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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[redacted]

DATE: APR 05 2012 OFFICE: NEBRASKA SERVICE CENTER File: [redacted]

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:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a garment import company. It seeks to employ the beneficiary permanently in the United States as a resource manager[1] pursuant to sections 203(b)(3)(A)(i) and (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) and (ii). As required by statute, a Form ETA 750,[2] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the alien employment certification. Specifically, the director determined that the beneficiary did not have a bachelor's degree. On appeal, the AAO identified additional issues including whether the job offer was bona fide due to the petitioner's dissolution and whether the petitioner submitted evidence to demonstrate that the beneficiary has the requisite experience as of the priority date.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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.

On appeal, an issue arose as to whether the petitioning entity was in good standing and an active business capable of sponsoring a worker. 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

On May 17, 2011, the AAO sent a Notice of Derogatory Information noting that the petitioner was inactive, having been dissolved on July 28, 2010.[3] In response, [redacted] former president of the petitioner and current president of [redacted], submitted a letter stating that the petitioner

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[1] The Form I-140 lists the position as a wholesaler II.

[2] After March 28, 2005, the correct form to apply for alien employment certification is the Form ETA 9089.

[3] The AAO's second notice to the petitioner, dated October 11, 2011, was returned by the post office. As the petitioner's address is no longer valid, the AAO is addressing the decision to the petitioner in care of its attorney.

was dissolved and that [redacted] Inc. continued the petitioner's business. [redacted] stated that [redacted] Inc. was formed on November 8, 2010 and that his role as president of both entities and [redacted] Inc.'s desire to hire the beneficiary as a resource manager means that "there was no discontinuance of the business." He states that there was a new "business plan and re-organization under a new name and corporate identity" and that [redacted] Inc. sells "new products."

USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

The facts of the precedent decision, *Matter of Dial Auto*, are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to the successor-in-interest issue follows:

> Additionally, the representations made by the petitioner concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations*, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

In *Matter of Dial Auto*, the petitioner specifically represented that it had assumed all of the original employer's rights, duties, and obligations, but failed to submit requested evidence to establish that this claim was, in fact, true. The Commissioner stated that if the petitioner's claim was untrue, the INS could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason the Commissioner said: "if the claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved . . . ." *Id.* (emphasis added).

Accordingly, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.[4] *Id.* at 1569 (defining "successor"). When considering other business organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.[5]

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the

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[4] Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group includes "mergers," consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes "reorganizations" that occur when the new corporation is the reincarnation or reorganization of one previously existing. The fourth group includes transactions in which a corporation, although continuing to exist as a "shell" legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

[5] For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a bona fide successor-in-interest.

predecessor necessary to carry on the business.[6] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010).

Considering *Matter of Dial Auto* 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 beneficiary's 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.

Evidence of transfer of ownership must show that the successor not only purchased 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 Matter of Dial Auto*, 19 I&N Dec. at 482.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the petitioner has not established a valid successor relationship for immigration purposes. [redacted] Inc. did not describe or document a transfer of ownership of all or part of the petitioner's assets or liabilities. Instead, [redacted] Inc. was not formed until more than three months after the petitioning entity was dissolved. [redacted] does not claim in his letter that [redacted] Inc. purchased all or part of the petitioning entity's business and does not state that it is in the same line of work as the petitioner. In addition, although the job title is the same, [redacted] did not establish that the job offered to the beneficiary is the same as the one described on the Form ETA 750. As a result, [redacted] Inc. has not established that it is the successor-in-interest to the petitioner. As no successor-in-interest has been established and the petitioner was dissolved on July 28, 2010, the petition is moot and may not be approved.

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[6] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

In addition to the issue described above, the petitioner failed to demonstrate that the beneficiary had the education and experience required by the terms of the labor certification. When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Here, the labor certification was filed on September 4, 2001. The terms of the labor certification require a bachelor's degree in any field and one year of experience as a resource manager or in the related occupation of cargo shipping operator, ocean or air. The labor certification also requires the special skill of being able to speak, understand, and read Chinese.

The beneficiary stated his education on Form ETA 750B as a bachelor's degree in English from Szechuan Institute of Foreign Languages, Chongqing, China and his experience with: [redacted] Services from September 2000 to April 2001 as an ocean shipping operator; [redacted], Inc. from May 1997 to September 2000 as an ocean and air shipping operator; and [redacted] Textiles, Co. from 1993 to 1997 as vice general manager.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
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> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

