



U.S. Citizenship
and Immigration
Services

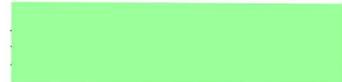
(b)(6)



DATE: SEP 09 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE:



IN RE:

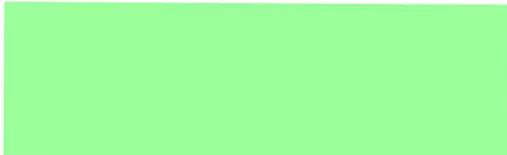
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a gift shop. It seeks to employ the beneficiary permanently in the United States as an evening manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it was a successor-in-interest to the labor certification employer. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely 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.

As set forth in the director's December 15, 2007 denial, the issue in this case is whether the entity [REDACTED] is a successor-in-interest to the original petitioner, [REDACTED], as listed on the Form I-140, Immigrant Petition for Alien Worker.

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ two workers. On appeal, counsel asserts that [REDACTED] is the successor-in-interest to the petitioner.

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

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.

The record contains the following documentation regarding the successor-in-interest issue:

- An assignment of assumption of lease from the petitioner to [REDACTED], with an effective date of March 1, 2006.
- A Texas Sales and Use Tax Permit in the name of [REDACTED], dated March 14, 2006.
- An affidavit from [REDACTED] and an affidavit from [REDACTED] stating that each of them own 50% stock in [REDACTED]; that each of them owned 50% stock in [REDACTED]; that [REDACTED] Inc. conducts business at the same location as [REDACTED]; that the DBA name of both businesses is the same; that [REDACTED] was incorporated in 2006 with the intent to carry on the business of [REDACTED], which ceased doing business in February 2006; and that all assets and liabilities of [REDACTED] have been assumed by [REDACTED].
- A document entitled, "Agreement for the Transfer and Assumption of Assets and Liabilities," dated March 16, 2006, between [REDACTED] and [REDACTED].

The evidence in the record does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. Counsel asserts that this is not necessary due to the common ownership over both entities and provides stock certificates for both companies. However, common ownership here does not establish a successor-in-interest relationship because corporations are separate from their owners. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The record does not contain any evidence that [REDACTED] purchased the stock, thereby becoming an owner, of [REDACTED]. Because there is no

evidence that [REDACTED] owns or controls [REDACTED] these stock certificates cannot establish a successor-in-interest relationship.

The affidavits from [REDACTED] and [REDACTED] state that [REDACTED] ceased doing business in February 2006 and the record reflects that [REDACTED] was incorporated on March 14, 2006. However, nothing in the record demonstrates that [REDACTED] Inc. purchased assets from the predecessor or that the essential rights and obligations of the predecessor were transferred to [REDACTED]. The petitioner has not demonstrated that its assets and liabilities were transferred prior to its dissolution, and it has not asserted how this transfer would have occurred prior to the incorporation of the purported successor. 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 record contains a document entitled, "Agreement for the Transfer and Assumption of Assets and Liabilities" ("transfer agreement"), dated March 16, 2006, between [REDACTED] and [REDACTED], which states that as of March 16, 2006, [REDACTED] has transferred all of its assets to [REDACTED]. The AAO notes that this document was not included in the petitioner's response to the director's Notice of Intent to Deny (NOID), dated December 15, 2007. This transfer agreement also conflicts with counsel's assertion in a letter, dated May 30, 2007, that "no closing agreement was made." This casts doubt on the authenticity of the transfer agreement. The owners stated in their affidavits that [REDACTED] Inc. ceased doing business in February 2006. Therefore, it is unclear why the transfer agreement states that [REDACTED] transferred all of its assets to [REDACTED] on March 16, 2006, after the time that [REDACTED] ceased doing business. The transfer agreement specifically states the following:

(a)(5) As of March 16, 2006, the Transferor [REDACTED] has transferred to the Transferee [REDACTED] all the assets of the Transferor by virtue of a successorship-in-interest between the Transferor and the Transferee.

