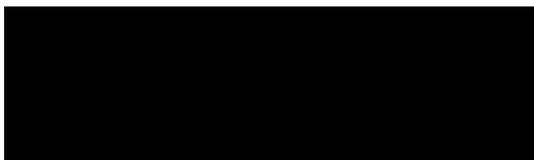


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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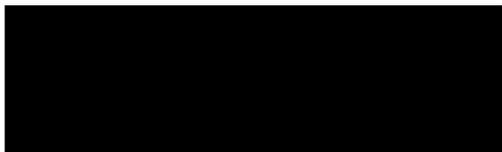
Date: **SEP 28 2012** Office: VERMONT SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER IN THE FORM I-129 PRECEEDING:



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,

Perry Khew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed.

In the Petition for a Nonimmigrant Worker (Form I-129), the petitioner described itself as a restaurant with 20 employees. It sought to continue to employ the beneficiary in what it described as an executive pastry chef position and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

On August 13, 2010, the director denied the petition, finding that the petitioner failed to submit a Labor Condition Application (LCA) that had been certified by the U.S. Department of Labor prior to the filing of the petition. A subsequent appeal to the AAO was filed on behalf of the petitioner by its counsel at that time, [REDACTED] however, upon a *de novo* review of the petition, the appeal was dismissed on the ground that the petition was filed after the expiration of the petition it sought to extend. *See* 8 C.F.R. § 214.2(h)(14). The AAO further determined that the petitioner failed to establish that:

- (1) at the time of filing, the petitioner had obtained a certified LCA in the claimed occupational specialty for the requested employment periods;
- (2) the beneficiary remained eligible for an exemption from section 214(g)(4) of the Act, 8 U.S.C. § 1184(g)(4);
- (3) the proffered position qualified as a specialty occupation; and
- (4) the beneficiary was qualified to perform the duties of a specialty occupation.

On March 14, 2012, [REDACTED] filed a motion to reconsider the dismissal of the appeal on behalf of the beneficiary's current employer, [REDACTED] (hereinafter [REDACTED]). Part I of the Form I-290B which seeks information about the "Business/Organization/School" for which counsel is appearing states that counsel is representing [REDACTED] submitted two Forms G-28, Notice of Entry of Appearance as Attorney or Representative, with the Form I-290B. One Form G-28 was signed by the beneficiary and [REDACTED] while the other was signed by [REDACTED] and [REDACTED].

The brief filed in support of the motion to reconsider states the following with respect to the beneficiary's employment:

The employer-petitioner referenced in the Decision here at issue is [REDACTED]. This is not, however, [the beneficiary's] current employer. Since February of 2011, [the beneficiary's] employer-petitioner is [REDACTED] located in Hollywood, Florida. We therefore respectfully request that you take note of [REDACTED] as [the beneficiary's] new employer and, thus, the H-1B petitioner and appellant in this matter, together with [the beneficiary] himself.

This change in employment and extension of H-1B stay was undertaken in accordance with the provisions of Section 106(c) of the American Competitiveness in the 21st Century Act ("AC21"), which amended I.N.A. §204.

As an initial matter, U.S. Citizenship and Immigration Services (USCIS) regulations only entitle the "person or entity with legal standing" as an "affected party" to file a motion to reconsider. See 8 C.F.R. §§ 103.3(a)(1)(iii)(B) and 103.5(a)(1). In addition, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements shall be dismissed.

In this case, none of the new Forms G-28 that was submitted with the Form I-290B was signed by an authorized agent or representative of [REDACTED] the petitioner. [REDACTED] never claimed to be a successor-in-interest to [REDACTED] nor does the record contain any evidence to show that [REDACTED] qualifies as a successor-in-interest to the petitioner.

According to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), 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. *Id.* Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered. *Id.* Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the visa in all respects. *Id.*

Evidence of a transfer of ownership must show that the successor not only purchased or acquired 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 *id.* at 482.

In this matter, the record is devoid of any evidence establishing that [REDACTED] is a successor-in-interest to the employer which filed the H-1B petition, i.e., [REDACTED]. The record does not contain any evidence detailing the transaction, such as an agreement of sale, bill of sale, or any other record documenting the transaction in detail. 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)). Accordingly and absent evidence to the contrary, the AAO finds that the petitioner, [REDACTED] is a different business entity from the entity, [REDACTED] that seeks for the AAO to reconsider its prior decision to dismiss the appeal in this matter.