> (C) *Professionals.*[7] If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The petitioner submitted the following evidence to demonstrate that the beneficiary had the required education as of the priority date: a letter from [redacted] Foreign Language Institution dated March 6, 2008 stating that the beneficiary began his studies in the English Department in 1972 and graduated in August [redacted] a document identified as a diploma by the translator stating the same; and a transcript reflecting seven semesters of study. The petitioner also submitted a degree equivalency evaluation from [redacted] dated August 5, 2008. In his decision dated May 19, 2008, the director stated that [redacted] Foreign Language Institution did not appear on an approved list of educational institutions and further that, as the beneficiary studied only for three years, his education would not be the equivalent of a four-year, single-source U.S. bachelor's degree. On appeal, counsel stated that [redacted] Foreign Language Institution changed its name ten years ago and submits a copy of the [redacted] International Studies University website to support that assertion. The [redacted] International Studies University website, however, makes no mention of its name previously being the [redacted] Foreign Language Institution. Instead, it states:

> [redacted] International Studies University [redacted] was founded in [redacted] . It has gone through five stages in its development: the PLA's [redacted] Training Corps of Southwest University of Military and Political Sciences, the [redacted] Training Brigade of No. 2 Senior Infantry School of the PLA, the Russian Department of Southwest People's Revolutionary University, the Southwest Russian College, and [redacted] International Studies University."

http://en[redacted] (accessed January 17, 2012). The credential evaluation from [redacted] states personal knowledge that [redacted] International Studies University was previously known as [redacted] Foreign Language Institute. 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)). Although [redacted] International Studies University appears on the Chinese

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[7] The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

government's list of accredited institution. [redacted] Foreign Language Institute does not appear on that list and no evidence was submitted to demonstrate that [redacted] Foreign Language Institute and [redacted] International Studies University are the same institution. *See* http://www.moe.edu.cn/publicfiles/business/[redacted] (accessed January 17, 2012). As the Ministry of Education of the People's Republic of China ensures the foundation of norms and standards, the educational value of an unaccredited institution cannot be properly assessed.

Even if the beneficiary's degree was issued by an accredited institution, it has not been shown to be the equivalent of a U.S. bachelor's degree. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977). The transcripts submitted on appeal demonstrate that the beneficiary attended seven semesters, or three and one half years, of classes at [redacted] Foreign Language Institute.

The clearly stated requirements of the position on the certified labor certification application do not include alternatives to a four-year U.S. bachelor's degree. Instead, the Form ETA 750 states that four years of college education culminating in a bachelor's degree is required for the position. In determining whether the diploma from [redacted] Foreign Language Institute is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed January 17, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://aacraoedge.aacrao.org/register/ (accessed January 17, 2012).

EDGE provides a great deal of information about the educational system in China, including that Chinese higher education institutions issue two types of Graduation Certificates: a BENKE Graduation Certificate that is awarded following four years of education and a ZHUANKE Graduation Certificate that is awarded following two or three years of education. A BENKE Graduation Certificate is equivalent to a U.S. bachelor's degree, a ZHUANKE Graduation Certificate is equivalent to two or three years of university study in the United States. The document submitted regarding the beneficiary's education does not state whether it is a BENKE Graduation Certificate or ZHUANKE Graduation Certificate; however, the transcripts submitted on appeal indicate that the beneficiary did not attend a full four years of university study.

The petitioner urges us to consult the evaluation submitted from Jianming Shen to conclude that the beneficiary's degree is the equivalent to a U.S. baccalaureate. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

[redacted] evaluation states that the beneficiary's "diploma from [redacted] Foreign Language Institute is the U.S. euivalent [sic] of a Bachelor of Arts in language studies." [redacted] does not state any reasoning or basis for his conclusion and does not explain how three and one half years of education is equivalent to the four years of study required to earn a U.S. baccalaureate. In addition, Mr. [redacted] is a self-identified attorney who was born and educated in China, but has no stated credential evaluation training or background. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). This evaluation cannot outweigh the information provided by EDGE. The AAO concludes that the beneficiary did not have the required education as of the priority date.

In addition to the failure to submit sufficient evidence that the beneficiary has the required education as of the priority date, the information submitted to establish the beneficiary's previous employment experience casts doubt on whether he had the required experience as of the priority date.

As explained in the AAO's Second Notice of Derogatory Information and Request for Evidence (NDI) dated October 11, 2011, the employment experience listed on the Form ETA 750 conflicts with the experience listed on a previously filed Form I-140 and Form G-325A. The beneficiary represented on Form ETA 750B that he worked for [redacted] Services, Jamaica, NY as an ocean shipping operator from September 2000 to April 2001, for [redacted] Jamaica, New York, as an ocean and air shipping operator from May 1997 to September 2000, and for [redacted] Textiles in Jamaica as a vice general manager from 1993 to 1997. The beneficiary signed and attested to the veracity of this information on September 24, 2003. In support of the Form I-140 petition, the petitioner submitted a letter dated April 10, 2008 from [redacted] Group, stating that he worked with the beneficiary as "his employer and his colleague at [redacted] Inc." from 1997 to 2000. [redacted] also states:

> While in my employment, [redacted] was in charge of handling shipping arrangements. He was also responsible for our sales. In addition to his excellent work on the field, [redacted] also prepared and accounted for the paperwork needed in our line of work.

