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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: **MAY 02 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Appellant: [REDACTED]
Beneficiary: [REDACTED]

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:

[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,

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

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), initially approved the employment-based preference visa petition on April 10, 2003. The director later served the employer with a Notice of Intent to Revoke (NOIR) the approval of the petition, followed by an amended NOIR. In a Notice of Revocation (NOR), dated September 1, 2011, the Acting Director, Nebraska Service Center (acting director), ultimately revoked the approval of the Form I-140, Immigrant Petition for Alien Worker. The matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

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 acting 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 appellant describes itself as a plastering company. It seeks to permanently employ the beneficiary in the United States as a plasterer. The appellant requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by an ETA Form 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).² The priority date of the petition is April 27, 2001, which is the date the DOL (or one of the offices in its employment system) accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

In her NOIR of January 10, 2011 and in her amended NOIR of April 8, 2011, the director notified the petitioner of her intent to revoke the petition’s approval because the record lacked sufficient evidence of the beneficiary’s qualifications for the offered position by the petition’s priority date. The acting director revoked the petition’s approval for failure to demonstrate that the beneficiary had the required minimum experience stated on the labor certification.

¹ 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), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The record shows that [REDACTED] (the petitioner), a general partnership, filed the labor certification and the petition. The appellant claims to be a “successor-in-interest” to [REDACTED]. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm’r 1986) (a successor-in-interest must establish that it has acquired the essential rights and obligations necessary to carry on the business to offer employment in the same job opportunity for immigration purposes). Whether the appellant has established a successorship is discussed below.

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.³

The beneficiary must possess all of the required education, training and experience for the offered position set forth on the labor certification by the petition's priority date. 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 determining the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) examines the labor certification. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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 (1st Cir.1981).

Where the job requirements in a labor certification are not otherwise plain, e.g., required by regulation, USCIS must examine "the language of the labor certification job requirements" to determine what the appellant 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 job requirements 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 sets forth the following minimum requirements for the

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal of Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). In the instant case, however, as will be explained later in the decision, the AAO declines to exercise its discretion and rejects the appellant's newly submitted documents on appeal. *See Matter of Estime*, 19 I&N Dec. 450, 452 (BIA 1987) (a revocation decision will be sustained, notwithstanding the submission of evidence on appeal, where USCIS properly issues the NOIR and the petitioner fails to submit a timely rebuttal after being given a reasonable opportunity to do so); *see also Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988) (where USCIS has notified a petitioner of a deficiency in the evidence and has given the petitioner an opportunity to respond to that deficiency, the AAO may exercise its discretion to reject evidence offered for the first time on appeal).

offered position:

EDUCATION: None required.

TRAINING: None required.

EXPERIENCE: Two years full-time in the job offered.

OTHER SPECIAL REQUIREMENTS: None Required.

On ETA Form 750B, which the beneficiary signed on April 25, 2001, the beneficiary states that he worked full-time for [REDACTED] in the offered position from October 17, 1997 until December 1999.⁴ He also states that he has worked full-time for the petitioner in the offered position since May 1999.

On the beneficiary's Form G-325A, Biographic Information, which the beneficiary submitted with his application for adjustment of status in January 2004, the beneficiary states that he worked in the offered position for [REDACTED] from January 1998 to February 2000, and for the petitioner since February 2000.

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 AAO finds that the director properly issued the NOIR and the amended NOIR pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases hold that a notice of intent to revoke a visa petition's approval 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 the petition's denial based upon the petitioner's failure to meet its burden of proof.

The director's NOIR and amended NOIR noted that the petition did not include any letters from prior employers to evidence the beneficiary's employment experience. *See* 8 C.F.R. § 103.2(b)(8)(ii) (USCIS may deny a benefit request if it fails to include all required initial evidence). The notices also pointed out that the employment start date in the petitioner's letter in support of the beneficiary's adjustment of status application conflicted with the beneficiary's statements on the

⁴ The ETA Form 750B originally stated that the beneficiary worked full-time for [REDACTED] for "over 2 years." The form was amended to reflect employment dates with [REDACTED] from October 17, 1997 to December 1999. The beneficiary initialed the change on the form, but he did not date it. The record does not indicate when the change occurred or whether the DOL requested the amendment.

