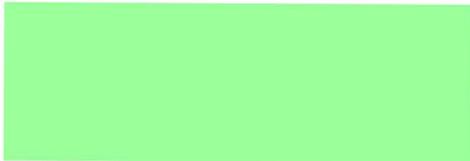




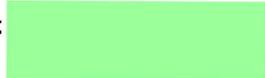
U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: JUL 26 2013

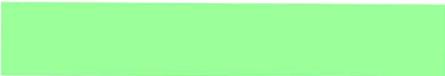
OFFICE: TEXAS SERVICE CENTER FILE:



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  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center, initially approved the immigrant visa petition. Upon review and further investigation, the Director, Texas Service Center (director), issued a Notice of Intent to Revoke (NOIR) the petition's approval. Upon review of the petitioner's response, the director revoked the petition's approval (NOR). The petitioner appealed this decision to the Administrative Appeals Office (AAO), and, on January 24, 2013, the AAO dismissed the appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motions will be approved. The AAO's decision of January 24, 2013 will be affirmed. The appeal remains dismissed and the petition's approval remains revoked.

The petitioner is a contractor. It seeks to employ the beneficiary permanently<sup>1</sup> in the United States first as a rough carpenter. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The Form I-140, Immigrant Petition for Alien Worker, was filed on or about July 1, 2002. The Form ETA 750 established an April 16, 2001, priority date. The position of rough carpenter as stated on the Form ETA 750 requires only a minimum of two years of training or experience in the job offered. The Form I-140 was initially approved on April 5, 2003. Upon review and further investigation, the director issued a NOIR on January 23, 2009. After considering the evidence submitted in response to the NOIR, the director revoked the petition's approval, finding that the petitioner had failed to establish that the beneficiary's employment experience satisfied the terms of Item 14 of the Form ETA 750 and also that the record failed to verify that the DOL labor certification was valid. On appeal, the AAO withdrew the

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<sup>1</sup>Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (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 regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

grounds of denial based on the validity of the DOL recruitment but concurred with the director's decision that the petitioner had not established that the beneficiary possessed the required two years of employment experience. The AAO additionally found that the evidence failed to establish the petitioner's continuing ability to pay the proffered wage.

The petitioner, through counsel, has filed a motion to reopen and reconsider the AAO's decision. With the motion, counsel submits additional evidence relevant to the petitioner's ability to pay the proffered wage, the existence of a successor-in-interest stated as [REDACTED]<sup>2</sup> and its ability to pay the proffered wage, as well as additional documentation pertinent to the beneficiary's employment experience. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

On motion, the petitioner submitted evidence that the petitioner, [REDACTED] transferred the business to the principal shareholder's daughter, as president of [REDACTED] on March 25, 2011, as indicated on a Bill of Sale. With respect to the petitioner's ability to pay the proffered wage, in its prior decision, the AAO rejected evidence of the petitioner's payment of wages to the beneficiary based on the discrepancies in the social security numbers used by the beneficiary as set forth on the Wage and Tax Statements (W-2s) submitted to the record. On motion, the petitioner has submitted evidence that sufficiently establishes that the Internal Revenue Service (IRS) assigned a Tax

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<sup>2</sup>Successor-in-interest determinations in employment-based petitions are related to the petitioner selling or transferring its business to a successor business not whether a beneficiary can port to a different employer in a same or similar occupation after approval of a Form I-140. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Id.*

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. If a petition's approval is properly revoked, as has been done here, there is no basis of the beneficiary to seek benefits pursuant to AC21. See also *HQ Memorandum, Interim Guidance for processing I-140 employment-based immigrant petitions and I-1485 and H-1B petitions affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21 (Public Law 106-313), (Michael Aytes, Acting Director of Domestic Operations) (December 27, 2005) (an I-140 is no longer valid for porting purposes when an I-140 is denied or revoked at any time except when it is revoked based on a withdrawal that was submitted after an I-485 has been pending for 180 days.)*

Identification Number to the beneficiary, which he used until he applied for and received a Social Security number. Evidence of payment of wages to the beneficiary by the petitioner, [REDACTED] will be accepted as stated on the W-2s, which appeared to exceed the proffered wage of \$29,920.80 in each of the years from 2001 through 2010. Corroboration of these wages has been submitted in the form of copies of quarterly wage reports covering 2003 through 2010. No quarterly wage reports have been submitted for 2001 and 2002. Additionally, even if the W-2s were taken as evidence of the petitioner's ability to pay the proffered wage for the claimed years, the purported successor company has failed to establish the predecessor company's ability to pay the proffered wage until the date of transfer on March 25, 2011. No federal income tax returns or first-hand evidence of wages paid to the beneficiary have been submitted. Until this is resolved, it may not be concluded that a valid successorship relationship has been established by the current record.

