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

(b)(6)

DATE: MAR 0 1 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

CC:

DISCUSSION: The Director, Nebraska Service Center (director), 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 describes itself as a remanufacturer of laser and ink cartridges. It seeks to permanently employ the beneficiary in the United States as an international sales manager. 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.

The director's decision denying the petition concludes that the petitioner has not established that it had the ability to pay the beneficiary the proffered wage beginning on the priority date and continuing until the beneficiary gains lawful permanent residence.

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.[1]

On December 19, 2012, the AAO sent the petitioner a request for evidence/ notice of intent to dismiss the appeal (RFE/NOID) with a copy to counsel. The RFE/NOID informed the petitioner that failure to 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). A response was received from as counsel for the petitioner, along with a Form G-28 Notice of Appearance.[2]

The RFE/NOID notified the petitioner that according to documents submitted on appeal, the petitioner,

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[1] 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).

[2] An attorney for a petitioner may properly file an appeal on behalf of a petitioning entity in certain circumstances. However, the Form G-28 in this case does not establish that the attorney who filed the appeal represents the petitioner because it does not appear to have been signed by the petitioner. Instead, it appears to have been signed on behalf of the petitioning entity by a member of the law firm that submitted the RFE/NOID response. The only properly executed Form G-28 in the record is the one signed by the beneficiary. Thus, we can only recognize the attorney who filed the appeal as representing the beneficiary. We further note that the copy of the RFE/NOID sent to the petitioner was returned as undeliverable; however, the G-28 submitted by counsel lists the same address for the petitioner, which according to the U.S. Postal Service, is no longer correct.

was sold to on August 10, 2007. Per the bill of sale, was sold in its entirety and does not appear to survive the sale as an operational entity. If no longer exists as an operational company, then it can no longer intend to permanently employ the beneficiary in the position described on the labor certification. 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 position offered no longer exists with the petitioning company, then the Form I-140 petition cannot be approved because there is no longer a valid underlying labor certification application. The RFE/NOID afforded the petitioner an opportunity to establish that a petitioning successor exists in the instant case. Specifically, we requested that the petitioner provide evidence that would qualify as a successor-in-interest in this proceeding and evidence that has the ability to pay the prevailing wage from the date of transfer of ownership onward. In the alternative, we requested that the petitioner provide evidence of its ability to pay the proffered wage from 2007 onward.

However, the petitioner's response to the RFE/NOID did not address whether or not a successor-in-interest existed nor did it address the petitioner or petitioning successor's ability to pay the proffered wage. Instead, in response to the AAO's questions about the status of the petitioner, counsel writes the following:

> Rather than argue about whether or not [sic] transferred its assets which we aver it did and that the sale demonstrates this per already submitted documents, the beneficiary is submitting an AC-21 request which should dispel any issues raised. The initial I-140 petition is bona fide and the job offering employer can be changed under AC-21

Counsel is incorrect. There is no evidence that the I-140 petitioner has established a *bona fide* continuing job offer. The petitioner ceased to exist in 2007 and no successor-in-interest has been established. Counsel's statement that the beneficiary is now submitting an American Competitiveness in the Twenty-First Century Act of 2000 (AC21) request does not remedy this fact.[3] Since the petitioner failed to submit requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14). Further, the evidence in the record is not sufficient to establish that a *bona fide* job opportunity exists.

The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*[4] to be approved despite the fact that the initial

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[3] The AC21 letter counsel refers to is an employment intent letter for the beneficiary from The letter is dated December 6, 2012 and does not indicate that the has employed the beneficiary prior to this date.

[4] The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A

job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

Furthermore, the RFE/NOID requested that the petitioner establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. In the instant case, the labor certification states that the offered position requires two years of experience as a manager, international sales. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an international sales manager with from February 1997 to January 2000. The RFE/NOID notified the petitioner that according to the record, it appears that the beneficiary's prior qualifying experience was with a branch of the petitioning entity and in the same capacity as the proffered position. In general, experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without invalidating the actual minimum requirements of the position, as stated by the petitioner on the Form ETA 750. In the instant case, if the beneficiary's experience was gained with the petitioner and was in the position offered, the petitioner cannot rely solely on this experience for the beneficiary to qualify for the proffered position. We requested that the petitioner submit evidence that is a distinct entity from

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USCIS memorandum signed by May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

In response, the petitioner submitted no such evidence or explanatory statement. Counsel asserted in his brief that the two companies are distinct entities but provided no evidence to establish this fact. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As the petitioner failed to submit this evidence that precludes a material line of inquiry the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14). Further, the petition must also be denied because the evidence in the record does not establish that the beneficiary had the required 24 months of qualifying experience in the job offered at the time of the priority date.

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.