ETA Form 750B and the Form G-325A. *See Matter of Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve any inconsistencies in the record by independent, objective evidence). The evidence at the time of the notices' issuances, therefore, would have warranted a denial if unexplained and un rebutted, and thus were properly issued for good and sufficient cause.

Counsel argues that the acting director erred in grounding the revocation of the petition's approval on failure to establish the beneficiary's employment experience with the petitioner. According to counsel, the appellant relies on the beneficiary's prior experience with [REDACTED] not with the petitioner, to demonstrate that the beneficiary meets the employment experience requirements for the offered position.⁵

For the first time on appeal, the appellant submits a copy of an October 7, 2011 letter from [REDACTED] letterhead. The letter states that the company employed the beneficiary as a plasterer in Colorado from January 1998 until March 2000. The letter describes the beneficiary's duties in the position and states that the company, which is based in California, operated in Colorado from 1995 to 2004.

The petitioner also submits a November 2, 2011 affidavit from the beneficiary, stating that, until shortly before signing the affidavit, he was unaware that [REDACTED] continued to operate in California. In addition, the appellant submits information from the Business Division of the Colorado Secretary of State's office, showing that Colorado revoked B&L Plastering's permission to operate in the state on September 2, 2004.

The appellant's submission of the letter from [REDACTED] on appeal comes after the director requested such evidence twice before, in the NOIR and in the amended NOIR, to demonstrate the beneficiary's qualifications for the offered position. In his affidavit, the beneficiary explains the delay in submitting the required evidence by stating that he "was not aware that [REDACTED] was still in business in California until recently."

The record, however, shows that the beneficiary knew [REDACTED] since at least the petition's priority date of April 27, 2001. The beneficiary stated the

⁵ In his NOR, the acting director found that a May 24, 2005 letter from one of the petitioner's partners, which the beneficiary submitted at his adjustment of status interview, was insufficient evidence of the beneficiary's qualifying experience. The acting director found that the letter, which stated that the beneficiary "has been working five years" with the petitioner, implied an employment start date in May 2000. The acting director said the letter therefore failed to establish that the beneficiary had the required two years of experience before the petition's April 27, 2001 priority date and conflicted with the February 2000 start date that the beneficiary stated on his Form G-325A. The acting director also found that evidence of the beneficiary's employment with [REDACTED] that the petitioner submitted in response to the amended NOIR, including pay vouchers and an affidavit from a purported former co-worker of the beneficiary there, also failed to establish the beneficiary's qualifications for the offered position.

company's California address on ETA Form 750B, and the 2011 letter from [REDACTED] president bears the same address. The evidence therefore shows that the appellant or beneficiary could have contacted [REDACTED] at its California address after issuance of the NOIR and the amended NOIR. The appellant has not submitted any evidence that it or the beneficiary attempted to contact [REDACTED] before the revocation of the petition's approval.

One of the purposes of a notice of intent to revoke a petition's approval is to allow the petitioner the opportunity to offer evidence in support of the petition and in opposition to the grounds alleged for revocation. See 8 C.F.R. § 205.2(b); *Matter of Estime*, 19 I&N Dec. at 451. "If [the NOIR has been issued for 'good and sufficient cause'] and the petitioner fails to make a timely explanation or submission of evidence to the Service, after having been given a reasonable opportunity to do so, the Service's decision to revoke will be sustained, notwithstanding the submission of evidence on appeal." *Estime*, at 452; see also *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988) (where USCIS has notified a petitioner of a deficiency in the evidence and has given the petitioner an opportunity to respond to that deficiency, the AAO may exercise its discretion to reject evidence offered for the first time on appeal).

Here, the appellant has not demonstrated that the employment experience letter from [REDACTED] was not previously available. If the appellant had wanted USCIS to consider the [REDACTED] letter, it should have submitted the document in response to the director's NOIR or amended NOIR, or it should have provided evidence of its attempts to contact [REDACTED]. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted on appeal.

