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U.S. Citizenship and Immigration Services
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**U.S. Citizenship
and Immigration
Services**

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FILE: [REDACTED]
SRC-07-245-51293

Office: TEXAS SERVICE CENTER

Date: APR 22 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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, Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor (DOL) accompanied the petition. The director denied the petition because it was not accompanied by an appropriate labor certification and failed to meet statutory and regulatory criteria for the preference classification sought.

On appeal, counsel submits a Form G-28, Notice of Entry of Appearance as Attorney or Representative (Form G-28), from the beneficiary and the Form I-290B indicates that counsel represents the beneficiary only. While U.S. Citizenship and Immigration Services' (USCIS) 8 C.F.R. § 103.3(a)(1)(iii)(B) specifically prohibits a beneficiary of a visa petition, or a representative acting on a beneficiary's behalf, from filing an appeal, the AAO notes that the record contains a Form G-28 properly executed by counsel and the legal representative of the petitioner for the instant petition. Therefore, the AAO considers the instant appeal properly filed.

As set forth in the director's decision on August 8, 2008, the issue in this case is whether the successor-in-interest relationship between [REDACTED] and the petitioner has been established.

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.

The regulation 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.

The instant case is not an application for Schedule A designation, nor an application that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an individual labor certification from DOL for the proffered position.

The record shows that the petitioner, [REDACTED], filed a Form ETA 750 on behalf of the instant beneficiary on April 24, 2001 and the Form ETA 750 was certified on

January 11, 2007 to the petitioner. On July 31, 2007, the petitioner filed the instant petition. Therefore, the petitioner in the instant case is [REDACTED]. In response to the director's request for evidence (RFE) on January 30, 2008, counsel asserted that the petitioner had ceased operations; however, [REDACTED] located at the same address as the petitioner, wished to continue the petition. Counsel also submitted letters from the presidents of the two entities to support his assertions. The director denied the petition due to his determination that the submitted documentation did not establish the successorship between the two entities.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal counsel submits a brief, a letter dated August 29, 2008 from [REDACTED] ([REDACTED] August 29, 2008 letter), and the beneficiary's paystubs from [REDACTED]. Other relevant evidence in the record includes a letter dated March 12, 2008 from [REDACTED], President of the petitioner (the petitioner March 12, 2008 letter), a letter dated March 12, 2008 from [REDACTED] ([REDACTED] March 12, 2008 letter) and the beneficiary's two pay checks in March 2008 from [REDACTED].

On appeal, counsel asserts that [REDACTED] operates the same type of business as the petitioner, has retained the beneficiary under the same terms and conditions as set forth on the petitioner's labor certification, and obtained the recipes and client list from the petitioner, and therefore, [REDACTED] is the successor-in-interest to the petitioner.

However, the record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner. According to Black's Law Dictionary, 1473 (8th Ed, 2004), the definition of a successor in interest is "One who follows another in the ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Similarly, the term "successor" with reference to corporations is defined therein as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." A determination consistent with these definitions was made in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). *Matter of Dial Auto* relates to a petition filed by a company as a successor-in-interest based on an approved labor certification for a predecessor company. The petitioning entity in *Dial Auto* operated a same type of business at the same location after the predecessor company ceased doing business. In order to determine whether the petitioner was a true successor to the predecessor company the petitioner was instructed to fully explain the manner by which the successor company took over the business of the predecessor and provide USCIS with a copy of

¹ 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 record 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).

the contract or agreement between the two entities. However, no response was submitted. The Commissioner held that if the petitioner's claim of having assumed all of the predecessor's rights, duties, obligations, etc., is found to be true, and it is determined that an actual successorship exists, the petition could be approved. The Commissioner determined that the successor-in-interest status was not established because the petitioner failed to adequately describe the transfer of business from the predecessor.

In the instant matter, counsel claims that [REDACTED] qualifies as the successor-in-interest to the petitioner because it operates the same type of business at the same location and retains the beneficiary under the same terms and conditions as set forth on the labor certification. [REDACTED] also provides letters dated March 12, 2008 and August 29, 2008 respectively asserting that it operates the same type of business, the petitioner provided their customer list as well as their recipes, and the new company will assume all terms and conditions as was assigned to the petitioner by the DOL. However, the record does not contain any evidence, such as a contract or agreement between [REDACTED] and the petitioner, adequately describing the transfer of business from the petitioner to [REDACTED] so that it is established that [REDACTED] has assumed all of the rights, duties, and obligations of the petitioner in respect of replacement of the petitioner in the proceeding. 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). 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)). Accordingly, the AAO finds that the record does not contain persuasive evidence to establish that [REDACTED] qualifies as the successor-in-interest to the petitioner in the instant matter.

In addition, the AAO also notes that the record contains the petitioner March 12, 2008 letter. In this letter, the petitioner notifies the director that the petitioner had ceased operations and would no longer continue the instant petition. As previously discussed, the record does not contain sufficient evidence to establish [REDACTED]'s successor-in-interest status in this matter. Failure to establish [REDACTED]'s successor-in-interest status renders the matter moot.

Moreover, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *Matter of Dial Auto*, 19 I&N Dec. 481. Since the petitioner failed to establish its successor-in-interest status in this matter, it is not necessary to discuss the ability to pay issue further. If the petitioner had established its successor-in-interest status, the AAO would determine whether the petitioner has also established the predecessor's ability to pay from the priority date to the date of successorship establishment and the petitioner's ability to pay from the date of successorship establishment to the present through examination of wages already paid to the beneficiary, their net income or net current assets respectively.

The denial of the petition will be affirmed 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.