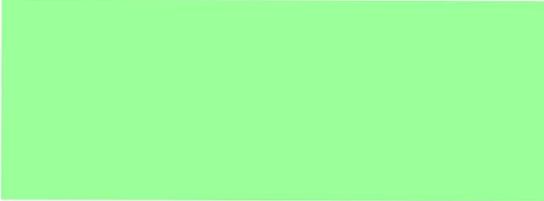


(b)(6)

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



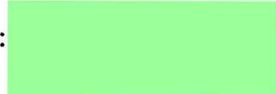
U.S. Citizenship
and Immigration
Services



DATE: **MAY 29 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 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", is written over the "Thank you," text.

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on the petitioner's motion to reopen. The petitioner's motion will be approved. The prior decision of the AAO, dated August 7, 2012, is affirmed. The petition will remain denied.

The petitioner, [REDACTED] is an architectural firm. It seeks to permanently employ¹ the beneficiary in the United States as an architectural designer. 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). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition, concluding that the petitioner had failed to establish its continuing ability to pay the proffered wage from the priority date onward.

The petitioner, through counsel, appealed the director's decision. The AAO dismissed the appeal on August 7, 2012, concluding that the petitioner had not established that it is the successor-in-interest to the employer specified on the labor certification, that the petitioner had not established its continuing ability to pay the proffered wage and that the petitioner had not established that the beneficiary possessed the qualifications for the offered position.

The petitioner has filed a motion to reopen. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

The AAO accepts counsel's submission as a motion to reopen. Accompanying the motion is a statement from the petitioner's owner, a copy of Articles of Amendment filed by the petitioner, a copy of a credentials evaluation previously submitted to the record, a copy of the beneficiary's diploma from Colombia, copies of two employment verification letters dated August 14, 2012 and August 21, 2012, respectively, and an affidavit from the beneficiary relevant to his employment history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

¹ The regulation at 20 C.F.R. § 656.3 states:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Employment means permanent full-time work by an employee for an employer other than oneself. For the purposes of this definition an investor is not an employee.

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 labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate its continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on June 19, 2002, which establishes the priority date. The proffered wage is set forth on the labor certification application as \$700 per week, which amounts to \$36,400 per year. The labor certification states that the position requires grade school and a high school education, five years of college culminating in a Bachelor's degree in Architecture. Additionally, the beneficiary must have either five years of experience in the job offered as an architectural designer or six years of experience as an architectural drafter.

The AAO noted in its prior decision, that the Form ETA 750, Part B, which was signed under penalty of perjury by the beneficiary on April 8, 2002, listed discrepant dates of employment than those later claimed for [REDACTED]. A new employment verification letter submitted on motion states that the beneficiary worked at [REDACTED] from June 1994 until June 1998 and describes some of the projects that he was involved in. The letter does not state whether

the beneficiary's duties were part-time or full-time as stated in the AAO's prior decision. Moreover, no explanation has been offered to resolve the contradictory information contained in the Form ETA 750B in which the beneficiary claims that this employment began approximately thirteen months later in September 1995. Additionally, the discrepancy of dates for the beneficiary's employment for [REDACTED] has not been addressed. On the Form ETA 750, the beneficiary claimed that this employment was from October 1999 until July 2001. The beneficiary now claims that the employment was from October 1998 to July 2000. The new [REDACTED] letter does not specify months of employment and merely reiterates that the employment was from 1998 to 2000, which is also widely disparate from the dates originally claimed by the beneficiary. No part-time or full-time designation of the employment has been made. No clarification of these discrepancies has been offered on motion, and no independent corroborative evidence of such employment such as payroll or tax records have been submitted. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Relevant to the beneficiary's education, the AAO noted in its prior decision (page 10, footnote 16, and page 11, footnote 17) that the beneficiary's diploma in architecture from Colombia was submitted with an English translation that fails to comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Additionally the record does not contain any grade transcripts to confirm that the beneficiary's course of study was five years of college as required by the labor certification. It is noted that the while the credentials evaluation submitted on motion, which had been previously submitted to the record, indicates a U.S. equivalency, no primary evidence of the beneficiary's grade transcripts have been submitted to the record. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Based on the foregoing, as the record stands, the AAO cannot conclude that the petitioner has established that the beneficiary acquired the necessary work experience and educational credentials required by the terms of the labor certification.