Even if the AAO considered the evidence on appeal, however, the record is insufficient to merit withdrawal of the revocation of the petition's approval. First, the record is inconsistent regarding the beneficiary's dates of employment with [REDACTED]. The beneficiary states on ETA Form 750B that he worked for [REDACTED] from October 17, 1997 to December 1999. On his Form G-325A, however, he states that he worked for the company from January 1998 to February 2000. The beneficiary also states on ETA Form 750B that he began working for the petitioner in May 1999, before his December 1999 end date with [REDACTED] as set forth on the same form. As the beneficiary states that both jobs were full-time, the AAO finds it unlikely he held two full-time jobs for competing companies in different cities. Also, copies of payroll records purportedly show that the beneficiary worked for [REDACTED] in January and February 1998 and in February 2000.⁶ The 2011 letter

⁶ The Social Security Number (SSN) on the beneficiary's purported 1998 and 2000 paystubs from [REDACTED] and his purported 2003 IRS Form W-2 Wage and Tax Statement from the petitioner, which begins with "638," differs from the SSN, which begins with "678," on his purported 2001 and 2002 W-2 forms from the petitioner and with the SSN, which begins with "650," on his purported 2004, 2005 and 2006 W-2 forms from the petitioner and his purported 2007, 2008 and 2009 W-2 forms from the appellant. The discrepancies in the beneficiary's SSN casts doubt on the veracity of the paystubs from [REDACTED] and on the W-2 forms from the petitioner and the appellant. See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the

from [REDACTED] president further states that the beneficiary worked for the company from January 1998 to March 2000. Thus, the evidence contains discrepancies in both the start dates and end dates of the beneficiary's purported employment with [REDACTED]. This casts doubt on the petitioner's claim that the beneficiary obtained at least two years of employment experience in the job offered at [REDACTED]. See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). The petitioner must resolve inconsistencies in the record by independent, objective evidence. *Id.*, at 591-592

The evidence also does not establish that the beneficiary worked full-time for [REDACTED]. The beneficiary states on ETA Form 750B that he worked 40 hours per week for [REDACTED]. The letter from [REDACTED] however, does not indicate whether it employed the beneficiary on a full- or part-time basis. Moreover, the beneficiary's purported 1998 and 2000 paystubs from [REDACTED] show that he worked only 18 to 38 hours per week. Thus, the evidence in the record does not support the beneficiary's claim on the labor certification that he worked full-time for [REDACTED] for more than two years. See *Matter of Ho*, 19 I&N Dec. at 591-592 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Further, although its president states, and Colorado records confirm, that [REDACTED] "closed" its office in Colorado in 2004, the 2011 letter on [REDACTED] letterhead shows a local telephone number for the company in "Denver." The Colorado telephone number on [REDACTED] letterhead suggests that the petitioner and/or the beneficiary could have contacted this employer by the same means as in 2000 and conflicts with the beneficiary's statement that he lost contact with [REDACTED]. See *Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

Because the AAO need not consider the appellant's evidence on appeal and because the evidence, even if considered, would be insufficient, the AAO affirms the director's decision that the petitioner failed to establish the beneficiary's qualifications for the offered position as set forth on the labor certification. The beneficiary therefore does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the appellant also failed to establish that it is a successor-in-interest to the entity that filed the petition and 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 appellant is a different entity than the petitioner or labor certification employer, it must establish for immigration purposes that it has acquired the essential rights and obligations necessary to carry on the predecessor's business. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

visa petition). The petitioner must resolve inconsistencies in the record by independent, objective evidence. *Id.*, at 591-592.

An appellant 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. *See Matter of Dial Auto Repair*, 19 I&N Dec. at 482-83.

The record shows that [REDACTED] a general partnership established on June 15, 1998, filed the labor certification on April 27, 2001 and that the DOL certified the labor request on August 19, 2002. The partnership also filed the petition, which USCIS initially approved on April 10, 2003.

