²

On December 10, 2012, the AAO sent the petitioner a notice of intent to dismiss the appeal (NOID)/notice of derogatory information (NDI). The NOID/NDI informed the petitioner that, according to the office of the Massachusetts Secretary of the Commonwealth, Corporations Division, the petitioner, [REDACTED] was dissolved on June 18, 2012 for failure to comply with administrative requirements. The NOID/NDI also noted that Massachusetts records show that [REDACTED] a company to which the petitioner indicated it had "transferred" its business in 2008, was dissolved on April 19, 2011.

¹ Although the petitioner refers to itself in the petition as [REDACTED] the petitioner's Articles of Organization, its federal income tax returns and its labor certification identify it as [REDACTED]. The record contains copies of the petitioner's Profit/Loss Statements from 2007 to 2009, indicating that it operated coffee shops in various Massachusetts communities, including Lowell, Tewksbury, and Tyngsboro, as well as one in Windham, New Hampshire. According to the petitioner's tax returns and letters from its president and accountant, the petitioner's shops did business as [REDACTED].

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The NOID/NDI requested evidence of the existence and operation of the petitioner and/or a successor-in-interest entity that acquired the essential rights and obligations to carry on the petitioner's business. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm. 1986) (explaining that a successor must acquire the essential rights and obligations to carry on the business to continue immigrant sponsorship in the same job opportunity of the original filing organization). The NOID/NDI also requested documentation to establish that each entity had the ability to pay the offered wage. See *Dial Auto Repair Shop*, 19 I&N Dec. at 482 (requiring full explanation of acquisition's nature and copies of corroborative contracts or agreements in addition to evidence of successor's ability to pay). The NOID/NDI informed the petitioner that failure to submit requested evidence that precludes a material line of inquiry would be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner responded to the AAO's NOID/NDI on January 10, 2013. The petitioner submitted documentation showing that Massachusetts revived [REDACTED] on December 31, 2012. See 950 Code Mass. Reg. § 104.18 (dissolved corporation shall be revived upon acceptance of an application and payment of the proper fee). The petitioner, however, remains dissolved, according to Massachusetts records. See <http://corp.sec.state.ma.us/corp/corpsearch.asp> (accessed on February 6, 2013).

The petitioner also submitted additional documentation of [REDACTED] ability to pay the offered wage. The documentation, which includes recent pay stubs, shows that [REDACTED] currently employs the beneficiary. In a letter that the petitioner previously submitted to U.S. Citizenship and Immigration Services (USCIS), [REDACTED] sole owner- who is also the petitioner's president and sole owner- indicated that [REDACTED] wishes to permanently employ the beneficiary in the offered position.

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 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 area of intended employment 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.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor

must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. Although the petitioner's president and accountant stated in letters that the petitioner "transferred" its business to [REDACTED] on April 1, 2008, the petitioner failed to fully explain the transaction and to submit corroborative evidence of [REDACTED] successorship. *See Dial Auto Repair Shop*, 19 I&N Dec. at 482; *see also 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)(going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings).

[REDACTED] relationship to the petitioner is a material fact in this matter because, without evidence of [REDACTED] successorship to the petitioner's business, the job opportunity is different and [REDACTED] therefore cannot use the petitioner's labor certification and petition.³ *See Dial Auto Repair Shop*, at 482.

Because the petitioner failed to submit requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to the regulation at 8 C.F.R. § 103.2(b)(14).

Further, because the evidence in the record is insufficient to establish [REDACTED] as a successor to the petitioner, the AAO must also dismiss the appeal as moot. The record shows that the petitioner is now dissolved. Therefore, its job offer to the beneficiary is no longer valid. 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 AAO notes that it agrees with the director's determination that the petitioner failed to demonstrate the continuing ability to pay the offered wage since the petition's priority date. The petitioner did not submit the required evidence for the relevant years. *See* 8 C.F.R. § 204.5(g)(2) (requiring copies of annual reports, federal tax returns or audited financial statements from the priority date until the beneficiary obtains lawful permanent resident status).

³ If the petitioner transferred its business to [REDACTED] on April 1, 2008, as the petitioner's president and accountant state, and [REDACTED] was then intended to permanently employ the beneficiary, then [REDACTED] not the petitioner, should have filed the labor certification on June 2, 2008, as well as the later petition. *See* 20 C.F.R. § 656.3 (defining "employer" for labor certification purposes as an entity "that proposes to employ a full-time employee at a place within the United States"); 8 C.F.R. § 204.5(c) (U.S. employer "desiring and intending to employ" the alien must file a petition under section 203(b)(3) of the Act).

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.