



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

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

MATTER OF UCE-C-

DATE: JAN. 26, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, an education business, seeks to employ the Beneficiary as an instructional coordinator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the Petitioner had not made a valid offer of full-time employment. The Director also invalidated the labor certification upon concluding that the Petitioner had willfully misrepresented a material fact. The Petitioner appealed the matter to us. We held that the record did not establish that the Petitioner willfully misrepresented a material fact. Accordingly, we withdrew the Director's decision in this regard and reinstated the labor certification. We also concluded that the Petitioner had established that the position offered constituted a *bona fide* job offer. However, we held: (1) that the Petitioner had not provided sufficient evidence regarding the transfer of ownership of the petitioning company, and (2) that the Petitioner had not established its ability to pay the proffered wage.

The matter is now before us on motion to reopen. On motion, the Petitioner asserts that it has previously established its ability to pay the proffered wage and submits additional information regarding its transfer of ownership.

Upon review, we will deny the motion to reopen.

**I. LAW**

**A. Requirements for Motions by a Petitioner**

The provision at 8 C.F.R. § 103.5(a)(1)(i) limits a United States and Citizenship Immigration Services officer's authority to reopen the proceeding or reconsider the decision to instances where "proper cause" has been shown for such action.

(b)(6)

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Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B, Notice of Appeal or Motion, that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), "Processing motions in proceedings before the Service," "[a] motion that does not meet applicable requirements shall be dismissed."

#### B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), "Requirements for motion to reopen," states: "A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence."

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: "**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence that establish eligibility at the time the underlying petition or application was filed."<sup>1</sup>

Further, the new facts must possess such significance that, "if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case." *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); see also *Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

## II. ANALYSIS

The primary concern in this proceeding is to determine whether the Petitioner's submissions on motion are sufficient to overcome our prior decision dismissing the Petitioner's appeal. On motion, the Petitioner resubmitted its 2010 through 2014 federal tax returns that were previously analyzed in our decision dismissing the appeal. The Petitioner also submitted a business purchase agreement dated January 20, 2015, and states that this demonstrates a successor-in-interest relationship through the transfer of ownership from the Petitioner to [REDACTED]

#### A. Ability to Pay

First, we conclude that the Petitioner has not established its ability to pay the proffered wage. In our prior decision, we analyzed the wages paid to the Beneficiary, the Petitioner's net income, and the

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

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totality of circumstances, and found that the record did not establish that the Petitioner had the ability to pay the Beneficiary the proffered wage in any year from the priority date onward.<sup>2</sup> The Petitioner has not submitted any additional evidence that would establish that it had the ability to pay the Beneficiary the proffered wage from the priority date of December 27, 2010 onward.

We also note that the Petitioner's owners stated during a site visit that it could no longer pay the Beneficiary in 2013 but that it would be able to pay the proffered wage once the Beneficiary has obtained lawful permanent resident status. The Petitioner has not provided any evidence to substantiate what would have changed within its financial outlook to demonstrate the ability to pay the Beneficiary's proffered wage at that time. It is fundamental that the Petitioner show its ability to pay the proffered wage from the time of priority date continuing to the present time. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

As the Petitioner did not submit any new facts supported by affidavits or documentary evidence in reference to its ability to pay the Beneficiary the proffered wage from the priority date onward with its motion to reopen, the motion must be denied.

#### B. Successor-in-Interest

Second, the motion to reopen must also be denied in regards to the successor-in-interest issue. Although the Petitioner submitted new evidence pertaining to its transfer of ownership, the evidence submitted is not sufficient to overcome our prior decision.

On motion, the Petitioner submitted a copy of a business purchase agreement between the Petitioner and [REDACTED] which it claims is sufficient to establish a successor-in-interest in this case. Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) 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 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, including the ability to pay the proffered wage.

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<sup>2</sup> Although the Petitioner asserts on motion that its tax returns show "net assets" in excess of the proffered wage for the years in question, the tax returns do not identify the "net *current* assets." As we noted in our appeal decision, the Petitioner may rely on the net *current* assets figure in order to establish its ability to pay the proffered wage. If the Petitioner wishes to rely on its net current assets, which are not reflected on its tax returns, then it must submit audited balance sheets to identify the net current assets available for each year in question.

