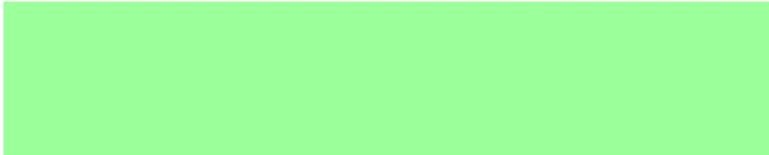


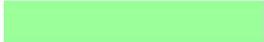


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 24 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:

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: On September 10, 2001, United States Citizenship and Immigration Services (USCIS), California Service Center (CSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the CSC director on October 14, 2004. The director of the Nebraska Service Center (the director), however, revoked the approval of the immigrant petition on August 23, 2011, and the petitioner subsequently appealed the director's decision to revoke the petition's approval to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be remanded.

Section 205 of the Immigration and Nationality Act (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 [she] deems to be good and sufficient cause, revoke the approval of any petition approved by [her] 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).

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese cook pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is submitted along with an approved Form ETA 750 labor certification. As stated earlier, this petition was approved on October 14, 2004 by the CSC, but that approval was revoked in 2011. The director determined that a change in ownership of the petitioner had occurred which required the petitioner to establish that it was still in business and that it qualified as a successor-in-interest. The director noted that the petitioner failed to respond to the Notice of Intent to Revoke (NOIR) issued on November 1, 2010. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.1(a)(3)(iii)(D).

On appeal, counsel for the petitioner² contends that the director has improperly revoked the approval of the petition. Specifically, counsel asserts that the director did not have any good and sufficient cause as required by section 205 of the Act; 8 U.S.C. § 1155 to revoke the approval of the petition. Counsel argues that the change in ownership of the petitioner did not result in any change in the business which would require the petitioner to establish that it is a successor-in-interest.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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

¹ 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.

² Counsel, [REDACTED] is now deceased; however, the petitioner has chosen to move forward with the appeal unrepresented.

evidence properly submitted upon appeal.³ On appeal, counsel submits a brief and copies of the petitioner's business license,⁴ initial statement by domestic stock corporation, cancelled certificate of common stock shares, and transfer of those shares from [REDACTED] to [REDACTED].⁵ Evidence in the record establishes that the petitioner's Federal Employer Identification Number (FEIN) has not changed and that it is still in business.

Although not raised by counsel, as a procedural matter, the AAO finds that 8 C.F.R. § 205.1 only applies to automatic revocation and is not the proper authority to be used to revoke the approval of the petition in this instant proceeding. Under 8 C.F.R. § 205.1(a)(3)(iii), a petition is automatically revoked if (A) the labor certification is invalidated pursuant to 20 C.F.R. § 656; (B) the petitioner or the beneficiary dies; (C) the petitioner withdraws the petition in writing; or (D) if the petitioner is no longer in business. Here, the labor certification has not been invalidated; neither the petitioner nor the beneficiary has died; the petitioner has not withdrawn the petition; nor has the petitioner gone out of business. Therefore, the approval of the petition cannot be automatically revoked. The director's erroneous citation of the applicable regulation is withdrawn. Nonetheless, as the director does have revocation authority under 8 C.F.R. § 205.2 and the director's denial will be considered under that provision under the AAO's *de novo* review authority.

The threshold issue on appeal is whether the director adequately advised the petitioner of the basis for revocation of approval of the petition. As noted above, the Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. See section 205 of the Act; 8 U.S.C. § 1155. This means that 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

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

⁴ Valid from May 28, 2011 until June 30, 2012.

⁵ Both individuals are original owners of stock in the petitioner and the transfer of [REDACTED] stock represents only a re-distribution of the common stock shares to the two remaining shareholders in the corporation.

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.

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, in the NOIR dated November 1, 2010, the director wrote:

An investigation of the petitioning business indicated a change in ownership. A change in ownership requires the new owner to file a new petition and submit documentation to establish that such new owner is the successor in interest to the original petitioner, and whether the new owner assumed all immigration rights and liabilities of the original owner. . . There is also an indication that the beneficiary has not been working for the petitioner.

The director advised the petitioner in the NOIR that the instant case might involve a successor in interest issue. The director specifically asked the petitioner to submit additional evidence to demonstrate that it was a successor in interest. The director also asked the petitioner to submit evidence that the petitioner employed the beneficiary.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. at 568 and *Matter of Estime*, 19 I&N Dec. at 450. Both cases held that a notice of intent to revoke 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. The director's NOIR sufficiently detailed the evidence of the record, pointing out specific evidence or information relating to the possibility of a successor-in-interest in the present case to the both the petitioner's and counsel's address of record,⁶ that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

The AAO finds that the director appropriately reopened the approval of the petition by issuing the NOIR and that the NOIR provided specific evidence or information relating to the possibility of a successor-in-interest in the present case to the both the petitioner's and counsel's address of record.