Successor-in-interest employer

As referenced in the AAO's prior decision, the petitioner that appears on the Immigrant Petition for Alien Worker (Form I-140) is [REDACTED]. The employer that appears on the Form ETA

750 is [REDACTED] For the purpose of filing a labor certification, the regulation at 20 C.F.R. § 656.3 defines an “employer” as a person, association, firm or a corporation that is located in the United States that possesses a valid Federal Employer Identification Number (FEIN). A FEIN is a unique Internal Revenue Service (IRS) identifier of tax-filing entities. In this matter, the Form ETA 750 employer’s FEIN is 52-xxx-3777. The Form I-140 petitioner and claimed successor-in-interest’s FEIN is 71-xxx-2072.

For a Form I-140 to be properly filed with USCIS, it must reflect that the petitioner is the same employer (or successor-in-interest to the employer) which secured the accompanying labor certification. The exception to this guidance may only be permitted if the Form I-140 petitioner can establish that it is the successor-in-interest to the employer identified on the labor certification.

For pending Form I-140 petitions accompanied by approved labor certification USCIS reviews issues of successor-in-interest relationships in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986) (“*Matter of Dial Auto*”). *Matter of Dial Auto* is a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

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. *Id.* at 1569 (defining “successor”). 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.³

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

²DOL no longer permits substitutions or modifications of the labor certification. *See* 20 C.F.R. § 656.11.

³ 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.

the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.⁴ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010). As noted in the AAO's prior decision, eligibility for the immigration benefit may be shown if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*"). 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.

In this case, as noted in the AAO's prior decision, there is no evidence submitted to the record that fully documents the transfer of ownership from the Form ETA 750 employer to the Form I-140 petitioner. On motion, as noted above, the petitioner submits a copy of an Articles of Amendment, dated September 15, 2007, relating to the Form I-140 petitioner changing its name to [REDACTED]. This document omits any mention of the employer specified on the Form ETA 750. The Form I-140 petitioner's owner states that he has been the owner of each successive [REDACTED] but this does not establish a successor-in-interest relationship with independent corroborative evidence establishing a transfer of ownership from the Form ETA employer to the Form I-140 employer. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, it is noted that the state of Maryland regards the status of the Form ETA 750 employer as "forfeited" for failure to file the 2004 property tax return.⁵ Therefore, the job offer from this entity lapsed when it lost authorization to conduct business in the geographical location where the job offer was located.

The record does not establish the date or document that any transfer of ownership between the entities ever occurred. No audited financial statements of both entities for the year in which the

⁴ 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).

⁵ See [REDACTED] (accessed May 15, 2013). Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the petitioner's business. See 8 C.F.R. § 205.1(a)(iii)(D). If the entity is not authorized to conduct business, then no *bona fide* job offer exists, and the petition and appeal would be considered moot.

transfer occurred or copies of financial instruments used to execute any transfer have been submitted. No evidence has been provided that the successor-in-interest acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before any transfer. Therefore, the evidence in the record is not sufficient to establish that [REDACTED] is the successor-in-interest to [REDACTED].

With respect to the ability to pay the proffered wage, the AAO's prior decision discussed the documentation submitted relevant to the Form ETA 750 employer and the claimed successor-in-interest, the Form I-140 petitioner and found that the evidence submitted would not establish the petitioner's ability to pay the proffered wage in 2005 or 2006. That discussion was predicated on the Form I-140 employer's demonstration that it is a successor-in-interest. As this was not accomplished, the financial documentation from this entity cannot be considered separately in support of the petitioner's ability to pay the proffered wage when it is a separate entity from the employer specified on the Form ETA 750.

The claimed successor has failed to establish that it is a successor-in-interest to the original petitioner. The petitioner has failed to demonstrate that the beneficiary possessed the required qualifying employment experience or education and the petitioner has failed to establish that it has had the continuing financial ability to pay the proffered wage from the priority date onward.

ORDER: The motion to reopen is approved. The prior decision of the AAO, dated August 7, 2012 is affirmed. The petition remains denied.