(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: MAY 0 6 2013 OFFICE: TEXAS 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:

SELF-REPRESENTED

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 Director, Texas 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 construction company and seeks to employ the beneficiary permanently in the United States as a roofer applicator. On May 23, 2012, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the above-named beneficiary.[1] As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner failed to demonstrate that it is the successor-in-interest to the petitioner indicated on the labor certificate and denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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.

In this case, the labor certification was issued to . The Form I-140 petition in the instant case was filed by . The petitioner asserts that is the successor-in-interest to and was a successor-in-interest to and therefore, is the successor-in-interest to .

A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor. The successor bears the burden of proof to establish eligibility in all respects.

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[1] The record indicates that filed a Form I-140 petition on September 1, 2004, which was denied on July 28, 2005 for abandonment. Subsequently, on August 10, 2010, filed another Form I-140 petition on behalf of the beneficiary; however, on April 6, 2011, counsel withdrew the petition.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The re cord in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

U.S. Citizenship and Immigration Services (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. 1986), 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 482-83 (emphasis added).

The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, 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).

The Commissioner clearly considered the petitioner's claim that it had assumed all of the original employer's rights, duties, and obligations to be a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full

explanation as to the "manner by which the petitioner took over the business" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims. *Id.*

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. *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.

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.

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.

The record indicates that was incorporated on January 12, 1993; was incorporated on August 27, 2004; and was incorporated on July 1, 2008. the president of asserts that became the successor-in-interest to on January 1, 2007, and subsequently, became the successor-in-interest to on January 1, 2009. However, in a letter dated March 6, 2012, states that all assets, right and obligations of were transferred to s of January 1, 2008, which predates establishment on July 1, 2008. states that he owns 100 percent of shares and his wife, owns 100 percent of shares. The petitioner also submits a letter from its certified public accountant, dated May 3, 2011, stating that owns both and In his September 14, 2011 letter, states that s doing precisely the same work as and with the same clientele. The petitioner also submits various correspondences for collections; a list of litigations for a 2012 annual report reminder for from the state of New Jersey; and a 2011 annual report reminder for from the state of New Jersey.

The record indicates that have separate tax identification numbers and despite the purported successorship, all three companies continue to exist. However, evidence in the record is insufficient for the AAO to make a determination regarding the extent of and continuing operations. states that have not been dissolved because of pending law suits. All three companies have the same business address, which is also the residential address. The petitioner submits virtually identical undated statements from indicating exactly the same office supplies and furniture being transferred from to and from While letter does not indicate when the transfer from had occurred, letter states that these assets were transferred in January 2008, which was corrected with a pen to 2009.

The petitioner also submits two identical letters from two supply companies, both dated March 7, 2012, stating that has held accounts with them for three different companies over the years. The letters also state that are closed and have been transferred over to

The evidence in the record contains inconsistent information regarding when purportedly became the successor of It is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). The record fails to establish when each company took over the rights and obligations of its predecessor company and became the successor to carry on the business. It is also unclear whether each purported successor acquired a discrete unit of its predecessor or wholly took over the predecessor's essential rights and obligations. In the instant case, has not adequately detailed the nature of the transfer of rights, obligations, and ownership of the prior entities. The record fails to

demonstrate transfer of ownership from Rather, the record indicates that are wholly owned by and is wholly owned by Other than letters from stating transfer of certain office supplies and furniture, there is no evidence in the record that ever took over the ownership of and that took over the ownership of Although these companies do substantially the same business, evidence suggests that each company was incorporated to operate as an independent company from one another and that operate three different companies from their home. Moreover, because the business addresses are the same as residential address, the mortgage statement, dated May 13, 2011, addressed to does not establish a transfer of mortgage obligation from one business to the other. The current record fails to demonstrate that each company took over the essential rights and obligations of the other company and became the successor company to carry on the business of its predecessor.

Furthermore, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. In the present case, it is also unclear that will be the beneficiary's employer and is authorized to file the instant petition.

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the DOL regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). The petitioner would need to demonstrate the job offer is a *bona fide* job opportunity to U.S. workers despite the close financial relationship between the petitioning entity and the beneficiary's company. Additionally, the petitioner would need to demonstrate that it would employ the beneficiary directly, and not that the petitioner would continue to employ the beneficiary's business as an independent contractor. The record indicates that the beneficiary incorporated his own company, on December 30, 2005 and has been contracting his services to the petitioner as an independent contractor since 2006. The 2011 and 2010 Forms 1099-MISC, Miscellaneous Income, indicate that the beneficiary's company, $171,059 and $168,434 respectively for its services. The record also contains evidence that in 2009, paid

$146,883 and $124,318 in 2008. Therefore, the beneficiary has a direct financial relationship to the petitioner. According to the labor certification, the proffered wage the petitioner intends to pay the beneficiary is $20.32 per hour for 35 hours per week, which is $36,982 per year. Given the significant difference between the incomes the beneficiary's company earns as an independent contractor for the petitioner alone and the proffered wage, the job offer does not appear to be a realistic one. Furthermore, record does not indicate that employs any construction workers other than independent contractors. Therefore, the petitioner has failed to establish that its job offer is a *bona fide* job offer.

The petitioner must also establish that the original employer possessed the ability to pay the proffered wage from the priority date until the date the petitioner assumed the original employer's right and responsibilities. *Id* at 482. The petitioner submits unofficial copies of federal income tax returns for from 2001 to 2006; federal income tax returns for 2007 and 2008; the 2009 New Jersey Corporation Business Tax Return and the 2010 federal income tax return for Because the record does not establish the exact transfer of ownership dates from one corporation to the other, the AAO cannot determine the relevant years for which must show the ability to pay. The petitioner has failed to establish the ability to pay the proffered wage from the priority date onwards.

Therefore, the AAO concludes that has failed to establish a transfer of ownership from and from that its job offer is *bona fide*; and that each employer had the ability to pay the proffered wage as required. As the petitioner has not established that it is the successor-in-interest to the petition must be denied. The labor certification was issued to and not to the petitioner. Thus the petition is not accompanied by a valid labor certification. *See* 8 C.F.R. § 204.5(l)(3); *see also* 8 C.F.R. § 204.5(a)(2), which states, "A petition is considered properly filed if it is accompanied by any required individual labor certification." As the petition is not accompanied by a labor certification approved for use by the petitioner and since the petitioner is not the successor-in-interest to , the petitioner is not entitled to use the labor certification. For this reason, the petition must be denied.

Beyond the director's decision, the AAO notes several inconsistencies in the record regarding employees and their wages. 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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). According to the Form I-140 petition that filed on August 10, 2010, it employs 60 employees. president submitted a statement, dated March 15, 2011, indicating it employs only two employees. Furthermore, timesheet printed on September

[3] The AAO notes that many of these tax returns are copies of unsigned tax forms, so it is not clear that these were filed with the Internal Revenue Service.

9, 2010, reflects two employees, to whom it paid a total of $33,053 in wages year-to-date. However, 2010 corporate income tax return reflects only $12,703 in salaries and wages. As indicated above, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 582. The current record fails to explain or reconcile the inconsistencies between the number of employees that employed and the salaries it paid to its employees in 2010.

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.