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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 03 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 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 with the field office or service center that originally decided your case by filing a 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 preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motions will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner is a drafting and engineering company. It seeks to employ the beneficiary permanently in the United States as an architectural drafter. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted any of the required initial evidence. The director denied the petition accordingly.

On June 22, 2012, the AAO dismissed the appeal, finding that no successor-in-interest to the original petitioner existed and therefore, the appeal had not been submitted by an affected party. Furthermore, the AAO noted that the petitioning business had been dissolved and, therefore, the appeal was moot. The AAO further held that the appeal would be dismissed if considered on the merits and affirmed the director's denial.¹ The record shows that the motions are properly filed and timely, and include additional evidence in support of the motion. Here, we will accept the motions to reopen and reconsider the matter based on the new information submitted. Thus, the instant motions are granted. 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.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The threshold issue in the case is whether the petitioner established a successor-in-interest relationship. If no successor has been established, no affected party would have filed either the appeal or the instant motion and both would properly be rejected. In addition, the action would be moot since the original petitioner is not an active entity.

As stated in the prior AAO decision, *Matter of Dial Auto*, 19 I&N Dec. 481, 482 (Comm'r 1986), is instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. Considering *Matter of Dial Auto*

¹ The AAO noted on appeal that the director's decision was partially based on the petitioner's failure to submit an ETA Form 9089 with original signatures of the petitioner, beneficiary, and attorney. The petitioner submitted an ETA Form 9089 with the required signatures with these motions.

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 id.*

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

In the prior decision, the AAO stated that no evidence was submitted to demonstrate that [redacted] and [redacted] are the same company using different names except for the statements of counsel. The decision further noted that the companies have different Federal Employer Identification Numbers, and the petitioner did not submit any documents reflecting any transfer of ownership of assets and/or liabilities from [redacted] to [redacted]. In addition, counsel on appeal stated that [redacted] as an individual was the successor-in-interest to the petitioner and did not state that the successor was [redacted]. The AAO decision further noted that the petitioner failed to submit evidence demonstrating that [redacted] individually assumed the assets and liabilities of the petitioner in order to be considered the successor.

With its motion, the petitioner submitted a letter from [redacted] on [redacted] letterhead, stating that he operated two companies in which he owned 100% of the stock until 2007: [redacted] and [redacted]. In that year, [redacted] decided to consolidate the two entities "solely to simplify [the] filing and reporting requirements under current IRS regulations." [redacted] further states that he owned 100% of the assets and liabilities of both these companies and of [redacted] the company into which he consolidated the two previous companies. [redacted] states that [redacted] reports its corporate earnings on Schedule C of his personal tax returns.

The petitioner also submitted a letter from [REDACTED] a Certified Public Accountant, stating that he worked with [REDACTED] for over twenty years and that no change in ownership, assets, or liabilities was made because Steve Husmann owned all of the corresponding assets of all companies at all times. He further stated that the change in corporate structure was made for tax and administrative reasons alone.

As stated in the prior AAO decision, no evidence has been submitted to document any transfer of ownership of any assets and/or liabilities from [REDACTED] to [REDACTED]. 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)). Despite [REDACTED] statement that he owned both companies in full, no evidence of a transfer of asset and liabilities from one company to the other has been provided. Without independent, objective evidence that [REDACTED] assumed the rights, assets, and obligations of [REDACTED] we are unable to conclude that [REDACTED] is the successor-in-interest to the petitioner. As such, the motion was not filed by an affected party and must be rejected. Further, as the original petitioner is no longer in business, the motions must be dismissed as moot.

The AAO will nevertheless address the remaining issues identified by the director and discussed in its prior decision. With regards to the petitioner's ability to pay the proffered wage, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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.

As noted in the AAO's prior decision, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on February 12, 2004. The proffered wage as stated on the ETA Form 9089 is \$33,509 per year.

