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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: **JAN 29 2015**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

FILED BY: [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,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (Director), initially approved the employment-based visa petition. However, the Acting District Director, Detroit Field Office, revoked the petition's approval. On appeal, the Administrative Appeals Office (AAO) withdrew the revocation decision and remanded the matter to the Director, who also revoked the petition's approval. We dismissed the petitioner's appeal from the Director's decision and rejected a motion to reconsider by a company that claimed to be the petitioner's successor-in-interest. We reopened this matter on our own motion to vacate our decision on the appeal from the Director's decision, and to enter a new decision dismissing the appeal.

The petitioner was a construction company that sought to permanently employ the beneficiary in the United States as a project manager. The petition sought preference classification of the beneficiary as a skilled worker or professional under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). A Form ETA 750, Application for Alien Employment Certification, certified by the United States Department of Labor (labor certification), accompanied the petition.

U.S. Citizenship and Immigration Services (USCIS) may revoke a petition's approval "at any time" for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. The realization that a petition was erroneously approved may constitute good and sufficient cause for revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

On remand, the Director concluded that the petition was erroneously granted because the beneficiary previously attempted to engage in a fraudulent marriage for the purpose of obtaining permanent resident status in the United States. *See* Section 204(c) of the Act, 8 U.S.C. § 1154(c) (barring a petition's approval if a beneficiary is determined to have attempted or conspired to marry for the purpose of evading the immigration laws). Accordingly, the Director revoked the petition's approval on December 16, 2009.

Upon the petitioner's appeal, we affirmed the Director's decision. We also found that the petitioner did not demonstrate the existence of a successor-in-interest to its business after its dissolution. Accordingly, we dismissed the petitioner's appeal on December 13, 2012.

On November 20, 2014, we rejected a motion as improperly filed, finding that the movant did not establish itself as a successor-in-interest to the petitioner and thus as an "affected party" in this matter.¹ *See* 8 C.F.R. § 103.5(a)(1) (requiring an affected party to file a motion). Subsequent review of the matter indicated that we dismissed the petitioner's appeal from the Director's decision on inappropriate grounds. Therefore, we reopened the matter *sua sponte* to correct our appellate decision of December 13, 2012. *See* 8 C.F.R. § 103.5(a)(5)(ii) (authorizing us to issue a new decision after giving an affected party at least 30 days in which to submit a brief in opposition to an

¹ The record indicates that the petitioning corporation, [REDACTED] dissolved on July 15, 2011, while this appeal was pending. The movant, [REDACTED] stated that it was owned by the brother of the petitioner's former president and offered to permanently employ the beneficiary in the same or similar occupation.

unfavorable decision). We received no response from the petitioner to our Motion to Reopen, which was served on November 25, 2014.

We conduct appellate review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence of record.²

The Petitioner's Intent to Employ the Beneficiary

A labor certification remains valid only for the particular job opportunity stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2) (2004). A petitioner must intend to employ a beneficiary pursuant to the terms of an accompanying labor certification. *Matter of Izdebska*, 12 I&N Dec. 54, 54 (Reg'l Comm'r 1966) (upholding a petition's denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker as specified on the labor certification).

In the instant case, the petitioning corporation concedes that it dissolved on July 15, 2011, while this appeal was pending. The petitioner's dissolution indicates that it no longer intends to employ the beneficiary and appears to render the appeal and the petition moot. Even if the appeal could otherwise be sustained, the petition's approval would be subject to automatic revocation because of the termination of the petitioner's business. *See* 8 C.F.R. § 205.1(a)(3)(iii)(D) (stating that the termination of a petitioner's business automatically revokes a petition's approval as of its approval date).

Moreover, even if the petitioner's business was not terminated, the record establishes that the petition should not have been granted. The Director had "good and sufficient cause" to revoke the petition's approval. *See Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987) (holding that a director properly issues a notice of intent to revoke a petition's approval if the evidence of record at the time of the notice's issuance, if unexplained and unrebutted, would warrant the petition's denial). The record contains investigative reports and documentation indicating that the beneficiary attempted to marry a U.S. citizen for immigration purposes on August [REDACTED] in a mock wedding ceremony that was arranged, in part, by undercover officers of the former Immigration and Naturalization Service (INS).³

The petitioner submitted an affidavit in which the beneficiary states that he sought to marry in good faith, was unaware that \$500 was paid in exchange for the U.S. citizen's marriage agreement, and did not attempt to engage in a fraudulent marriage. However, the petitioner has not submitted sufficient evidence to support the beneficiary's statements. *See Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983) (holding that, where there is reason to doubt the validity of a marital relationship, a

² The instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1), allow the submission of additional evidence on appeal and motion. The record in the instant case provides no reason to preclude consideration of any of the documents of record. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

³ The INS ceased to exist on March 1, 2003. Its functions were assumed by agencies within the newly formed Department of Homeland Security, including USCIS. *See, e.g., Pieniazek v. Gonzales*, 449 F.3d 792, 792 (7th Cir. 2006).

petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws); *see also Ghaly v. INS*, 48 F.3d 1426, 1431 (7th Cir. 1995) (holding that the INS did not abuse its discretion in revoking a petition's approval under section 204(c) of the Act where the beneficiary's ex-wife stated in an affidavit that she agreed to marry him for \$1,500).

