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U.S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

MAY 01 2009

FILE: LIN 05 095 51772 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be granted. The prior decision of the AAO will be affirmed. The petition will be denied.

The petitioner - no longer in business – was a construction business that sought to extend its authorization to employ the beneficiary as an assistant project superintendent. Before it went out of business, the petitioner filed an extension petition for continuation of the H-1B classification of the beneficiary 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). The director denied the petition because the petitioner is no longer in operation and thus is no longer the employer on the petition.

On appeal, former counsel for the petitioner alleged that the petitioner's successor-in-interest affected a formal name change during the pending petition and updated U.S. Citizenship and Immigration (USCIS) with the new name and address of the petitioner. Consequently, counsel asserted, the record was complete and accurately reflected the new name of the petitioner, and thus should not be considered a "new" employer. The AAO dismissed the appeal, finding that despite counsel's assertions, a new petition was required to receive the benefit sought.

The matter is now once again before the AAO on a motion to reopen and/or reconsider. Newly-retained counsel for the petitioner claims that the AAO did not fully analyze the case as a successor-in-interest case in which the new entity was formed to continue the same work under the same contracts of the initial petitioner. Counsel submits a brief and additional evidence in support of this position. The AAO finds that counsel's submissions meet the requirements for a motion to reconsider, and therefore grants the motion.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the petitioner's appeal to the AAO; (6) the AAO's denial letter; and (7) the petitioner's motion to reopen/reconsider and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The facts of the case are as follows. The beneficiary began working for Reliance, Inc. as an assistant project superintendent for its highway construction business pursuant to the approval of an earlier H-1B petition filed by Reliance, Inc. to employ the beneficiary in that position. In order to continue its employment of the beneficiary as an H-1B temporary worker, Reliance, Inc. filed the Form I-129 and associated documentation that is the subject of this appeal. These documents constituted a petition to extend the beneficiary's H-1B classification and extend his stay. Reliance, Inc. filed this petition on February 7, 2005, while still in business. Shortly after filing the extension petition, Reliance entered into a receivership, ceased its operations, and terminated all of its employees, including the beneficiary.

Shortly after Reliance, Inc. went out of business, its former management team formed Relyco, Inc., which was established through "negotiations with Reliance and the bankruptcy receiver to purchase the business and

assets of Reliance." According to former counsel, the beneficiary commenced employment with Relyco in May 2005, as soon as Relyco was able to start up the former operations of Reliance.

The director found that Reliance, Inc., the business entity that filed the petition, ceased operations on April 5, 2005, after which time its manager and employees formed a new company. The director further determined that the new business, Relyco, Inc., must file a new petition, since Relyco, Inc. was the employer as defined in the regulations. The director concluded that since Reliance Inc. was no longer in operation and no longer the employer, the petition could not be approved.

On appeal to the AAO, former counsel for the petitioner stated that based on a telephone conversation with and correspondence from USCIS, the petitioner was under the impression that its name had been properly amended to "Relyco, Inc." Counsel further claimed that Relyco, Inc. was not required to file a new petition or labor condition application "as it was assuming [the petitioner's] obligations and undertakings arising from and under the attestations made in the LCA filed by [the petitioner] and there was no material change in [the beneficiary's] employment."

The AAO upheld the director's decision for a number of reasons. First, the AAO found that since Reliance, Inc., the entity that filed the petition, went out of business and thus ceased its employer status, Relyco, Inc. was required to file a new petition. The AAO noted that at the time the present petition was filed, Relyco, Inc. did not exist. Additionally, the AAO noted several issues not raised by the director in his denial. First, the fact that Reliance, Inc., the entity that filed the petition, went out of business, automatically revoked the approval of the petition that it sought to extend by filing the present petition, and that revocation was not subject to appeal. *See* 8 C.F.R. §§ 214.2(h)(11)(ii) and (12)(ii). The AAO concluded, therefore, that the extension sought by Relyco, Inc. was not possible, since the approval of the beneficiary's H-1B classification ceased to exist, by automatic revocation, on the date that Reliance, Inc. went out of business. Finally, the AAO found that even if Reliance, Inc. had not gone out of business but merely restructured itself into Relyco, Inc., a new petition filed by Relyco, Inc. would have been required by the DOL regulation at 20 C.F.R. § 655.730(e)(2).