...

(b)(3) Both parties recognize the Transferee as the Transferor's successor in interest. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor as if the Transferee were the original party.

No addenda or other documents were submitted to demonstrate what assets and liabilities were transferred, and the signatories were not identified and were only listed as a "Co-owner." As stated above, Part (a)(5) states that [REDACTED] "has transferred" the assets and liabilities to [REDACTED] but there is no evidence of this transfer; the document states only that this transferred occurred "by virtue of a successorship-in-interest" between the two entities. The record does not contain any explanation of these terms. Additionally, Part (a)(7) of the transfer agreement states that "[REDACTED] has assumed all obligations and liabilities of [REDACTED] under the contracts by virtue of the above transfer, including any immigration-related

liabilities.” However, nothing is articulated or documented in the record concerning this purported assumption.

Further, the AAO notes that the Form I-140 was filed on October 24, 2006 by [REDACTED], more than eight months after it purportedly ceased to operate. The record contains a letter, dated August 22, 2006, on [REDACTED] stationery signed by [REDACTED] which indicates that [REDACTED] is currently in business. This casts doubt on the petitioner’s subsequent assertions that a successorship-in-interest occurred in March 2006. Doubt cast on any aspect of the petitioner’s evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* Therefore, the petitioner has not provided sufficient evidence to establish the purported transaction transferring ownership of all, or a relevant part of, [REDACTED] to [REDACTED] and that [REDACTED] did not remain in business as a separate entity.

Further, 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 determining an entity’s ability to pay the proffered wage, USCIS first examines whether it has paid the beneficiary the full proffered wage each year from the priority date. If the entity has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether it had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.² If the net income or net current assets is not sufficient to demonstrate the entity’s ability to pay the proffered wage, USCIS may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm’r 1967).

In the instant case, the record contains the 2006 tax return for [REDACTED], which states net income of \$6,001.00 and no net current assets. This is insufficient to meet the proffered wage of \$34,840.00 and the petitioner has not provided any other evidence to establish the ability of [REDACTED] to pay the proffered wage for 2006. As stated above, the Form I-140 was filed by

² *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

██████████ in October 2006, and the record contains a letter from ██████████ dated August 22, 2006, which both suggest that ██████████ was still in business at that time. Accordingly, it is unclear how long ██████████ Inc. remained in business. Therefore, the petitioner has also failed to establish that ██████████ had the ability to pay the proffered wage as of the priority date until the time of the alleged successorship-in-interest. *See* 8 C.F.R. § 204.5(g)(2). Accordingly, the petitioner has not established eligibility for the visa under the third prong of *Matter of Dial Auto*. *See id.* 19 I&N Dec. at 482. Therefore, the petitioner has not established that a valid successorship exists.

Additionally, information in the record indicated that the beneficiary may have a familial relationship to the signatory and owner of the petitioner. The AAO issued the petitioner a Notice of Intent to Dismiss (NOID) on June 13, 2013, and requested that the petitioner provide evidence of this relationship, if any. The AAO also requested that the petitioner provide documentation of the advertising conducted by the petitioner and the name and title of the individual responsible for interviewing and hiring employees. The petitioner did not provide this documentation. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petitioner only submitted a handwritten page of the ██████████ which appears to list the first name of each individual. Counsel for the petitioner states that “from this family tree, it is very clear that [the beneficiary] is not related to ██████████ in any degree.” However, it appears that the beneficiary and the petitioner’s owner may be cousins.³ The petitioner has not provided any objective evidence to resolve this issue, such as government or vital records. Therefore, it is unclear whether the beneficiary is related to the petitioner’s owner. The petitioner must resolve this issue with independent, objective evidence in any further filings.

In visa petition proceedings, it is the petitioner’s burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ The beneficiary appears to be listed in the flow chart as individual C3 and the petitioner’s owner appears to be listed as individual E1.