The beneficiary attested that he met the U.S. citizen twice before they applied for a marriage license. The record does not contain evidence that they lived together or otherwise intended to share their lives together. *See Yong Hong Guan v. INS*, 998 F.2d 1017, *2 (Table) (7th Cir. 1993) (stating that a marriage is considered a sham if the parties did not intend to establish a life together at the time they were married). Although the beneficiary's "marriage" was not legally effective and the U.S. citizen did not file a visa petition on his behalf as her spouse, section 204(c) of the Act bars this petition's approval based on his prior attempt to enter into a fraudulent marriage. *See Matter of Calilao*, 16 I&N Dec. 104, 106 (BIA 1977) (holding that section 204(c) applies to marriage ceremonies that were actually performed, even if they were legally ineffective); *Matter of Isber*, 20 I&N Dec. 676, 678 (BIA 1993) (finding that Congress extended the application of section 204(c) to marriages where no immigration benefits were sought, such as marriages that occurred "in connection with undercover Service investigations of marriage fraud rings.")

The Effect of the Portability Provision

The petitioner argues that the petition remains valid under the "portability" provision of section 204(j) of the Act. However, the record does not support the petitioner's argument.

Under section 204(j) of the Act, a petition "shall remain valid" if a beneficiary's application for adjustment of status based on the petition remained unadjudicated for at least 180 days, and the beneficiary changed jobs or employers within the same or similar occupational classification as the offered position. USCIS must have approved a petition in order for it to "remain valid" for portability purposes under section 204(j). *Matter of Al Wazzan*, 25 I&N Dec. 359, 367 (AAO 2010).

The instant record shows that the beneficiary's adjustment application remained pending for more than 180 days, from November 17, 2004 to March 15, 2007. However, the record does not establish that the beneficiary received a job offer in the same or similar occupational classification on or before the petitioner's dissolution on July 15, 2011.

The record contains letters from the petitioner's former president and his brother, the owner of [REDACTED] stating that [REDACTED] intends to employ the beneficiary in a position with the same duties as the offered position of project manager. However, both letters are dated September 20, 2012, after the petitioner's dissolution. Therefore, the record does not establish that the beneficiary received the job offer before the Director revoked the petition's approval, before the petitioner dissolved, or before the petition's approval would have been automatically revoked.⁴

⁴ For automatic revocation purposes, a petitioner's business terminates under 8 C.F.R. § 205.1(a)(3)(iii)(D) when the business ceases to operate. *Patel v. Johnson*, 2 F. Supp. 3d 108, 119 n.11 (D. Mass. 2014) (upholding our interpretation

Thus, the record indicates that the petition could not “remain valid” for portability purposes because its approval would have been automatically revoked before the provisions of section 204(j) of the Act were satisfied. *See Patel*, 2 F. Supp. 3d at 122 (holding that a petition was invalid for portability purposes where the petitioner’s dissolution predated the beneficiary’s change of jobs).

Successor-in-Interest Relationship

Although a labor certification remains valid only for the particular job opportunity stated on it, another business can continue to offer the job opportunity if it demonstrates a “successor-in-interest” relationship to the employer stated on the labor certification. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm’r 1986). To establish a successor relationship, the record must: 1) fully describe and document the successor’s acquisition of the essential rights and obligations needed to carry on the original employer’s business; 2) demonstrate that the job opportunity is the same one described on the labor certification; and 3) establish the successor’s eligibility for petition approval, including its continuing ability to pay the proffered wage. *Id.*

In the instant case, the petitioner’s dissolution would not prevent the continuation of the immigration process if the petitioner had a successor willing to employ the beneficiary in the offered position. *See Dial Auto Repair*, 19 I&N Dec. at 482 (considering whether a dissolved corporation had a successor-in-interest). The petitioner argues that [REDACTED] is its successor because: the brother of its former president owns [REDACTED] its former president serves as general manager of [REDACTED] operates the same type of business in the same geographic area as the petitioner; and the beneficiary’s job duties with [REDACTED] would remain the same as the duties of the position offered by the petitioner.

The position offered by [REDACTED] appears to be the same as the position specified on the labor certification. However, the record does not establish the company’s acquisition of the essential rights and obligations needed to carry on the petitioner’s business. The record contains corporate documentation indicating that [REDACTED] is a separate entity from the petitioner, with its own federal employer identification number. The record does not describe or document a transfer of business ownership from the petitioning corporation to [REDACTED]

The record also does not establish the continuing ability of [REDACTED] to pay the proffered wage. Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). The record does not contain any of the regulatory required materials or any other evidence to demonstrate the company’s continuing ability to pay the proffered wage. The record therefore does not establish [REDACTED] as a successor-in-interest to the petitioner.

of the regulation). Thus, the instant petitioner’s business could have terminated and automatically revoked the petition’s approval even before the petitioner’s formal dissolution on July 15, 2011. *Id.* In any future filings in this matter, the petitioner must provide evidence of when its business operations ceased.

Conclusion

The record indicates that the petitioning corporation no longer intends to employ the beneficiary in the offered position because of its dissolution on July 15, 2011. Contrary to the petitioner's arguments, the record does not establish [REDACTED] as its successor-in-interest, or the petition's continuing validity under the portability provision of section 204(j) of the Act. Because the record indicates that the petitioner's dissolution rendered this appeal moot and that the appeal's sustainment would result in the automatic revocation of the petition's approval, we will withdraw our appellate decision of December 13, 2012 and dismiss the appeal on the grounds stated above.

ORDER: Our appellate decision of December 13, 2012 is withdrawn. The appeal is dismissed.