⁶ The petitioner's address remains unchanged.

The AAO will next address the director's finding that the change in ownership of the petitioner resulted in a successor-in-interest issue in the instant case. On appeal, counsel contends that the change of ownership of the petitioner did not result in a successor-in-interest because the change in stock ownership of the petitioner was re-distributed between the two remaining original shareholders. The AAO notes that the petitioner remains in business with the same name and FEIN. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). 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.⁷ *Black's Law Dictionary* at 1569 (9th ed. 2009) (defining "successor in interest"). 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.⁸ However, in the instant case, the change in stock ownership does not result in a successor-in-interest because the petitioner is not a partnership or sole proprietorship and the petitioner did not vest rights and obligations to another entity through amalgamation, consolidation or other assumption of interest. Thus, the director's finding that the change in the petitioner's shareholders resulted in a successor-in-interest is withdrawn.

The AAO also withdraws the director's statements regarding the petitioner's employment of the beneficiary because the labor certification does not state that the beneficiary has been employed by the petitioner. Furthermore, whether the beneficiary was employed by the petitioner has no bearing on whether the petitioner is still in business or is a qualified successor-in-interest, the reasons

⁷ 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).

⁸ For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

underling the director's revocation of the approval of the Form I-140 petition.

Nonetheless, the petitioner must establish its ability to pay the proffered wage from the priority date, as well as that the beneficiary had the requisite work experience in the job offered before the priority date. 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 (9th 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).

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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 the instant case, the ETA 750 labor certification was accepted for processing on December 7, 2000. The rate of pay or the proffered wage specified on the ETA 750 is \$2,250.00 per month or \$27,000.00 per year. 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 before the director closed on November 1, 2010 with the failure of the petitioner to respond to the director's NOIR. As of that date, the petitioner's 2009 federal income tax return would have been the most recent return available. However, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner for 2004, 2005 or 2009. 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.

Additionally, according to USCIS records, the petitioner has filed at least two other Form I-140 immigrant petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

Concerning the beneficiary's qualifications for the position, the AAO finds that the record does not support the petitioner's contention that the beneficiary had the requisite work experience in the job offered before the priority date. Consistent with *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), the petitioner must demonstrate, among other things, that, on the priority date, the beneficiary had all of the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition.

Here, as stated earlier, the Form ETA 750 was filed and accepted for processing by the DOL on December 7, 2000. The name of the job title or the position for which the petitioner seeks to hire is "Chinese cook." Under the job description, section 13 of the Form ETA 750, part A, the petitioner wrote, "responsible for preparing a variety of Chinese style dishes per menu; appetizers and soups. Prepare meats, soups, sauces and vegetables [sic] prior to cooking. Season and cook food according to prescribed Chinese method: portion and garnish food. Estimate daily food consumption and requisitions. Specifically. . . prepare beef tomato chow yoke, almond diced chicken and Peking chicken." Under section 14 of the Form ETA 750A the petitioner specifically required each applicant for this position to have a minimum of two (2) years of work experience in the job offered.

On the Form ETA 750, part B, signed by the beneficiary on November 12, 2000, he represented that he worked 40 hours a week as a cook with [REDACTED] in Kaiping City, Guangdong, China from April 1994 to November 12, 2000, the date on which the labor certification was signed. A Certificate of Employment, dated September 13, 2000, states that the beneficiary was employed as a kitchen worker from April 1994 until June 1997 and as a cook from July 1997 until the date on which the certificate was completed with [REDACTED] under the [REDACTED] Guangdong province; however, the certificate does not provide a detailed description of the beneficiary's experience and fails to list the author's name, title or address. A Certificate of Employment, dated April 16, 2003, states that the beneficiary was employed as a kitchen worker from April 1994 until June 1997 and as a cook from July 1997 until the date on which the certificate was completed with [REDACTED] however, the certificate does not provide a detailed description of the beneficiary's experience and fails to list the author's name, title or address. Moreover, while both certificates state that they are translations, the petitioner failed to submit certified translations for the above listed documents. The AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3).⁹ Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

Further, the two certificates of employment are inconsistent with the Form ETA 750, which states that the beneficiary was employed as a cook from April 1994 until at least November 12, 2000. Additionally, the two certificates of employment are inconsistent with an Application for Immigrant Visa and Alien Registration, Form DS-230 Part I, dated July 2, 2008, in which the beneficiary states under penalty of perjury that he was employed as a kitchen worker from April 1994 until June 1997 and as a cook with [REDACTED] under the [REDACTED] and as a cook from October 2000 until the date on which the Form DS-230 Part I was signed, with [REDACTED]

⁹ The certified translations of the document do not meet the requirements of 8 C.F.R. § 103.2(b)(3).

Guangdong, China. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility that were not initially identified by the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. If the new decision is contrary to the AAO's findings, it should be certified to the AAO for review.

ORDER: The director's decision to deny the previously approved petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.