



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF D.-F-, LLC

DATE: MAY 3, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a manufacturer/wholesaler of oral products for consumers and dentists, seeks to employ the Beneficiary as a credit analyst. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director, Nebraska Service Center, denied the petition. The Director determined that the Petitioner was not the same employer listed on the labor certification and that the labor certification employer ceased to exist before the labor certification was filed. The Director concluded that the petition was not supported by a valid labor certification.

The matter is now before us on appeal. On appeal, the Petitioner asserts that a successor-in-interest relationship exists and that the original entity was an active business at the time the labor certification was filed. Upon *de novo* review, we will dismiss the appeal.

#### I. LAW AND ANALYSIS

A United States employer may sponsor a foreign national for lawful permanent residence, which is a three-part process. First, the U.S. employer must obtain a labor certification, which the U.S. Department of Labor (DOL) processes. *See* 20 C.F.R. § 656, *et seq.* The employer does so by filing an ETA Form 9089, Application for Permanent Employment Certification, with the DOL. The ETA Form 9089 sets forth: (A) the position's job duties, (B) the position's education, experience and other special requirements, (C) the required proffered wage, and (D) the position's work location(s). In addition, as part of the labor certification, the beneficiary attests to his or her education and experience. The date the ETA Form 9089 is filed becomes the "priority date" for the visa petition. 8 C.F.R. § 204.5(d).<sup>1</sup> The DOL's role in certifying the labor certification is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL's approval of the labor certification

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<sup>1</sup> The priority date is used to calculate when the beneficiary of the visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g).

affirms that, “there are not sufficient [U.S.] workers who are able, willing, qualified” to perform the position offered where the beneficiary will be employed, and that employment of such beneficiary will not “adversely affect the wages and working conditions of workers in the United States similarly employed.” *Id.* The labor certification is valid for 180 days.

Following labor certification approval, a Petitioner files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS) within the labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: (A) the Petitioner can establish its ability to pay the proffered wage, (B) the degree and/or experience required for the position offered matches the petitioned-for classification, and (C) whether the beneficiary has the required education, training, and experience for the position offered. *See* INA 203(b)(3)(A)(ii); 8 C.F.R. § 204.5.

If the I-140 visa petition is approved, then in the third and final step, the beneficiary would file a Form I-485, Application to Adjust Status or Register Permanent Residence, either concurrently with the Form I-140 based on a current priority date, or following approval of a Form I-140 petition and a current priority date. *See* 8 C.F.R. § 245. If the I-485 is approved, this application to adjust status will afford the beneficiary lawful permanent resident status.

The instant petition is accompanied by an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the DOL. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 8, 2012. *See* 8 C.F.R. § 204.5(d).

The issue before us is whether the labor certification employer was an operating business entity at the time the labor certification was filed on June 8, 2012, so that a *bona fide* job opportunity existed.

The regulation at 20 C.F.R. § 656.3 states, in part:

Employer means:

(1) A person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN). For purposes of this definition, an “authorized representative” means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters. A labor certification can not be granted for an Application for Permanent Employment Certification filed on behalf of an independent contractor.

A labor certification is only valid for the particular job opportunity stated on the ETA Form 9089. *See* 20 C.F.R. § 656.30(c)(2).

(b)(6)

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██████████ with Federal Employer Identification Number (FEIN) ██████████ filed the labor certification on June 8, 2012. ██████████ with FEIN ██████████ the Petitioner, filed the Form I-140 on December 18, 2014. The Petitioner asserts that it is the successor entity to the labor certification employer.<sup>2</sup> In support of its statement that the Petitioner is ██████████ successor-in-interest, the record contains tax returns and corporate documents that reflect that:

- ██████████ final tax return lists the end date of its fiscal year as May 15, 2012;
- ██████████ was merged into ██████████ on ██████████ 2012; and
- ██████████ changed its name to the Petitioner on ██████████ 2012.

The record of proceedings demonstrates that ██████████ was a New York corporation. The New York Secretary of State Division of Corporations Corporation and Business Entity database lists ██████████ as inactive. *See* NYS Department of State Division of Corporations Entity Information, www.dos.state.ny.us (accessed April 21, 2016). The Petitioner states that ██████████ never filed a certificate of dissolution and was therefore an active entity at the time the labor certification was filed. The Petitioner asserts that ██████████ was still engaging in “wind down” activities and was legally permitted to do so until at least 30 days after the merger. The Petitioner cites section 906 of the New York Business Corporation Law in support of this assertion. New York Business Corporation Law § 906 (McKinney, 2012), provides that:

*Effect of merger or consolidation.* (a) Upon the filing of the certificate of merger or consolidation by the department of state or on such date subsequent thereto, not to exceed thirty days, as shall be set forth in such certificate, the merger or consolidation shall be effected.

The record suggests that ██████████ terminated activities on ██████████, 2012, as its 2011 IRS Form 1120 was filed with a tax year of January 2, 2012 to ██████████ 2012, and no 2012 tax return was submitted. The Petitioner’s 2012 federal tax return reflects that it commenced filing on ██████████ 2012. The Petitioner has not provided evidence of any business activity that ██████████ conducted after ██████████ 2012, including “wind down” activities. The Petitioner cannot meet the burden of proof simply by claiming a fact to be true, without supporting documentary evidence. *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)); *see also Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376.

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<sup>2</sup> 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. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986). 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.

(b)(6)

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The record of proceedings includes copies of the Beneficiary's paychecks, issued bi-weekly with a gross pay of \$2884.62. The record reflects that [REDACTED], issued the Beneficiary's last paycheck on May 30, 2012 (pay period May 13 to May 26) and the Petitioner issued the Beneficiary's next paycheck on July 11, 2012 (pay period June 24 to July 7). The record does not contain any paycheck issued to the Beneficiary by either entity for the pay periods from May 27 to June 23. Although two paychecks issued in June 2012 appear to be absent from the record, we note that the first paycheck the Petitioner issued on July 11, 2012 lists a "gross pay year to date" of \$8653.86. This amount matches the Beneficiary's gross pay from May 27 to July 7 (\$2884.62 for three pay periods). Therefore, it appears that the Beneficiary's employment with [REDACTED] ended on May 26, 2012 and began with the Petitioner on May 27, 2012. This is consistent with the termination of [REDACTED] before the labor certification was filed on June 8, 2012.

Further, California SOS Business Entity Details for [REDACTED] show that a Certificate of Surrender was filed on [REDACTED] 2012. Even if [REDACTED] was still operating in New York, it had surrendered its right to do business in California, the State in which the proffered position is located.

While the evidence in the record reflects that [REDACTED] succeeded [REDACTED] all evidence reflects that, at the time the labor certification was filed, [REDACTED] no longer continued to operate to a degree which required a permanent, full-time credit analyst, the proffered position listed on the labor certification. As such the record does not reflect that a *bona fide* job offer with [REDACTED] in California existed at the time the labor certification was filed on June 8, 2012. As the Form I-140 is not supported by a valid labor certification as required by 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i), the appeal must be dismissed.

## II. CONCLUSION

In summary, the Petitioner did not establish that the labor certification employer was a valid business entity at time the labor certification was filed. The petition is not supported by a valid labor certification as required by 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i). The Director's decision denying the petition is affirmed.

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 Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

Cite as *Matter of D-F-, LLC*, ID# 16657 (AAO May 3, 2016)