U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

File: WAC 02 263 54315 Office: CALIFORNIA SERVICE CENTER Date: JUN 2 4 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a managed care provider. It seeks to employ the beneficiary permanently in the United States as a senior analyst/programmer. A Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor is required by statute. According to 8 C.F.R. § 204.5(g), photocopies of this document are not acceptable. The petitioner, however, submitted only a photocopy of the Form ETA 750. Further, the employer named on the copy of the Form ETA 750 labor certification is not the petitioner. The director determined that the petitioner had not established that it is the successor-in-interest to the employer named on the labor petition and denied the petition accordingly.

On appeal, counsel submits a statement. While counsel indicated that he would submit a brief and/or additional evidence within 30 days, as of this date, more than 28 months later, this office has received nothing further. Thus, the appeal will be adjudicated on the evidence of record.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The Department of Labor does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/petitioner. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The employer named on the approved Form ETA 750 in this case is Whittman-Hart, Inc. The petitioner on the Form I-140 petition is Managed Health Care Network, Inc. With the petition, the petitioner submitted a letter, dated August 16, 2002, stating that ". . . [the petitioner] succeeds to the interests and obligations of Whittman-Hart, the original petitioning employer, and the terms and conditions of [the beneficiary's] employment remain the same as described in the labor certification, except for the identity of the petitioner." The petitioner submitted no evidence, however, of its assertion that the petitioner succeeded to the interests and obligations of Whittman-Hart. The petitioner did not describe or provide any evidence of the transaction pursuant to which the petitioner allegedly succeeded to Whittman-Hart's interests and obligations. Unsupported assertions are insufficient to sustain the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner also cited *International Contractors, Inc. & Technical Programming Services, Inc.*, 89 INA 278 (BALCA, June 13, 1990) for the proposition that a change in employers does not necessitate a reapplication for certification where the alien is working in the exact same position, performing the same duties, and in the same area of intended employment for the same salary or wage.

Because the substituted petitioner did not establish that it is the successor-in-interest of its predecessor, the director, on December 4, 2002, issued a Notice of Intent to Deny. That notice stated that, in order to avoid denial

of the petition, the substituted petitioner must demonstrate that it is the successor-in-interest of its predecessor within the meaning of *Matter of Dial Repair Shop*, 19 I&N Dec. 481.

In response, counsel submitted a letter, dated January 2, 2003. In that letter, counsel states that Citizenship and Immigration Services (CIS) is obliged to follow the precedent of *International Contractors, Inc. & Technical Programming Services, Inc.*, 89 INA 278.

On January 28, 2003, the director denied the petition, finding that the petitioner had not demonstrated that it is the successor-in-interest of Whittman-Hart.

On appeal, counsel states:

> "A change of employer does not invalidate a labor certification so long as the job opportunity and area of intended employment remain the same. Where, as here, the alien is working in the same position, performing the same duties, and in the same area for the same salary, the existing labor certification remains valid as to a succeeding employer."

Counsel apparently continues to rely on the decision in *International Contractors, Inc.* Without expressing any opinion pertinent to the wisdom of the decision in *International Contractors*, this office notes that it is bound by the decisions of the Bureau of Immigration Appeals. 8 C.F.R. 1003.1(g). This office, therefore, is bound by the decision in *Matter of Dial Repair Shop*, 19 I&N Dec. 481. In that case, the substituted petitioner was operating the same type of business as its predecessor, at the same address,[1] and proposed to employ the beneficiary in the same position at the same pay. In that situation, the BIA ruled that the substituted petitioner must show that it is the successor-in-interest of its predecessor through the tests described above.

The substituted petitioner in this matter has not demonstrated that it is the original petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop*. 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 met that burden. The petition may not be approved.

Beyond the decision of the director, this office notes that the original employer proposed, on the Form ETA 750, to employ the beneficiary in Chicago, Cook County, Illinois, whereas the substituted petitioner proposes, on the Form I-140, to employ the beneficiary in San Rafael, Marin County, California.[2] The labor certification was not approved for employment in California and is invalid for that purpose. Further still, as stated above and contrary to the requirements of 8 C.F.R. §§ 204.5(l)(3)(i), 204.5(g), a copy of the labor certification, rather than the original, accompanied the petition. The petition might also have been denied on that ground.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), aff'd. 345 F.3d 683 (9th Cir.

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[1] In the instant case, the petitioner does not operate the same type of business as its predecessor, and does not propose to employ the beneficiary at the address shown on the Form ETA 750 labor certification as the address of the prospective employment.

[2] The substituted petitioner claims, in fact, that its predecessor, a computer consulting firm which is now defunct, employed the beneficiary at the substituted petitioner's San Rafael location, rather than at the Chicago location for which the Form ETA 750 labor certification was approved. This assertion, however, does not render the labor certification valid for employment in California.

2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

ORDER: The appeal is dismissed.