The AAO's June 22, 2012 decision specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of Internal Revenue Service (IRS) Forms W-2 demonstrating that the petitioner paid the beneficiary \$36,542 in 2004, \$39,013 in 2005, and \$47,096 in 2006. The prior decision stated that as these amounts exceeded the proffered wage, the petitioner established its ability to pay the proffered wage in these years alone. The AAO's prior decision also considered the petitioner's IRS Forms 1120 for 2000 through 2006, noting that the years 2000 through 2003 were prior to the priority date so would be considered generally, and that the Forms W-2 established the

petitioner's ability to pay the proffered wage in 2004 through 2006. The petitioner did not submit evidence that it employed and paid the beneficiary after 2006. The decision also noted that additional Forms W-2 were submitted on appeal and more were submitted with the motions demonstrating that [REDACTED] paid the beneficiary wages in excess of the proffered wage, however, as stated above, [REDACTED] has not been shown to be a petitioning successor, so these Forms W-2 may not be considered in determining the petitioner's ability to pay the proffered wage. Had [REDACTED] established that it was the successor-in-interest to the petitioner, its ability to pay the proffered wage would have been established in all relevant years: from 2000 to 2006 by the petitioner and 2007 through 2011 by the successor. As noted above and in the prior AAO decision, however, the petitioner has not established that [REDACTED] is its successor-in-interest.

On appeal, profit and loss statements for [REDACTED] were submitted for 2007 and 2008; with its motion, the 2009, 2010, 2011, and 2012 profit and loss statements were submitted. As noted above, [REDACTED] has not established as that it is a petitioning successor, so its profit and loss statements cannot be considered in determining the petitioner's ability to pay the proffered wage. In addition, the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The profit and loss statements submitted do not indicate that they were compiled through an audit. As a result, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner 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 and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the

beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not submit any new evidence to demonstrate that it has a successor-in-interest, so the evidence in the record demonstrates that the petitioner no longer exists and that no *bona fide* offer is available to the beneficiary. Without such evidence, considering the totality of the circumstances in this individual case it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Concerning the beneficiary's experience, as stated in the prior AAO decision, 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 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, 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).

In response to the AAO's prior decision notifying the petitioner that the evidence submitted did not demonstrate that the beneficiary had the experience required by the terms of the labor certification, [REDACTED] submitted a letter dated July 17, 2012 stating that the he considered the beneficiary's work as a superintendent for [REDACTED] relevant to the proffered position because "hands on construction experience is essential to draftspersons and retailiers for them to [allow them] to understand how structures are built in the 'real' world." [REDACTED] also stated that he confirmed that the beneficiary had the experience claimed with [REDACTED] and included a copy of the beneficiary's employee badge with the company. A July 19, 2012 letter was also submitted from [REDACTED] General Manager/Owner of [REDACTED] [REDACTED] stating that the beneficiary worked as an architect for that company from June 1998 to April 1999.

The letter submitted establishes that the beneficiary has eleven months of experience as an architect with [REDACTED]. The labor certification, however, requires five years of experience as an architectural draftsman. As stated in the prior AAO decision, the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter from [REDACTED] does not establish that the beneficiary worked for either [REDACTED] or [REDACTED] as [REDACTED]. *Id.* Also, the job title of the position for [REDACTED], as provided by the beneficiary under penalty of perjury on the Form ETA 9089 is "construction superintendant." On Part H, Question 10, the petitioner indicated that experience in an alternate occupation would not be accepted. The beneficiary's position with [REDACTED] would, therefore, not qualify as experience towards the proffered position. Even though [REDACTED] stated that he found the experience with [REDACTED] valuable, the terms of the labor

certification do not allow any experience outside of that as an architectural draftsman to qualify for the proffered position. As stated above, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1. In addition, even if evidence had been submitted to demonstrate the beneficiary's experience with both of these companies, the total time worked is 53 months (11 months with [REDACTED] 9 months with [REDACTED] and 33 months with Immunisa) whereas the labor certification requires 60 months of experience in the proffered position. As a result, the petitioner did not establish that the beneficiary had the experience required for the proffered position.

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 motions to reopen and reconsider are granted and the decision of the AAO dated June 22, 2012 is affirmed. The petition remains denied.