The beneficiary of the instant petition was also the beneficiary of an L-1A non-immigrant visa petition filed by [redacted] Inc., together with an extension application, valid from February 27, 1996 through November 30, 1998. [redacted] Inc. filed a Form I-140 multinational executive or manager petition on behalf of the beneficiary on November 28, 1997. The Form I-140 was approved on

February 18, 1998 and the approval was later revoked on January 11, 2001.[8] On the beneficiary's Form G-325A, filed January 14, 2000 in connection with his adjustment of status application, the beneficiary listed his present employment as Sanfer, Inc. and stated that he began working for that company in November 1995. He listed no additional employment for the past five years. [redacted] Inc. submitted a letter dated November 10, 2000 in response to the director's notice of intent to revoke, stating that the beneficiary continued to work for [redacted], Inc. with a statement of his weekly schedule. The same response contained a staff listing for Sanfer, Inc, showing the beneficiary as President of [redacted] as a Sales and Purchase Manager of [redacted] Inc. [redacted], Inc. also submitted quarterly tax returns for third and fourth quarter 1999 and first quarter 2000 signed by the beneficiary as President and showing [redacted] as an employee; a Form I-9 for [redacted] certified by the beneficiary as President of [redacted] Inc. on March 10, 1997; a 1999 Form W-2 stating that [redacted] nc. paid the beneficiary wages in that year; federal income tax returns for 1997, 1998 and 1999 signed by the beneficiary as President of [redacted] a letter dated November 21, 1997 signed by '[redacted] (the beneficiary's name transposed) in his capacity as President of [redacted] Inc., stating that the beneficiary served as general manager of [redacted] Ltd. From 1993-1995, and as President of [redacted] from February 1996 to the date of the letter; and purchase orders from 2000 signed by the beneficiary as President of [redacted]

In response to the AAO's NDI, counsel states that the beneficiary did not list his employment with [redacted] on the ETA 750 because he did not feel that his experience with that company was relevant to the position with the petitioner that was the subject of the labor certification. Nevertheless, the beneficiary represented that he was working for [redacted] on his Form G-325A and submitted evidence that he was working for [redacted] as of November 10, 2000 while on the Form ETA 750, he represented that he was working for [redacted] Services beginning in September 2000. In response to the NDI, counsel states that the beneficiary worked for both [redacted] [redacted] and [redacted] in 2000 and that such an arrangement was possible due to the geographic proximity of the two companies' offices. The petitioner submitted no documentation as to the extent of the work done for [redacted] Services so that we are unable to conclude that the beneficiary was employed by [redacted] Services, in what capacity he served, or how many hours he worked per week. "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No evidence was submitted to document any experience with [redacted] Services as of the priority date.

Similarly, counsel states in response to the AAO's NDI that the geographic proximity of [redacted] and [redacted] allowed the beneficiary to simultaneously be employed at both companies. In addition, counsel states that as the beneficiary was employed only part-time with [redacted] he found it unnecessary to list that employment on his Form G-325. As stated above, the evidence submitted states that the beneficiary was working in a full-time capacity for [redacted] from 1997 to

[8] The petition's approval was revoked because the beneficiary was not employed primarily in a managerial or executive capacity.

2000. No evidence was submitted to demonstrate that the beneficiary worked for [redacted] during this time or how, if he was working full-time for [redacted] as stated above, he was also able to take care of [redacted] sales and shipping as stated in [redacted] letter. Counsel explains that a reciprocal arrangement was in place between the beneficiary and [redacted] where each worked for the other's company in order to gain relevant experience.[9] The evidence outlined above demonstrates that both the beneficiary and [redacted] were employed by [redacted] and not [redacted] Again, "it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. at 591-592. As the letter from [redacted] does not state that the beneficiary worked in a part-time capacity, and no other evidence was submitted to document the extent of the beneficiary's work for [redacted], or to resolve the inconsistencies with respect to the overlapping employment, we are unable to rely upon that letter to demonstrate that the beneficiary had the required one year of experience as of the priority date.

Concerning the beneficiary's dates of employment with [redacted], counsel states in response to the AAO's NDI that a typo was made on the Form ETA 750 and that the true end date of the beneficiary's employment with that company was 1996. Counsel also states that the beneficiary may have "thought" that his work with that company was more than five year prior to when the G-325 was filed so listing it would be unnecessary. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner was advised in the AAO's NDI that it needed to provide objective, independent evidence of the beneficiary's previous employment which may include pay stubs, tax documents, financial statements or other evidence of payments made to the beneficiary by his previous employers during his periods of employment that precede the priority date. No such evidence was submitted in response. As a result, the petitioner has failed to demonstrate that the beneficiary had the required experience as of the priority date. The petition will be denied on this basis as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[9] The schedule showed that the beneficiary worked from 8:30 am to 5:30 pm Monday through Friday in his capacity as President of [redacted] The schedule also showed that [redacted] worked from 9 am to 5 pm Monday through Friday in his capacity as Sales and Purchase Manager of [redacted]