



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

DATE: **JAN 03 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner:
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 (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, Texas Service Center on June 1, 2011. The petitioner filed a motion to reopen and reconsider with the director which was dismissed as being untimely filed on March 14, 2012. The petitioner filed a second motion to reopen which the director dismissed on July 24, 2012. The petitioner filed a third motion to reopen and reconsider with the director which was dismissed on August 15, 2013. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an engineer. The record contains an ETA Form 9089, Application for Permanent Employment Certification, filed by the petitioner, [REDACTED] which was approved by DOL on January 29, 2007.¹

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.²

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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The director stated in his initial decision, dated June 1, 2011, that the petitioner had not demonstrated: (1) that the beneficiary meets the education and experience requirements of the labor certification; (2) that the petitioner had the ability to pay the difference between the proffered wage and the wages paid to the beneficiary for 2009; and (3) that the petitioner is a successor-in-interest to the labor certification employer, [REDACTED]

The director stated in his decisions, dated March 14, 2012, July 24, 2012, and August 24, 2012, that the motion to reopen and reconsider the June 1, 2011 decision was untimely filed and that the petitioner had not demonstrated that the delay was reasonable and beyond its control.

¹ The record also contains a Form ETA 750, Application for Alien Employment Certification, filed by [REDACTED] on the beneficiary's behalf and approved by the United States Department of Labor (DOL) on April 30, 2001. The petitioner seeks to rely on this Form ETA 750 to retain the earlier priority date.

² 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).

(b)(6)

Timeliness of the motion to reopen and reconsider

United States Citizenship and Immigration Services (USCIS) regulations require that motions to reconsider be filed within 30 days of the underlying decision. 8 C.F.R. § 103.5(a)(1)(i). If the unfavorable decision was mailed, the motion must be filed within 33 days. 8 C.F.R. § 103.8(b); *see also* 8 C.F.R. § 103.5(a)(3). If the last day for filing an appeal or motion falls on a Saturday, Sunday, or legal holiday, the period shall run until the following day. In this case, the 33rd day following the director's initial decision fell on July 4, 2011, thereby making July 5, 2011 the final day to file the motion to reopen and reconsider.

On appeal, counsel asserts that the motion to reopen and reconsider was timely filed, and seems to suggest that if the filing is deemed untimely, any delay in filing the motion to reopen and reconsider the director's decision was reasonable and beyond the petitioner's control. First, the evidence in the record does not clearly establish the date the motion to reopen and reconsider was filed. The record contains a sales receipt from the U.S. Postal Service which states that delivery of the package is guaranteed by July 5, 2011. The record contains an email query from counsel for the petitioner in which the U.S. Postal Service informed her that the package was delivered on July 8, 2011. The record also contains an affidavit by counsel for the petitioner, dated October 7, 2013, stating that the U.S. Postal Service confirmed orally to her that the motion was delivered on July 6, 2011, which is 35 days after the director's June 1, 2011 decision. Counsel for the petitioner states in her brief, dated October 8, 2013, that when she contacted the U.S. Postal Service regarding the delivery date of the package, she was told it was delivered on July 5, 2011. This assertion by counsel conflicts with her affidavit. Further, 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)). Therefore, the evidence in the record does not demonstrate that the motion to reopen and reconsider was timely filed.

On appeal, counsel for the petitioner asserts that if USCIS finds that the filing of the motion to reopen and reconsider was untimely, any such delay was reasonable and beyond the petitioner's control. The U.S. Postal Service sales receipt in the record reflects that the motion to reopen and reconsider was mailed on Friday July 1, 2011 and that delivery was guaranteed for July 5, 2011. However, this receipt also states that the "delivery date may be affected by the time tendered to the Postal Service in addition to weekend and holiday operation hours." Counsel has not provided any legal support that demonstrates that the delay in this case was reasonable or that a late delivery by a common carrier excuses a filing deadline for motions to reopen and reconsider USCIS decisions. Therefore, the petitioner had not demonstrated that the late filed motion to reopen and reconsider the director's decision was reasonable and beyond the petitioner's control. Even if the motion to reopen and reconsider was timely filed, the petitioner has not overcome the other reasons for denial in the director's prior decisions, as discussed below.

Ability to pay the beneficiary's proffered wage and successor-in-interest relationship

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).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.³ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The regulation at 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 stated above, the record contains a Form ETA 750 filed by [REDACTED] on the beneficiary's behalf and approved by DOL on April 30, 2001. The record also contains an ETA Form 9089 filed by the petitioner, [REDACTED] which was approved by DOL on January 29, 2007. The petitioner seeks to rely on the earlier Form ETA 750 filed by [REDACTED] to retain the earlier priority date. However, the DOL stated on the cover page in certifying the ETA Form 9089 filed by the petitioner that the refiling of the earlier labor certification was not approved because the employer did not provide sufficient evidence to establish a successor-in-interest relationship with [REDACTED]. The director also determined that the petitioner had not established this successor-in-interest relationship.