It is noted that *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere.

In this case, as noted in the AAO's prior decision, the petitioner has not submitted any federal tax returns, annual reports or audited financial statements, from which a framework of profitability may be considered. The petitioner was additionally sold to a successor. It may not be concluded that such analogous factual circumstances to *Sonogawa* have presented themselves in this case that would overcome the lack of any of the evidence required by 8 C.F.R. § 204.5(g)(2). Unlike the *Sonogawa* petitioner, the instant petitioner has not submitted any evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* are present in this matter.

### **Beneficiary's Experience**

In its prior decision, the AAO discussed the jobs claimed in support of the beneficiary's qualifying experience including:

- Part B of the Form ETA 750 signed by the beneficiary under penalty of perjury on March 29, 2001 states that he worked as a carpenter (35 hours per week) for "[REDACTED]" in Brazil from February 1993 to June 1995." As noted by the AAO in its prior decision, although instructed to state the last occupation abroad, the beneficiary did not include this job or any occupation on the Form G-325, Biographic Information form signed by

him on March 24, 2003 and filed with his Form I-485, Application to Register Permanent Residence or Adjust Status. [REDACTED] had been determined by the director to possess an invalid Brazilian Cadastro Nacional da Pessoa Juridica (CNPJ) number. As noted in the prior decision, a CNPJ number is a unique number given to every registered business with the Brazilian authority. Only with a CNPJ number, a business can hire employees, open bank accounts, or buy and sell goods. A letter from [REDACTED], signed by [REDACTED] as Director accompanies the petition stating that the beneficiary worked for that firm in the carpenter's department from February 8, 1993 to June 30, 1995. In a subsequent statement submitted in response to the director's NOIR, the beneficiary states that although he was "aware that [he] worked for a company, he did not know the name of the company" and that he had asked one of his work colleagues to get a letter from the company to verify the experience. The beneficiary stated that at that time that the company he thought he was working for was not in existence. In a subsequent statement submitted on motion, the beneficiary explains that he knew [REDACTED] who wrote the experience letter for [REDACTED] because [REDACTED] paid him for his work in cash and told him which jobs to go to. The beneficiary also states that the other letters from private individuals, which were listed and discussed on page 6 of the AAO's January 24, 2013 decision, were individual projects worked on while at [REDACTED]. The AAO does not find it credible to believe that the beneficiary claims to have known [REDACTED] (who signed the letter as director) for the two-year time period claimed, yet simultaneously claims to not have been acquainted with the name of the firm that the beneficiary states employed him for the same time period.

- The petitioner submitted an employment verification letter from [REDACTED], an accounting technician for [REDACTED] who stated that the beneficiary worked as a carpenter for another firm named [REDACTED] from July 1995 to November 1997. On motion, a statement signed by [REDACTED] as the ex-proprietor of [REDACTED], states that he had authorized [REDACTED] to write an employment verification letter for the beneficiary as [REDACTED] firm of [REDACTED] had been hired to do the bookkeeping for [REDACTED] firm. [REDACTED] states that the beneficiary worked as a carpenter for his firm from July 1995 to November 1997. A copy of a 2006 contract for services between [REDACTED] and [REDACTED] was also submitted to the record. It is unclear how a 2006 document would relate to the beneficiary's work experience claimed to have occurred between July 1995 and November 1997.

The documentation contained in the record has not satisfactorily resolved the inconsistencies and discrepancies underlying the beneficiary's claimed experience. The AAO does not find the beneficiary's representations of his experience to be credible. As noted in the AAO's previous decision, the beneficiary's employment with [REDACTED] was not listed on the Form ETA 750, signed under penalty of perjury by the beneficiary, or on the Form G-325, also signed by the beneficiary. *See Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

As also noted by the AAO, in an interview held on November 23, 2005, the beneficiary states that he taught at [REDACTED]<sup>3</sup> The beneficiary now attributes this to interpreter confusion and states that he was never a professor at this institution. However, the record also contains a copy of the beneficiary's daughter's birth certificate that states on August 1, 1995, the beneficiary appeared at the registry office to declare the birth and that he was a "professor." The evidence submitted has not established that the terms of the labor certification have been met because the petitioner has not shown that the beneficiary attained two years of experience as a rough carpenter as of the priority date. The documentation submitted on motion does not resolve this issue and counsel's assertions in this regard do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The AAO does not find that the petitioner established that the beneficiary obtained two years of experience as a rough carpenter as required by the terms of the labor certification.

**ORDER:** The prior decision of the AAO on January 24, 2013, dismissing the appeal is affirmed. The petition's approval remains revoked.

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<sup>3</sup> He stated that he taught engineering.