



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **MAR 15 2013** OFFICE: TEXAS SERVICE CENTER FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:
[Redacted]

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 (director), denied the employment-based immigrant visa petition and the matter came before the Administrative Appeals Office (AAO) on appeal. The director's decision was affirmed and the appeal dismissed by the AAO. The matter is again before the AAO on motion to reconsider. The motion will be granted. The previous decision of the AAO, dated December 10, 2008, will be affirmed, and the petition will remain denied.

The petitioner describes itself as a truck equipment manufacturer and fabricator. It seeks to permanently employ the beneficiary in the United States as a truck painter. The petitioner requests classification of the beneficiary as an other worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 25, 2001. See 8 C.F.R. § 204.5(d).

The AAO's decision dismissing the appeal concludes that: (1) the petitioner did not demonstrate that it was the successor-in-interest to the labor certification employer; and (2) the beneficiary did not possess the minimum experience required to perform the offered position by the priority date.

The record shows that the motion is properly filed.² A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). The AAO finds that the petitioner has met the requirements for a motion to reconsider.

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to qualified immigrants who are capable, at the time of petitioning for classification, of performing unskilled labor, requiring less than two years training or experience, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

² The petitioner's motion, submitted January 12, 2009, states that counsel for the petitioner was on personal leave when the AAO issued its decision, and counsel requested thirty days in order to "fully brief the issues and present supporting evidence." Subsequently, counsel submitted a six page brief, entitled "motion to reconsider," along with supplemental material in support of the motion. However, a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Further, the instructions to Form I-290B, which are incorporated by reference into the regulations, do not permit additional time for the submission of a brief or additional evidence. See 8 C.F.R. § 103.2(a)(1). Therefore, the AAO need not consider this later filed brief or evidence in consideration of the petitioner's motion. However, as discussed above, even if the AAO were to consider the later filed brief and evidence, the petitioner failed to overcome the grounds for dismissal stated in the AAO's decision.

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.

Beneficiary's Qualifications for the Position Offered

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position's minimum requirements include one year of experience in the position offered, truck painter. The labor certification indicates that there are no education, training, or special requirements for the position offered.

An amendment to the labor certification, which appears to have been accepted by DOL on June 23, 2005, states the beneficiary's experience as follows:

- A full-time truck painter with the labor certification employer from May 2000 onward.
- A full-time boat painter with [REDACTED] in California from October 1999 until May 2000.
- A full-time truck painter with the labor certification employer from June 1993 until October 1999.
- A full-time auto body painter with [REDACTED] in Mexico from October 1985 until February 1990.

No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

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.

The director, prior to his decision, requested evidence of the beneficiary's experience. In response, counsel stated that the labor certification as well as a "certificate of completion of training in auto body & paint" evidenced the beneficiary's qualifying experience. The AAO stated in its decision that the petitioner did not provide any evidence of the beneficiary's experience on appeal, and stated that the labor certification and "certificate of completion" did not meet the regulatory requirements for documenting that the beneficiary had the required experience in the position offered.

In the brief filed after the petitioner's motion, counsel states that the beneficiary's experience is documented by a sworn affidavit from the beneficiary. This "affidavit" is entitled "amendment" and was previously filed with DOL in order to amend Form ETA 750B, item 15. The amendment is sworn. However, a sworn statement from the beneficiary cannot be accepted in lieu of the regulatory required evidence. The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Further, this statement was previously included in the record of proceeding and the AAO previously found this document to be insufficient to document that beneficiary possessed the one year of experience in the position offered as required by the terms of the labor certification. The petitioner did not submit any additional evidence with its motion to reconsider in order to document the beneficiary's experience.

Counsel again asserts that the beneficiary's "Certificate of Proficiency" evidences the beneficiary's qualifying experience. However, Form ETA 750B does not state that any training is required for the position offered. Further, the certificate does not state the dates of training, the length of training, or the content of the training, and the petitioner did not provide a course syllabus or related materials, preventing the AAO from determining the length or nature of the training. Most importantly, the certificate is dated June 7, 2002, therefore, this training occurred after the priority date. Therefore, this certificate is insufficient to demonstrate that the beneficiary possessed the required one year of experience in the position offered as of the priority date. The petitioner must demonstrate that the beneficiary possessed the minimum qualifications stated on its labor certification application as of the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The petitioner also provided color copies of photographs purportedly showing the beneficiary at work, in order to document the beneficiary's claimed experience. The photographs are not labeled or dated.

In addition, neither the beneficiary nor the place of employment are identified. These photographs cannot stand in place of regulatory required evidence, pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A), and do not document that the beneficiary possessed the required one year of experience in the position offered.

Therefore, the petitioner has not provided any regulatory required evidence of the beneficiary's experience. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The AAO affirms its prior decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as an other worker under section 203(b)(3)(A)(iii) of the Act.