On motion, counsel for the petitioner contends that Relyco, Inc. was clearly the successor-in-interest to Reliance, Inc., and that the transition of the petitioner to Relyco, Inc. was underway as early as February 2005. In support of the motion, counsel submits documentation demonstrating that Relyco, Inc. has the same employees, leases the same premises, and undertakes all the same projects as Reliance, Inc., thereby satisfying the requirements of a successor-in-interest as prescribed by law. In conclusion, counsel contends that Relyco is the petitioner's legal successor-in-interest and was not required to file a new petition.

According to the regulation at 8 C.F.R. § 214.2(h)(2)(i)(A), the filer of an H-1B petition must be "[a] United States employer" seeking to classify an alien as an H-1B temporary employee.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii), defines "United States employer" as follows:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(1) Engages a person to work within the United States;

(2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(3) Has an Internal Revenue Service Tax identification number.

The regulation at 8 C.F.R. § 214.2(h)(11)(ii), *Automatic revocation*, states:

The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition.

The regulation at 8 C.F.R. § 214.2(h)(12)(ii), states that automatic revocations are not subject to appeal.

An employer must file a new petition in order to hire as an H-1B temporary worker an alien who has been working in that classification for a different employer. With regard to change of employers, the regulation at 8 C.F.R. § 214.2(h)(2)(i)(D) states:

Change of employers. If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I-129 requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay shall conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H-1C nonimmigrant alien may not change employers.

The regulation at 8 C.F.R. § 214.2(h)(2)(i)(E) requires a new petition and labor condition application whenever there is any material change in the terms and conditions of employment. It states:

Amended or new petition. The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

The AAO notes the following Department of Labor (DOL) regulatory provisions related to H-1B employment.

The regulation at 20 C.F.R. § 655.715 includes the following definitions:

Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, ``no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B or H-1B1 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including an H-1B1 nonimmigrant), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

The following DOL provisions, at 20 C.F.R. § 655.730(e), govern changes in an employer's corporate structure or identity in the H-1B context:

Change in employer's corporate structure or identity. (1) Where an employer corporation changes its corporate structure as the result of an acquisition, merger, ``spin-off," or other such action, the new employing entity is not required to file new LCAs and H-1B petitions with respect to the H-1B nonimmigrants transferred to the employ of the new employing entity (regardless of whether there is a change in the Federal Employer Identification Number (FEIN)), provided that the new employing entity maintains in its records a list of the H-1B nonimmigrants transferred to the employ of the new employing entity, and maintains in the public access file(s) (see Sec. 655.760) a document containing all of the following:

(i) Each affected LCA number and its date of certification;
(ii) A description of the new employing entity's actual wage system applicable to H-1B nonimmigrant(s) who become employees of the new employing entity;
(iii) The Federal Employer Identification Number (FEIN) of the new employing entity (whether or not different from that of the predecessor entity); and
(iv) A sworn statement by an authorized representative of the new employing entity expressly acknowledging such entity's assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA filed by the predecessor entity. Unless such statement is executed and made available in accordance with this paragraph, the new employing entity shall not employ any of the predecessor entity's H-1B nonimmigrants without filing

new LCAs and petitions for such nonimmigrants. The new employing entity's statement shall include such entity's explicit agreement to:

(A) Abide by the DOL's H-1B regulations applicable to the LCAs;

(B) Maintain a copy of the statement in the public access file (see Sec. 655.760); and

(C) Make the document available to any member of the public or the Department upon request.

(2) Notwithstanding the provisions of paragraph (e)(1) of this section, the new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.

(3) A change in an employer's H-1B-dependency status which results from the change in the corporate structure has no effect on the employer's obligations with respect to its current H-1B nonimmigrant employees. However, the new employing entity shall comply with Sec. 655.736 concerning H-1B-dependency and/or willful-violator status and Sec. 655.737 concerning exempt H-1B nonimmigrants, in the event that such entity seeks to hire new H-1B nonimmigrant(s) or to extend the H-1B status of existing H-1B nonimmigrants. (See Sec. 655.736(d)(6).)

Furthermore, USCIS regulations affirmatively require a petitioner to establish H-1B eligibility as of the date the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

In this matter, counsel asserts in his brief that "business transactions are not neat and clean" and contends that an H-1B employer "may very well be purchased by another entity" during the petition's validity. Consequently, counsel's main argument is that an amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms of the employment remain the same but for the identity of the petitioner. INA § 214(c)(10), 8 U.S.C. § 1184(c)(10).

