

(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: OFFICE: TEXAS SERVICE CENTER

FILE:

JAN 14 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:

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,

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

Ron Rosenberg  
Acting 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 dry cleaning company. It seeks to employ the beneficiary permanently in the United States as an alteration tailor. 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).<sup>1</sup>

The petition is accompanied by a copy of a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).<sup>2</sup> The priority date of the petition is April 30, 2001.<sup>3</sup>

The director's decision denying the petition concluded that the petitioner had not submitted the original labor certification; that the petitioner had not established a valid successor-in-interest; and, that the petitioner did not have the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

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.<sup>4</sup>

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<sup>1</sup> 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.

<sup>2</sup> In the director's request for evidence it requested the petitioner submit the original labor certification. In response, the petitioner stated former counsel was contacted and the original labor certification could not be located. The petitioner did not instruct the director to request a duplicate labor certification from the Department of Labor, and the director did not independently request a duplicate labor certification.

<sup>3</sup> The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

<sup>4</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001, and was filed by the employer [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$10.70 per hour (\$22,256 per year). The Form ETA 750 states that the position requires two years of experience as an alteration tailor.

In the director's Notice of Intent to Deny ("NOID") issued on December 1, 2009, he requested the petitioner, [REDACTED] submit specific documentation pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), to establish that the petitioner was the successor-in-interest to the employer on the labor certification, [REDACTED]

In its first response, the petitioner merely stated that [REDACTED] became successor in interest in that it took over the customer base and walk-in retail business of the prior petitioner at that time.<sup>5</sup> In its second response to the NOID, the petitioner submitted an accountant's report for [REDACTED], in an effort to establish the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide any documentation to establish the transfer of ownership from [REDACTED] to [REDACTED]. This documentation would have established if the petitioner was a successor-in-interest to [REDACTED]. The petitioner's failure to submit these documents cannot be excused. The failure to

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<sup>5</sup> It is noted that the petitioner is located approximately 17 miles from [REDACTED] location listed on the labor certification. Therefore, with this distance, it is unclear how the petitioner could have taken over the customer base and walk-in retail from [REDACTED]. Further, the 2004 tax return in the record does not show it was a final return for [REDACTED] and the petitioner's shareholders are entirely different than the single shareholder of [REDACTED].

submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Since there is no evidence in the record that [REDACTED] is a successor-in-interest to the employer on the labor certification, [REDACTED] the instant petition cannot be approved.<sup>7</sup> It is noted that the Delaware Department of State, Division of Corporations shows [REDACTED] as a closed corporation. The petition is moot because the permanent employment set forth on the labor certification is no longer being offered to the beneficiary by the petitioner or a successor-in-interest.

On appeal, counsel submitted no further evidence and asserts the copy of the labor certification is sufficient; sufficient evidence of a successor-in-interest was already submitted; and, the petitioner already submitted sufficient evidence to establish its ability to pay. Counsel's assertions on appeal cannot be concluded to outweigh the evidence in the record.

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<sup>6</sup> A labor certification is only valid 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, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). A petitioner may establish a valid successor relationship 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. There is no evidence in the record establishing any of these three conditions.

<sup>7</sup> Even if the instant appeal were considered on the merits, it would be dismissed. As noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The record does not contain tax returns, annual reports or audited financial statements from [REDACTED] for tax year 2001. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Finally, the petitioner, even if it would have established a successor-in-interest to [REDACTED] it did not establish that it had the continuing ability to pay the beneficiary the proffered wage for years 2006 and 2007 through an examination of wages paid to the beneficiary, or its net income or net current assets.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.<sup>8</sup> The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires two years of experience as an alteration tailor. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a clothing repair person for [REDACTED] Uijongbu City, Korea, from February 1995 to April 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an employment certificate from [REDACTED] stating [REDACTED] employed the beneficiary as a repairperson from February 1995 to April 1998. However, the letter does not state the title of the signatory or state his/her position within the company and whether s/he had the authority to issue the certificate.

Further, the record contains documentation from the beneficiary's attempted entry into the U.S. on May 20, 1998, in which the beneficiary made a statement to an immigration inspector, that he and his wife "have a cosmetics shop in Korea, and make about \$20,000 per year between them." Therefore, it is unclear how the beneficiary would have gained experience as an alterations tailor, if he was assisting his wife with a cosmetics shop during the same time-frame. 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.*

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to

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<sup>8</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).

establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.