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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**



B2

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. Although the director granted a subsequent motion to reconsider, he affirmed his initial decision to deny the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

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 June 25, 2009, 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 motion to reconsider filed on behalf of the petitioner by the petitioner's counsel at that time, [REDACTED] was granted, but the petition was again denied on May 2, 2012, on the ground that the LCA was not certified prior to the filing of the petition.

On May 30, 2012, [REDACTED] filed an appeal of the denial of the petition on behalf of the beneficiary's current employer, [REDACTED] (hereinafter [REDACTED] with the Federal Employer Identification Number [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 Form I-290 states the following with respect to the beneficiary's employment:

[The beneficiary's] former 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] [REDACTED], located in Hollywood, Florida. We therefore 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.

¹ The AAO notes that no, new Form G-28 signed by the petitioner and [REDACTED] was submitted with the appeal. In accordance with the U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 292.4(a) as well as the instructions to the Form I-290B, a "new [Form G-28] must be filed with an appeal filed with the Administrative Appeals Office" and "must be properly completed and signed by the petitioner . . . to authorize representation in order for the appearance to be recognized by [USCIS]." This regulation applies to all appeals filed on or after March 4, 2010. See 75 Fed. Reg. 5225 (Feb. 2, 2010).

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.

USCIS regulations only entitle the "person or entity with legal standing" as an "affected party" or the person or entity's attorney or representative to file an appeal. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). A beneficiary of a petition is not an affected party and is not a recognized party in such proceedings. 8 C.F.R. §§ 103.2(a)(3) and 103.3(a)(1)(iii)(B). With the exception of when a parent or guardian signs on behalf of an applicant, the person or entity (or that entity's successor-in-interest) that signs the benefit request under penalty of perjury is considered to be the applicant or petitioner in immigration proceedings. *See* 8 C.F.R. § 103.2(a)(2). In this case, the only affected party is the petitioner, [REDACTED] (hereinafter [REDACTED] with [REDACTED] thus, only [REDACTED] its successor-in-interest, if any, or its current attorney or representative of record may file an appeal of the director's denial of its petition.

In this matter, 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 to appeal the denial of the director's decision in this matter.

Although the record contains two Forms G-28 signed by an authorized representative of [REDACTED] for the petition and the subsequent motion to reconsider, there is no evidence demonstrating that the petitioner authorized [REDACTED] to file the instant appeal.² As the beneficiary's new employer, [REDACTED] is not an affected party in the instant petition for H-1B nonimmigrant classification seeking authorization for [REDACTED] to employ the beneficiary, [REDACTED] and its counsel, [REDACTED] are not authorized to file the appeal in this matter; therefore, the appeal was not properly filed and will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).³

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.

² The AAO notes that while the two Forms G-28 indicate that the signatory for the petitioner is [REDACTED] [REDACTED] signatures are so different in appearance that they appear to have been penned by two different people. It therefore appears that the motion to reconsider may not have been properly filed on behalf of the petitioner either.

³ Moreover, even if the appeal had been properly filed by [REDACTED] and its counsel and even if USCIS had erred in denying the petition, it is unclear what relief such a conclusion would provide to [REDACTED]. Specifically, the approval of the instant petition would not result in the authority for [REDACTED] to employ the beneficiary as the instant petition's approval would be specific to [REDACTED] 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, [REDACTED] 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.

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, A77 046 062, SRC 08 216 52109, was not approved and the beneficiary has not applied for adjustment of status.⁴ Therefore, even if section 204(j) of the Act 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.

⁴ [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, 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.

- (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, 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 appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1). The appeal must therefore be rejected.

Lastly, 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 an appeal. See 8 C.F.R. § 103.3(a)(1)(iii)(B) ("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 appeal, and it must therefore be rejected as improperly filed for this reason as well. 8 C.F.R. § 103.3(a)(1)(iii)(B); 8 C.F.R. § 103.3(a)(2)(v)(A)(1); 8 C.F.R. § 103.3(a)(2)(v)(A)(2)(i).

ORDER: The appeal is rejected.