Upon review, the director was correct in determining that the fact that the entity that filed the petition went out of business and thus ceased its employer status required that Relyco, Inc. file a new petition. As stated above, the prospective employer must file a new H-1B petition whenever it seeks to newly employ an alien who attained H-1B classification by a petition filed by another employer. *See* 8 C.F.R. §§ 214.2(h)(2)(i)(D) and (E), quoted above. Moreover, a "new employing entity must file new LCA(s) and H-1B petition(s) when it hires any new H-1B nonimmigrant(s) ***or seeks extension(s) of H-1B status for existing H-1B nonimmigrant(s). In other words, the new employing entity may not utilize the predecessor entity's LCA(s) to support the hiring or extension of any H-1B nonimmigrant after the change in corporate structure.***" 20 C.F.R. § 655.730(e)(2). (Emphasis added). At the time the present petition was filed, Relyco, Inc. did not

exist. Although not related in the director's decision, the fact that the entity that filed the present petition - Reliance, Inc. - went out of business automatically revoked the approval of the petition that Reliance, Inc. sought to extend by filing the present petition; and that revocation is not subject to appeal. *See* 8 C.F.R. §§ 214.2(h)(11)(ii) and (12)(ii), quoted above. Therefore, the extension sought by Relyco, Inc. is not possible: the approval of the beneficiary's H-1B classification ceased to exist, by automatic revocation, on the date that Reliance, Inc. went out of business; as such, there is no classification to extend. Further, though also not mentioned in the director's decision, even if Reliance, Inc. had not gone out of business but merely restructured itself into Relyco, Inc., a new petition filed by Relyco, Inc. would have been required by the DOL regulation at 20 C.F.R. § 655.730(e)(2), quoted above. The regulations cited herein clearly requires that a new corporate entity arising from the restructuring of a corporation that employed H-1B beneficiaries must file a new LCA and a new petition in order to extend the status of any H-1B employees of the corporation from which the new entity arose. For this reason, the petition may not be approved.

Beyond the decision of the director, the AAO will further review counsel's claims that Relyco, Inc. is the petitioner's successor-in-interest. Whether Relyco, Inc. is truly the petitioner's successor-in-interest is not fundamental to the outcome of this appeal; however, the AAO, for clarification purposes, will consider counsel's assertions and discuss the issue.

Counsel correctly notes that as prescribed by law, a successor-in-interest must succeed to the interests and obligations of the original petitioning employer. Generally, a successor-in-interest must assume the interests and obligations, as well as the assets and liabilities, of the original petitioner, and continue to operate as the same type of business as the petitioning employer.

In this matter, the beneficiary's original employer, Reliance, Inc., ceased operating in 2005. The record does not establish that Reliance, Inc. ceased to exist because of a merger, acquisition, division, or change in corporate form or name, which resulted in Reliance, Inc. becoming a part of Relyco, Inc., a new entity. To the contrary, it appears that Relyco, Inc. was formed as a new business entity and that it simply acquired Reliance, Inc.'s assets after its formation. Relyco, Inc. did not acquire Reliance, Inc.'s stock or, more importantly, corporately absorb Reliance, Inc. or its liabilities. Instead, it appears that Reliance, Inc. was abandoned to its creditors in 2005. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The mere fact that another entity buys the assets of the beneficiary's original employer after its demise does not establish that this buyer has assumed the corporate identity of this original employer. Rather, it must be established that the original employer is still in existence at the time the nonimmigrant petition is filed, either in an identical corporate form or in some other form by way of merger, acquisition, division, or change of name or form. Accordingly, Relyco, Inc. has failed to establish that it is same employer as Reliance, Inc., and therefore will not be considered its successor-in-interest. Therefore, the instant petition could still not have been approved even if the prior petition had not been automatically revoked due to the petitioner's going out of business.

Regardless, the AAO reaffirms its findings in its September 26, 2007 decision. Specifically, the AAO correctly concluded that since Reliance, Inc. went out of business, the approval of the petition that Reliance, Inc. sought to extend by filing the present petition was automatically revoked as of that date, and that revocation is not subject to appeal. *See* 8 C.F.R. §§ 214.2(h)(11)(ii) and (12)(ii), quoted above. Therefore, since the approval of the beneficiary's H-1B classification ceased to exist, by automatic revocation, on the date that Reliance, Inc. went out of business, there was no classification to extend.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The prior decision of the AAO is affirmed. The petition is denied.