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

(b)(6)

DATE: MAR 2 9 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center (director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a communications and pre-paid phone card business. It seeks to employ the beneficiary permanently in the United States as a marketing manager. As required by statute, ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it is a successor-in-interest to the entity that filed the labor certification or that it had the ability to pay from the priority date in 2004 onward and denied the petition accordingly.

The record shows that the appeal is properly filed, 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. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As set forth in the director's denial, the single issue in this case is that the petitioner failed to establish that it is a successor-in-interest to the entity that filed the labor certification. The petitioner is a different entity from the employer listed on the labor certification. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*").

United States Citizenship and Immigration Service (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* 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 Immigration and Nationality Act (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 [redacted] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted] filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to [redacted] 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 [redacted] and itself are issues which have not been resolved. In order to determine whether the petitioner was a true successor to [redacted] counsel was

> instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] 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* [redacted] *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).

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.[1] *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.[2]

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[1] 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).

[2] 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.

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 predecessor necessary to carry on the business.[3] *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. *See Matter of Dial Auto*, 19 I&N Dec. at 482. 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. *Id.*

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.

In the instant case, [redacted] filed the ETA Form 750 labor certification on behalf of the beneficiary on August 24, 2004. The ETA 750 was certified on March 28, 2006. [redacted] filed an I-140 petition on behalf of the beneficiary on July 25, 2006. In response

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[3] 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).

to a request for evidence with this filing, informed the director that had been sold to and that was a successor-in-interest. This petition was denied by the director because he determined that the petitioner had failed to establish the ability to pay or that was a successor-in-interest to the petitioner.

On October 12, 2007, filed a petition for the beneficiary using the same labor certification application originally filed by , claiming to be the successor-in-interest. The director sent a request for evidence (RFE) requesting evidence to establish ability to pay. However, did not respond. Accordingly, the petition was denied for abandonment.

On April 20, 2009, filed an I-140 petition for the beneficiary using the same March 28, 2006 certified labor certification that was filed by Gamma. Texas state corporation records show that is only one name iteration of the company with the federal employer identification number (FEIN) The FEIN appears to have first belonged to which was changed to which subsequently became Because the three companies appear to share the same FEIN and to simply reflect a change in corporate organization, they will be considered to be the same entity for these proceedings. submitted the following documents in support of the petition:

- Transfer/Bill of Sale executed in Harris County, Texas on September 1, 2006, which states that transfers the The document is signed by but is not signed by a representative of the buyer,
- Certificate of Correction for from the Office of the Secretary of State of Texas, dated November 13, 2007. The certificate states that the Articles of Incorporation have been amended to change the name of the company to and add two members, The certificate also notes that the changes were adopted on January 1, 2002;
- "Election of Managing Member" which lists voting interest in the company as follows: is listed as the managing member. The document is signed by the three members and dated September 23, 2002;
- Franchise Tax Certification of Account Status from the Texas Comptroller of Public Accounts, dated November 1, 2007, stating that was in good standing through September 23, 2008;
- Franchise Tax Certification of Account Status from the Texas Comptroller of Public Accounts, dated November 1, 2007, stating that Inc. was in good standing through November 15, 2007;
- Operating Agreement of a limited liability corporation for signed by on September 23, 2002;
- Letter from owner of on letterhead dated November 23, 2008 stating that he intends to employ the beneficiary;

- Internal Revenue Service (IRS) Forms 1065 tax returns for for 2002 to 2005; and
- IRS Forms 1065 tax returns for for 2006 to 2007.

has asserted that it is the successor-in-interest to for these proceedings; however, has not provided documentary evidence to meet the standards discussed above to establish that it is indeed a petitioning successor.

On November 3, 2009, the director issued a notice of intent to deny the instant petition (NOID). In the NOID, the director specifically requested that submit evidence that it is a successor-in-interest to the labor certification petitioner. Such evidence could include but was not limited to mortgage closing statements, documentation of the transfer of real property and business licenses from predecessor to successor, a contract for sale or acquisition signed by both parties, or copies of financial instruments used to execute the transfer of ownership. The NOID also gave notice to the petitioner that the record contained information regarding two previously filed I-140 petitions that were filed on the beneficiary's behalf, by as detailed above. The director notified that the record contained information that contradicted the documents submitted with the instant Form I-140, specifically that had entered into an agreement with transfer ownership of on September 5, 2006. The director noted that owner of is also 20% owner of but that the record does not explain the relationship between the two entities. The director also informed that the transfer of ownership from within five days for the claimed transfer of raises doubt about the *bona fides* of the proffered job opportunity.

The director stated that the bills of sale transferring the created an inconsistent fact pattern. In summary, the record contains three bills of transfer/sale reflecting the following events:

- Transfer/Bill of Sale executed in Harris County, Texas on September 1, 2006, which states that transfers the to
- Transfer/Bill of Sale executed in Harris County, Texas on September 5, 2006, which states that transfers the to and
- Agreement of Transfer executed in Harris County, Texas on September 5, 2006, in which to of

The director noted that if sold its Houston office in its entirety to on September 1, 2006, it is unclear how that same property/entity transferred from four days later. The three bills of sale present in the record directly contradict one another, which raises doubt about the validity and veracity of each document. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered

in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). That [redacted] has also previously filed a Form I-140 petition claiming to be the successor-in-interest to [redacted] further highlights the inconsistencies in the record. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* In the NOID, the director also noted that Touch-Tel had not established that it had the on-going ability to pay the proffered wage to the beneficiary.

In response to the NOID, counsel for the petitioner submits an affidavit from the petitioner's owner, [redacted] dated December 1, 2009 stating that he "assumed the assets, debts, and liabilities of [redacted] affidavit is self-serving and does not provide independent, objective evidence of the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). 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)). The director denied the petition finding that it was filed without a valid labor certification and that the ability to pay had not been established.

On appeal, counsel resubmits its prior NOID response and asserts that the bill of sale and affidavit from [redacted] is sufficient to establish that [redacted] is the petitioning successor to [redacted] Counsel is incorrect. The bill of sale and affidavit are not sufficient to establish [redacted] standing in these proceedings. The requirements to establish a successor-in-interest were detailed in the director's NOID and discussed above. The evidence in the record does not establish that [redacted] qualifies as a successor-in-interest to [redacted] Neither counsel nor the petitioner has provided documentary objective evidence to establish [redacted] standing or to rebut and resolve the inconsistencies noted in the record. Therefore, the instant petition was filed without a valid labor certification and must be denied.

The petitioner has also not established that it had the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases,

additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The record establishes that had the ability to pay from 2006 onward. However, must also submit evidence that had the ability to pay the beneficiary the proffered wage from the priority date in 2004 until the claimed transfer of in 2006. In the NOID, the director specifically notified that the evidence in the record demonstrated that had the ability to pay the proffered wage in 2005 and 2006, but not in 2004. The director requested that submit evidence to establish that had the ability to pay in 2004. did not to respond to the director's request and did not submit any additional evidence of ability to pay on appeal. Therefore, has also failed to establish the continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.