³ 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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 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 a letter, dated July 1, 2010, from the general manager for the petitioner, [REDACTED], stating that [REDACTED] was a sole contractor for [REDACTED] and that "when [REDACTED] relocated from the [REDACTED] area, all of its contracts pending at that time, on or about 2003, were continued and completed by [REDACTED]" This letter further states that "[REDACTED] assumed all of the duties and obligations of [REDACTED]" This letter does not satisfy all three conditions described above because it does not fully describe and document the transaction transferring ownership of the predecessor. There is no independent, objective evidence in the record demonstrating that the petitioner, [REDACTED] purchased assets from the purported predecessor, [REDACTED], or that the essential rights and obligations of [REDACTED] were transferred 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)). The petitioner has not demonstrated that [REDACTED] was dissolved, or if it was dissolved, that its assets and liabilities were transferred to [REDACTED] prior to its dissolution. Instead, it appears that the [REDACTED] relocated outside of [REDACTED] to continue business elsewhere. Therefore, the petitioner has not established that it is a successor-in-interest to [REDACTED].

Here, the petitioner filed an ETA Form 9089 with DOL on January 29, 2007. The proffered wage as stated on the ETA Form 9089 is \$50,731.00 per year.⁴ As stated above, the petitioner sought to rely upon the priority date of the Form ETA 750 filed by the alleged predecessor entity, [REDACTED]

If the petitioner were to establish this successor-in-interest relationship, it would have needed to establish the ability of the alleged predecessor to pay the proffered wage from April 30, 2001, the date the Form ETA 750 was filed, until the date of the alleged successorship. The record does not contain any evidence of [REDACTED] ability to pay the proffered wage for this time period. The petitioner would also be required to establish its ability to pay the proffered wage from the alleged date of successorship onward. The director determined that the petitioner had not established its ability to pay the difference between the proffered wage and the wages paid to the beneficiary in 2009. The petitioner's 2009 tax return in the record reflects negative net income and negative net current assets. Therefore, even if the successor-in-interest relationship had been established, the petitioner has not demonstrated its ability, or the ability of the purported predecessor to pay the beneficiary's proffered wage. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage for all relevant periods.

Beneficiary's qualifications

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 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 *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 the instant case, the ETA Form 9089 states that the offered position requires 36 months of experience in the position offered as an engineer. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as an engineer for the [REDACTED] from March 1, 1995 to January 2, 1998.

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 record contains a letter in French from the [REDACTED] with an accompanying translation. The translation does not state the dates the beneficiary was employed there, but the original letter provides dates of March 15,

⁴ The Form ETA 750, filed by [REDACTED] states a proffered wage of \$20.00 per hour (\$41,600 annually) and requires two years of experience in the alternate occupation of "planning," whereas the Form ETA 9089 filed by the petitioner states a proffered wage of \$50,731.00 per year and requires 36 months of experience in the job offered.

1995 to January 15, 1998. However, this period of time is equivalent to 34 months of experience. As the ETA Form 9089 certified by the DOL states that the proffered position requires 36 months of experience in the job offered, the petitioner has not established that the beneficiary meets the experience requirements of the ETA Form 9089 filed by the petitioner.

Beyond the decision of the director,⁵ the petitioner has not established that the beneficiary meets the educational requirements of the ETA Form 9089 which requires a Bachelor's degree in Engineering. The record contains a certificate from the [REDACTED] of the [REDACTED] which states that the beneficiary possesses a Diploma of Higher Studies. According to the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),⁶ this Diploma of Higher Studies is equivalent to a bachelor's degree in the United States. However, it is unclear whether this diploma is in the field of engineering as required by the ETA Form 9089. The only other evidence in the record that addresses the beneficiary's educational qualifications is an affidavit from [REDACTED] dated June 3, 2011, which states that the beneficiary's education demonstrates that the beneficiary is a "qualified engineer (agronomist)." This affidavit does not state that the beneficiary's degree is equivalent to a U.S. Bachelor's degree in Engineering. Additionally, although Mr. [REDACTED] appears to have testified in many immigration hearings regarding country conditions in [REDACTED] and formerly worked in several politically important positions in [REDACTED] nothing in the record demonstrates that he has sufficient credentials to evaluate whether a foreign degree from [REDACTED] is the equivalent of a U.S. degree from an accredited college or university. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). See also *Matter of*

⁵ 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).

⁶ According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed December 26, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed December 26, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

D-R-, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Therefore, the petitioner has not established that the beneficiary meets the educational requirements of the ETA Form 9089.

The evidence in the record does not establish that the beneficiary possessed the required experience and education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered 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, 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.