On January 23, 2004, records of the Colorado Secretary of State's office show the establishment of a corporation named [REDACTED]. The records show that the corporation had the same address as the general partnership and identified one of the partners, who is also the appellant's sole shareholder, as its registered agent. Colorado records show the corporation was dissolved on June 30, 2005 for failure to file a periodic report with the secretary of state's office. Colorado records also show that the appellant, a limited liability company, formed on January 12, 2006 and is currently in "noncompliant" status for failing to file a periodic report.⁷ *See* <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do> (accessed April 2, 2013).

The record also contains two letters from the appellant's sole shareholder. In a February 7, 2011 letter, the shareholder states that he established the appellant in 2006 after his former company, which he identifies as [REDACTED] was dissolved. He states that his former company failed to file its "annual registration" with the secretary of state's office in 2005, but continued to operate into 2006. He states that the appellant operates the same business as his "old company[,] [REDACTED] that it is willing to assume all of the obligations and responsibilities of the petition, and that it employs the beneficiary on a full-time basis in the offered position.

In a May 5, 2011 letter, the appellant's sole shareholder states that he is the "sole owner" of the appellant and that he did not sign any written agreements regarding the appellant's acquisition of rights and/or obligations from his former companies. He states that the appellant continued to work for the clients of his previous company and that he operated both companies from his home.

The record shows that the appellant and [REDACTED] the general partnership that filed the labor certification and the petition, are separate and distinct employers, each with their own Federal

⁷ Colorado records also show that a corporation named [REDACTED] which has the same address as the appellant and which identifies the appellant's sole shareholder as its registered agent, was incorporated on October 11, 2010. The corporation is in "delinquent" status for failure to file a periodic report. *See* <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do> (accessed April 2, 2013). The record does not contain evidence as to whether the 2010 corporation has employed or intends to employ the beneficiary, or whether there is any further relationship between the 2010 corporation and the appellant.

Employer Identification Number. *See* 20 C.F.R. § 656.3 (for labor certification purposes, an “employer” means “[a] person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States” and that possesses “a valid Federal Employer Identification Number”). Because the appellant and the labor certification employer are separate and distinct employers for labor certification purposes, USCIS cannot allow the appellant to offer the labor certification job opportunity to the beneficiary without evidence of the appellant’s successor relationship to the labor certification employer.

The record does not establish that the appellant is a successor entity to [REDACTED]. The letters of the appellant’s sole shareholder state that he operated [REDACTED] immediately before he formed the appellant. But the appellant has not demonstrated that it is a successor to [REDACTED] or that “[REDACTED] converted into the appellant. *See* Colorado Revised Statute § 7-90-201 (allowing a Colorado entity to convert into another state entity without dissolving). The appellant has also failed to demonstrate that “[REDACTED] was a successor to the general partnership, or that the partnership converted into “[REDACTED].”

The evidence in the record does not describe and document the transactions (if any) that transferred ownership of the claimed predecessors, nor does it demonstrate that the appellant is eligible for the immigrant visa in all respects, including whether it and its claimed predecessors possessed the continuing ability to pay the proffered wage from the petition priority date onward.⁸ Accordingly, the petition is not approvable because the appellant has failed to establish that it is a successor-in-interest to the general partnership that filed the labor certification and the petition.

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).

In conclusion, the appellant failed to establish that the beneficiary met the minimum requirements of the offered position as set forth on the labor certification as of the priority date. In addition, the appellant has not established that it is the successor-in-interest to the petitioner and labor certification

⁸ The appellant has not provided copies of annual reports, federal tax returns or audited financial statements for the relevant years in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). The appellant provided copies of the beneficiary’s IRS Form W-2 Wage and Tax Statements from 2007 through 2009. The W-2 forms indicate that the appellant paid the beneficiary more than the proffered wage of \$15 per hour for a 40-hour week (or \$31,200 per year) in 2007 and 2008, but less than the proffered wage in 2009. In any further filings, the appellant must establish the petitioner’s ability to pay the beneficiary’s proffered wage from the petition’s priority date to the date of the appellant’s claimed successorship, and the appellant’s ability to pay the proffered wage from that date onward.

employer. Based on the foregoing, the AAO finds that the acting director properly revoked the petition's approval.

The petition's approval will remain revoked for the above stated reasons, with each considered an independent and alternative basis for revocation. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition's approval remains revoked.