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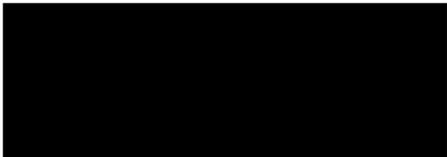
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **SEP 10 2010**

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 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 \$585. 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,

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 real estate rental and development company. It seeks to employ the beneficiary permanently in the United States as a property manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director also found that the petitioner failed to establish that it was a successor-in-interest to the original labor certification applicant.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 23, 2001.¹ The Immigrant Petition for Alien Worker (Form I-140) was filed on July 2, 2007.

The job qualifications for the certified position of property manager are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Manages commercial real estate properties. Prepares lease and rental agreements and collects rent. Deposits rent income and credits lessees for rent paid. Arranges for alterations, maintenance, upkeep and reconditioning of property as needed. Purchases supplies and equipment to perform the same. Enjoys and contracts for services of security, maintenance, groundskeeping, personnel, and on site management. Reports on status of properties, including occupancy rates and dates of expiration of leases. Assists in the financing, purchasing and selling of properties. Prepares periodic inventories of building contents, equipment and supplies. Contacts utility companies to

¹ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

switch transfer of service to tenants. Assists in eviction of tenants in compliance with court orders and directions from lawyers. Goes to court as representative of corporation in eviction and other landlord-tenant matters.

The minimum level of education required for the proffered position is listed in Part A, Block 14 of the Form ETA 750. The minimum years of college required is listed in Block 14 as "4 yrs or 3 yrs + exp." The college degree required for the position is listed in Block 14 as "B.A. or 3 yrs + experience." The required major field of study is listed as "Business or Hotel or Prop. Mgmt."

The minimum experience required for the position is also listed in Block 14 of the Form ETA 750. It states that the position requires four years of experience in the job offered or in a related real estate occupation.

On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary indicated that he attended Panamerican University in Mexico City, Mexico from 1987 to 1991. In addition, the beneficiary indicated that he had been employed as a sales manager by [REDACTED] a from July 1995 to December 1999, and had been employed by the petitioner as a Property Manager beginning in May 2000.

In support of the beneficiary's qualifications, the petitioner submitted an evaluation of the beneficiary's credentials prepared by [REDACTED]. The evaluation concludes that the beneficiary's "education in Mexico is the equivalent of the completion of 1.5 years of undergraduate study in Hotel Management and related subjects at a regionally accredited college or university in the United States." The evaluation further concludes that the combination of the beneficiary's education and work experience with [REDACTED] from 1987 to 1994 is equivalent to "the completion of three years of undergraduate study in Business Administration, Hotel Administration and related subjects at a regionally accredited college or university in the United States."

The director denied the petition on January 6, 2009. The director determined that the petitioner failed to establish that the beneficiary possessed a B.A. or three-year degree in business, hotel or property management.

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." On appeal, counsel concedes that the petitioner was not seeking to classify the beneficiary as a "professional." Counsel indicates that the petitioner is seeking to classify the beneficiary as a "skilled worker."

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 186.167-046 Manager, Property (real estate), to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. According to the DOL's public online database at <http://online.onetcenter.org/crosswalk/> (accessed September 1, 2010 under "Property,

Real Estate, and Community Association Managers," the DOL's updated correlative occupation) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Three requiring a "work-related skill, knowledge, or experience" for the occupation type closest to the proffered position.

According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." See <http://online.onetcenter.org/link/summary/11-9141.00> (accessed September 1, 2010). Additionally, the DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a skilled worker and, as noted above, counsel concedes that the petitioner was not seeking to classify the beneficiary as a "professional."

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) states the following:

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.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under the skilled worker category, the AAO will apply the regulatory requirements from the applicable provision to the facts of the case at hand.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 750 in this matter is certified by the DOL. Thus, at the outset, it is useful to discuss the DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining

² Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. 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." *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 [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

As noted above, the Form ETA 750 states that the position requires a "B.A. or 3 yrs + experience." However, on appeal, counsel states that no education was required for the proffered position and that the petitioner would have accepted "experience alone, if it was sufficient in quantity and quality." Counsel also refers to the petitioner's response to a request for evidence issued by the director in which the petitioner stated that it would accept various combinations of education ranging from three years of college plus 6 to 7 years of experience to "[n]o education at all, but 15-16 years' progressively responsible experience in a real-estate-related occupation."

Because of this ambiguity regarding the actual minimum requirements of the position, the AAO issued a request for evidence (RFE) on May 6, 2010 soliciting evidence of the petitioner's intent concerning the actual minimum requirements of the proffered position. In response, the petitioner submitted an affidavit from prior counsel; a copy of a newspaper advertisement posted on January 30, 2001; copies of newspaper advertisements posted on February 18 and 19, 2002; a copy of the Notice of Filing; a copy of the recruitment report; and copies of correspondence with the DOL.