Although the record contains two Forms G-28 signed by an authorized representative of [REDACTED] for the petition and the subsequent appeal, there is no evidence demonstrating that the petitioner authorized [REDACTED] to file the instant motion to reconsider. As the beneficiary's new employer, [REDACTED] is not a recognized party in this matter, [REDACTED] and [REDACTED] are not

authorized to file the motion to reconsider in this matter. The regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements shall be dismissed. Therefore, as the motion was not properly filed by an affected party or its authorized attorney or representative, it must be dismissed.

However, given the issue raised by counsel with respect to the "American Competitiveness in the Twenty-First Century Act" as amended by the "Twenty-First Century Department of Justice Appropriations Authorization Act" (hereinafter "AC21"), the AAO will address whether the portability provisions of AC21 are applicable, thus allowing [REDACTED] to be substituted for the petitioner in this matter. Because it is unclear to which AC21 portability provision in the Act counsel is referring, section 204(j) of the Act, 8 U.S.C. § 1154(j), or section 214(n) of the Act, 8 U.S.C. § 1184(n), the AAO will briefly discuss both.

First, the portability provision at section 204(j) of the Act provides the following:

Job Flexibility for Long Delayed Applicants for Adjustment of Status to Permanent Residence

A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

By its very terms and if certain conditions are met, section 204(j) of the Act generally permits a beneficiary of a valid, employment-based immigrant petition to change jobs if 180 days or more have passed since that beneficiary filed a Form I-485 application to adjust status to that of a lawful permanent resident. To be considered "valid," the employment-based immigrant petition must (1) have been approved and (2) have been filed on behalf of an alien who is entitled to the requested employment-based classification. *Matter of Al Wazzan*, 25 I&N 359, 367 (AAO 2010). Here, the I-140 petition, [REDACTED] was not approved and the beneficiary has not applied for adjustment of status.¹ Therefore, even if section 204(j) of the Act

¹ [REDACTED] claims in a letter to the AAO dated December 13, 2011, that "over 180 days have passed since [the beneficiary's] application for AOS [(adjustment of status)] was filed." However, it is noted that there is no evidence in the record that the beneficiary has applied for adjustment of status. Furthermore, a review of USCIS electronic records also failed to reveal any application for adjustment of status filed by the beneficiary.

It is also noted that a USCIS finding of willful, material misrepresentation may lead to criminal penalties. See 18 U.S.C. §§ 1001, 1546; see also *U.S. v. O'Connor*, 158 F.Supp.2d 697 (E.D. Va. 2001). Knowingly and willfully making materially false or fraudulent statements or using false writings or documents may result in a fine and imprisonment of not more than 5 years. 18 U.S.C. § 1001. Furthermore, "[w]hoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28,

applied in the context of a nonimmigrant I-129 H-1B petition under section 101(a)(15)(H)(i)(b) of the Act, which it does not, it would not confer to the beneficiary the ability to "port" to a new employer, i.e., [REDACTED]

Second, the portability provision at section 214(n) of the Act provides the following:

Increased Portability of H-1B Status

- (1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

- (2) A nonimmigrant alien described in this paragraph is a nonimmigrant alien—
 - (A) who has been lawfully admitted into the United States;

 - (B) on whose behalf an employer has filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized by the Attorney General; and

 - (C) who, subsequent to such lawful admission, has not been employed without authorization in the United States before the filing of such petition.

By its very terms and provided certain conditions are met, section 214(n) of the Act permits a qualified beneficiary of an H-1B petition for new employment to begin working for a new employer the date the petition is filed continuing until the petition is denied or until such approved, employment authorization shall cease. This provision of the Act explicitly requires the new prospective employer to file its own petition for new employment. Thus, despite the fact that [REDACTED] filed a Form I-129 [REDACTED] on behalf of the petitioner on April 18,

United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact . . . [s]hall be fined under this title or imprisoned not more than . . . 10 years" It will be assumed for purposes of this decision, however, that [REDACTED] simply misunderstood what this term meant or implied, i.e., the actual filing of a Form I-485 application with USCIS, and did not knowingly and willfully intend to misrepresent what he claims is a material fact in this proceeding.

2011, which was subsequently approved on February 16, 2012, it does not provide for the new employer to substitute itself for or to take the place of a petitioner of an H-1B petition that was previously filed by a different person or entity. In other words and contrary to counsel's apparent argument, it does not allow for retroactive "porting" to a new employer for a petition previously filed by another employer.