Successor-in-Interest

The AAO's decision concluded that the petitioner failed to establish that it is a successor-in-interest to the entity that filed the labor certification.³ This issue was first raised by the director in his request for evidence, however, the director did not base his denial on this issue. The record documents, and the petitioner does not contest, that the petitioner is a different entity from the employer listed on the labor certification. As the labor certification is only valid for the particular job opportunity stated on the application form, 20 C.F.R. § 656.30(c), and the petitioner is a different entity than the labor certification employer, then the petitioner 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).

The generally accepted definition of a successor-in-interest focuses on the rights and substance of the original and successor entities: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

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.⁴ *Id.* at 1569 (defining "successor").

³ The labor certification was filed by [REDACTED] (labor certification employer) doing business as [REDACTED] the petitioner's corporate name is [REDACTED] doing business as [REDACTED]

⁴ 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

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁵ *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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 metropolitan statistical area 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.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes.

After filing its motion to reconsider, the petitioner submitted additional evidence regarding the transfer of assets between the labor certification employer and the petitioner.⁶ The petitioner provided an "Asset

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).

⁵ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

⁶ The AAO again notes that this evidence was not submitted until after the petitioner's motion to

Purchase Agreement” (Agreement), dated February 19, 2003, between the petitioner and two parties, [REDACTED] (the labor certification employer), and its wholly-owned subsidiary [REDACTED]. However, it is unclear from this Agreement whether the petitioner took ownership of the labor certification employer, or a relevant part thereof, to an extent necessary to establish that a successorship occurred.

This Agreement states that the petitioner purchased certain assets from the labor certification employer, and provided a detailed description, 34 pages in length, of the assets transferred from the labor certification employer to the petitioner. Agreement § 1.1. The Agreement states that the petitioner purchased the rights to the name [REDACTED] and any associated goodwill. *Id.* at § 1.1(e). However, this Agreement also states that the petitioner assumed none of the labor certification employer’s liabilities. *Id.* § 1.2. Further, the Agreement states that the “[labor certification employer] has terminated all of its employees” except for one employee to be terminated upon closing of the Agreement, and “the Retained Employees.” *Id.* at § 2.1(i). In a following section, the Agreement states that the petitioner has no obligation to offer employment to any employees of the labor certification employer, and defines “Retained Employees” by stating that “an Affiliate of [the labor certification employer] has hired [one employee] and will hire [another employee] (the ‘Retained Employees’).” *Id.* at § 3.2. The Agreement does not indicate that the petitioner purchased the labor certification employer’s premises.⁷ Various portions of the Agreement indicate that the labor certification employer carried on business at multiple locations, however, there is no indication that the petitioner purchased or carried on business at any of these premises. In addition, while the Agreement states that the labor certification employer agrees not to compete with the petitioner for business with governmental bodies in San Diego county, California, for a period of three years, another subsidiary of the labor certification employer was explicitly exempted from this restriction. Therefore, this Agreement indicates that the petitioner purchased some of the labor certification employer’s inventory and equipment, as well as the rights to the corporate name of its subsidiary company, [REDACTED] however, the Agreement does not indicate that the petitioner received the essential rights and obligations of the labor certification employer necessary to carry on the business. Paramount in this analysis is that the Agreement indicates: (1) that the petitioner took none of the labor certification employer’s obligations, other than to assume equipment lease obligations subject to the lessor’s agreement; (2) that the labor certification employer had already terminated all but two of its employees as of the Agreement’s date; and (3) that by the terms of the Agreement the parent corporation and its designated subsidiary may continue to operate and compete in the same industry and in the same location, albeit the labor certification employer’s, but not its designated subsidiary’s, competition for governmental contracts are limited for a period of three years. Further, as stated above, the labor certification was filed in the name of the parent corporation, doing business as a subsidiary, therefore it is not clear from the record that the petitioner is the successor-in-interest to the labor certification

reconsider, and after the deadline for filing its motion.

⁷ The Agreement indicates that the labor certification employer maintained multiple premises. The record indicates that the petitioner was incorporated, and operated, at a separate location than was originally listed on the labor certification. An amendment of the company’s location and work location were filed with DOL and accepted on June 23, 2003.

employer, i.e. the parent company; from the record, it appears that the petitioner may have purchased assets of the labor certification employer's subsidiary, rather than the essential rights and obligations of the labor certification employer itself.

The evidence in the record does not satisfy all three conditions described above because it does not support counsel's assertion that the Agreement transferred ownership, including the essential rights and obligations, of the predecessor. Accordingly, even if the AAO were to accept and consider the petitioner's late filed evidence, the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

In summary, the petitioner has not established that the beneficiary possessed the minimum experience required by the terms of the labor certification as of the priority date, and the petitioner has not established that it is the successor-in-interest to the labor certification employer.

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, therefore, the AAO's prior decision will be affirmed.

ORDER: The motion is granted, however, the decision of the AAO, dated December 10, 2008, is affirmed. The petition remains denied.