The affidavit from prior counsel states that the labor certification was meant to convey that the petitioner "sought a Property Manager with a 4-year degree, or at least three years of college, or the equivalent, in business or real estate management, as long as the individual had at least 4 years of experience in a real estate occupation." The newspaper advertisement from January 30, 2001 states that five years of experience is required for the position. The newspaper advertisements from February 2002 state experience is required for the position, but do not provide any further detail regarding the required experience. The Notice of Filing states that the position requires a "Bachelor of Arts in Business, or Hotel or Property Management; or five years experience as a property manager." The newspaper advertisements and Notice of Filing submitted in response to the RFE are in conflict with the minimum requirements as stated on the Form ETA 750. Therefore, these

advertisements do not shed light on the petitioner's intent with respect to the minimum requirements stated on the Form ETA 750.³

As stated above, USCIS must look to the plain language of the labor certification in determining the actual minimum requirements for the proffered position. Here, the Form ETA 750 states that the minimum academic requirement is a "B.A. or 3 yrs + experience." The Form ETA 750 does not provide that the minimum academic requirements might be met through a combination of university level coursework and work experience or some other formula other than that explicitly stated on the Form ETA 750.⁴ The copies of the newspaper advertisements and recruitment, provided with the

³ Although largely inapposite to the current matter in that the labor certification does not require a bachelor's degree, but only three years of college or university, we are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. Similarly, if a labor certification requires three years of college or university, then an analysis of this requirement should be limited to the alien's educational background.

⁴ Furthermore, the beneficiary has not earned the "equivalent" of three years of academic studies through a combination of education and experience as that term is understood and applied in this context. See *Snapnames.com, Inc., supra*. The DOL has provided the following field guidance related to this issue: when the Form ETA 750 indicates, for example, that a "bachelor's degree in

petitioner's response to the RFE issued by this office, also fail to advise the DOL, or any otherwise qualified U.S. workers, that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency.

In this matter, the beneficiary has not completed three years of college or university studies in the field of business or hotel or property management. As noted above, the beneficiary has only completed 1.5 years of undergraduate study. Thus, the beneficiary does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

The beneficiary does meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

computer science" is required, and the beneficiary has a four-year bachelor's degree in computer science from the [REDACTED], "there is no requirement that the employer include 'or equivalent' after the degree requirement" on the Form ETA 750 or in its advertisement and recruitment efforts. See Memo. from [REDACTED], Acting Regl. Adminstr., U.S. Dept. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dept. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Further, where the Form ETA 750 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent," "we understand [equivalent] to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). Where the Form ETA 750 indicates, for example, that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] in order to qualify for the job." See Memo. from [REDACTED], Acting Regl. Adminstr., U.S. Dept. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dept. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). State Employment Security Agencies (SESAs) should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." See Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED], Jackson & Hertogs (March 9, 1993). Finally, DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

In this matter, the petitioner did not indicate that work experience could be substituted for three years of education (or for a bachelor's degree).

Successor-In-Interest

The director also denied the petition because he found that the petitioner, [REDACTED], had failed to establish that it is the successor-in-interest to the employer that filed the Form ETA 750, the [REDACTED].

The issue of successor-in-interest was addressed in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), which is a decision designated as precedent. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) 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 successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On 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.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the

original employer's rights, duties, and obligations is 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 of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities."

In view of the above, *Matter of Dial Auto* did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, 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 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.

Evidence of transfer of ownership must show that the successor not only acquired the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In support of the instant appeal, counsel submitted a letter from [REDACTED], CPA. In the letter, [REDACTED] states that, at the time the labor certification application was filed, the [REDACTED] provided "property management services" for properties owned by [REDACTED] and his family. [REDACTED] further states that, on October 14, 2003, [REDACTED] "took over all of the management functions previously carried out by the [REDACTED]."

The letter concludes that [REDACTED] is a successor in interest to the [REDACTED] "since both entities perform the same function, have the same employees, and are both controlled by [REDACTED], and owned by [REDACTED] (or with his late wife [REDACTED])." Similarly, in a letter dated June 29, 2007 and submitted with the Form I-140 petition, the petitioner stated that "[REDACTED] is a successor in interest to the Trust because [REDACTED] is a 50 percent beneficiary of the Trust and also is the sole and managing member of [REDACTED]."

The RFE issued by this office on May 6, 2010 noted that the record does not contain evidence that [REDACTED] acquired any assets, rights or obligations of the [REDACTED]. The RFE requested evidence of such acquisition by [REDACTED] in order to establish that [REDACTED] is a successor-in-interest to [REDACTED] for purposes of the labor certification application filed by and approved on behalf of the [REDACTED].

In response, counsel acknowledged that no transfer of ownership occurred between the [REDACTED] and [REDACTED]. However, counsel states that there is a valid successorship because [REDACTED] and the [REDACTED] are both controlled by the same

individual, [REDACTED] [REDACTED] is the sole member of [REDACTED] C and is the trustee of the [REDACTED]. Counsel appears to argue that this common ownership and the decision to shift a property management function from the trust to the LLC is sufficient to establish a successor-in-interest relationship for purposes of this visa classification.

The common control of [REDACTED] and the [REDACTED] by [REDACTED] are insufficient to establish a valid successorship for purposes of the instant Form I-140 petition. Nor is it sufficient that the terms of the beneficiary's employment have remained the same. As explained above, in order to qualify as a successor-in-interest to the original labor certification applicant, the petitioner must show, among other things, the transfer and assumption of the ownership of the assets, rights, and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. No such showing has been made here. Simply shifting a property management function from the trust to the LLC will not establish a successor-in-interest relationship. Accordingly, the record does not establish that the petition is accompanied by an individual labor certification from the DOL which pertains to the position proffered by the LLC. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R. § 656.30(c).

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.

ORDER: The appeal is dismissed.