(b)(6)

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Here, the documentation submitted on motion does not document and explain the transfer of ownership of the Petitioner, such that we can consider the business under [REDACTED] to be a successor-in-interest to the Petitioner. Rather, the documentation submitted on motion raises additional questions about the claimed transfer of ownership. Specifically, we note that according to the evidence submitted, the Petitioner was organized as a public benefit corporation under the laws of the state of California. Under federal tax law, the assets of a public benefit corporation must be dedicated to charitable purposes and cannot be distributed for private gain. *See* IRS, Inurement/Private Benefit – Charitable Organizations, <https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations> (last accessed on January 23, 2017).<sup>3</sup> If the Petitioner sold its assets to [REDACTED] as an individual, the Petitioner has not provided evidence to establish that the sale was completed in accordance with federal tax law and that its assets have not been distributed to an individual person for private gain.

It is also not clear from the documentation provided that ownership of the Petitioner itself was in fact transferred to [REDACTED]. The evidence submitted on motion indicates that the Petitioner sold its assets to [REDACTED] but the purchase agreement did not affect the voting membership of the Petitioner or its officers or directors. As such, it appears that the Petitioner survived the asset sale. Based on the evidence in the record, we cannot ascertain whether the proffered job opportunity remains with the Petitioner or with [REDACTED]. If [REDACTED] as an individual, is claiming to be the successor-in-interest, she must demonstrate that the same job opportunity exists as was originally offered in the labor certification. Presently, the submitted evidence is not sufficient to demonstrate that the same job opportunity continues to exist. The Petitioner has also not submitted evidence to demonstrate that the claimed successor has the ability to pay the proffered wage. For these reasons, we cannot conclude that a valid successor-in-interest relationship exists.

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<sup>3</sup> California law further requires advance notice to the Attorney General of California of the sale of its assets. The website for the Department of Justice for the State of California contains a link to its Guide for Charities in California and states the following regarding the sale of a public benefit non-profit corporation:

California law requires that certain transactions by public benefit corporations require either consent by or notice to the Attorney General. These transactions are treated with special attention because they significantly change the corporation. These transactions include dissolutions, mergers, sales of substantially all assets, and amendment of articles to change the form of the corporation (e.g., from a public benefit to a business (i.e., for-profit) corporation). See Chapter 10 for more detail on statutory transactions.

*See* California Attorney General's Guide for Charities, [https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide\\_for\\_charities.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf)? (last accessed January 23, 2017). "Except for an agreement or transaction subject to Section 5914 or 5920, a corporation shall give written notice to the Attorney General 20 days before it sells, leases, conveys, exchanges, transfers or otherwise disposes of all or substantially all of its assets unless the transaction is in the usual and regular course of its activities or unless the Attorney General has given the corporation a written waiver of this section as to the proposed transaction." Cal. Corp. Code § 5913.

In any further filings in this matter or any matter based upon the underlying labor certification, the Petitioner should submit additional information concerning the claimed transfer of ownership. Such information should include a copy of the Petitioner's Articles of Incorporation and Bylaws; the IRS determination letter for its 501(c)(3) status; a list of the corporation's members, officers, and directors in 2014, 2015, and 2016; and evidence demonstrating that any sale or transaction complies with federal law. The Petitioner must also demonstrate that the same job opportunity continues to exist. Finally, the Petitioner must provide evidence of its ability to pay the proffered wage prior to the claimed transfer of ownership and the purported successor's ability to pay the proffered wage after the transfer.

As the Petitioner did not submit any new facts supported by affidavits or documentary evidence to overcome our prior decision regarding the successor-in-interest issue, the motion to reopen must be denied.

### III. CONCLUSION

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 motion to reopen is denied.

Cite as *Matter of UCE-C-*, ID# 47197 (AAO Jan. 26, 2017)