Thus, for the reasons stated above, the AAO finds that (1) [REDACTED] is not the petitioner and is thereby not an affected party in this matter, and (2) neither it nor its counsel is authorized to file the instant motion to reconsider. 8 C.F.R. § 103.3(a)(1)(iii)(B); *see also* 8 C.F.R. § 103.5(a)(1)(i). Again, the regulation at 8 C.F.R. § 103.5(a)(4) states that a motion which does not meet applicable requirements must be dismissed. The motion must therefore be dismissed.

In addition, with respect to counsel's statement that [REDACTED] is the "H-1B petitioner and appellant in this matter, together with [the beneficiary]," USCIS regulations specifically prohibit a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing a motion to reconsider. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B) ("[f]or purposes of this section and §§ 103.4 and 103.5 of this part, affected party . . . means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition."). As the beneficiary has no legal standing in this proceeding, counsel acting on behalf of the beneficiary was not authorized to file the motion to reconsider, and it must therefore be dismissed for this reason as well. 8 C.F.R. §§ 103.3(a)(1)(iii)(B) and 103.5(a)(4).

Moreover, the motion shall also be dismissed for failing to meet another applicable filing requirement. The regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding." In this matter, the motion does not contain the statement required by 8 C.F.R. § 103.5(a)(1)(iii)(C). Therefore, because the instant motion did not meet the applicable filing requirement listed at 8 C.F.R. § 103.5(a)(1)(iii)(C), it must also be dismissed for this reason.² *See* 8 C.F.R. § 103.5(a)(4).

² It is noted that [REDACTED] and the beneficiary filed suit in the United States District Court for the Southern District of Florida four months after the filing of the instant motion to reconsider seeking in part a reversal of the AAO's decision to dismiss the appeal of USCIS's denial of the Form I-129 filed by [REDACTED]. However, as discussed herein, [REDACTED] and the beneficiary are not affected parties in this matter; therefore, they lack standing to bring this matter before the court. *See Kale v. U.S.I.N.S.*, 37 Fed.Appx. 90, at 2 (5th Cir. 2002) ("Under the applicable regulations, standing to move to reopen or reconsider is given only to an 'affected party,' which is defined as 'the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.'" (quoting 8 C.F.R. § 103.3(a)(1)(iii)(B))). Thus, it is unclear what, if any, "clear right to relief" they have as they are not parties recognized to have standing in this matter. *Id.*

It is also noted that in August 2012, the AAO learned during a telephone conference with a representative of [REDACTED] that the beneficiary ceased his employment with [REDACTED] approximately two years ago and that it is no longer interested in pursuing this matter. It is also apparent that the beneficiary in this matter no longer has any intent to work for the petitioner, [REDACTED] as he has moved on and accepted

Finally, 8 C.F.R. § 103.5(a)(3) states, in pertinent part, the following with respect to motions to reconsider:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record evidence shows that the instant petition extension was filed one year after the expiration of the petition that ██████ sought to extend. Title 8 C.F.R. § 214.2(h)(14) clearly states that a "request for a petition extension may be filed only if the validity of the original petition has not expired." Despite ██████ claims to the contrary, the 2009 H-1B petition extension is irrelevant to the instant petition in that this petition (██████) sought to extend the 2008 H-1B petition ██████, as evidenced by Part 2, number 4 of the Form I-129, and not the 2009 H-1B petition. ██████ and its counsel have therefore failed to establish that the AAO's prior decision was incorrect based on the evidence of record at the time of that decision. Thus, even if the motion had been properly filed by an affected party, the motion would have to be dismissed for this additional reason.

ORDER: The motion is dismissed.

employment with a new employer, ██████. Thus, the beneficiary's departure from ██████ rendered the controversy over the petition "no longer live." *See Wong v. Napolitano*, 654 F.Supp.2d 1184, 1192 (D. Or. 2009) (holding that "a live controversy requirement is provided by a present intent by both parties to enter into an employment relationship which is being thwarted by USCIS or some other party.").

Moreover, even if the court were to find that ██████ has standing to challenge the denial of ██████ petition in federal court and even if it were to rule in Bongos's favor, the court's determination would not result in the authority for Bongos to employ the beneficiary as the instant petition's approval would be specific to ██████ and its successor-in-interest, if any, and only grant that entity authorization to employ the beneficiary. *See* 8 C.F.R. § 274a.12(b)(9) (stating that an alien in H-1B status "may be employed only by the petitioner through whom status was obtained"). Thus, ██████ must file its own petition to employ the beneficiary. To permit otherwise would run counter to the entire statutory scheme of the Act which is designed in part to ensure temporary nonimmigrants may not be admitted to the United States and work without proper authorization obtained by the entity that seeks to employ those individuals.