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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**

B7c



FILE: [REDACTED]  
LIN 07 235 54282

Office: NEBRASKA SERVICE CENTER

Date:  
**APR 05 2011**

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

PETITION: Immigrant Petition for Alien Worker as an Unskilled Worker, Other, pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(iii)

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 \$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,

  
Perry Rhew

Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (director). The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a Mexican restaurant. It seeks to permanently employ the beneficiary in the United States as a Mexican food cook. The petitioner requests classification of the beneficiary as an other, unskilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup> The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 26, 2001, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

As set forth in the director's denial of the petition, at issue in this case is whether the petitioner has established the ability to pay the proffered wage. The AAO will also consider whether the petitioner is a successor-in-interest to the entity that filed the labor certification, and thus whether the petition is accompanied by a labor certification valid for the job offered.<sup>2</sup>

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

### **Procedural History**

On April 26, 2001, another Mexican restaurant, also named Cinco de Mayo [REDACTED] hereinafter "predecessor restaurant"), filed a labor certification on behalf of the above-named beneficiary. The offered position is for a Mexican food cook, and the proffered wage is \$11.47 per hour (\$23,857.60 per year). According to the job offer portion of the labor certification, the offered position does not have any education, training, experience or other special requirements.

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<sup>1</sup> Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), grants preference classification to other qualified immigrants who are capable of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

<sup>2</sup> 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 (9<sup>th</sup> 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).

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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 predecessor restaurant was a sole proprietorship owned by [REDACTED] husband and wife. The business address of the sole proprietorship listed on the labor certification is [REDACTED]. The predecessor restaurant claimed to have been in business since 1991. The DOL certified the labor certification on January 22, 2004.

On June 1, 2004, the predecessor restaurant filed an I-140, Immigrant Petition for Alien Worker, on behalf of the beneficiary [REDACTED]. On or about October 1, 2004, the Oregon Department of Transportation condemned the predecessor restaurant's building for a highway expansion project. According to a July 8, 2005 letter from [REDACTED] the predecessor restaurant resumed its operations at [REDACTED] on or about March 2005, after approximately five months of inactivity.

On May 11, 2005, the director issued a Request for Evidence (RFE), instructing the sole proprietor to submit its 2003 and 2004 tax returns, a list of monthly recurring household expenses, and copies of personal bank account statements. On August 16, 2005, the director issued a second RFE, instructing the sole proprietor to submit copies of pay vouchers issued to the beneficiary in 2005, documentation establishing the beneficiary's Social Security Number, and additional documentary evidence of the beneficiary's forced relocation due to the highway construction project.

The director denied the predecessor restaurant's petition on February 16, 2006. The decision concludes that the predecessor restaurant failed to establish its ability to pay the proffered wage for 2003 and 2004. The predecessor restaurant appealed the decision to the AAO, and the AAO dismissed the appeal on October 2, 2006. The AAO decision concludes that the predecessor restaurant failed to establish its ability to pay the proffered wage for 2001, 2002, 2003 and 2004.

On August 15, 2007, the petitioner filed the instant petition with United States Citizenship and Immigration Services (USCIS). The instant petition contains the same labor certification submitted with the prior petition filed by the predecessor restaurant. The petitioner claims to be a successor-in-interest to the predecessor restaurant.<sup>4</sup> The petitioner, also named [REDACTED] is located in [REDACTED] (hereinafter "petitioner" or "successor restaurant"). The petitioner claims to have been established in 1991. The petitioner was

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<sup>4</sup> The cover letter submitted with the petition states that the petition is a re-filing of the predecessor restaurant's prior petition and a motion to reconsider the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal. The director did not address the motion to reconsider requested on the cover letter. Even if the predecessor submitted a motion to reconsider in the correct format and with the appropriate filing fee, the motion would have been untimely. The regulation at 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. The instant petition was filed on August 15, 2007, over ten months after the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal. Accordingly, the predecessor restaurant failed to properly file a motion to reconsider the AAO's October 2, 2006 dismissal of the predecessor restaurant's appeal, and the AAO will not accept counsel's request on the cover letter to consider this new petition filing as a motion to reconsider.

originally formed as a sole proprietorship and then was restructured as a single member limited liability company (LLC). The petitioner's Operating Agreement states that the LLC commenced on August 14, 2007.

The evidence submitted to establish that the petitioner is a successor-in-interest to the predecessor restaurant is a one-page asset purchase agreement for restaurant equipment, inventory and signage dated December 27, 2006.

On November 19, 2008, the director issued a Notice of Intent to Deny (NOID) the instant petition. The NOID states that the evidence in the record did not establish that the predecessor restaurant possessed the ability to pay the proffered wage from the priority date until the date of the acquisition of the predecessor restaurant's assets. The NOID also states that the evidence in the record did not establish that the petitioner was a successor-in-interest to the predecessor restaurant.

On January 14, 2009, the director denied the petition. The decision concludes that the petitioner is a successor-in-interest to the predecessor restaurant, but that the petitioner did not establish its ability to pay the proffered wage. The decision notes that the AAO had previously concluded that the predecessor restaurant had not established its ability to pay the proffered wage for 2001 and 2002. However, the decision concluded that the predecessor restaurant had successfully established its ability to pay the proffered wage in 2001 and 2002. The decision also states that the predecessor restaurant had not established its ability to pay the proffered wage in 2004, 2005 and 2006.<sup>5</sup> The director then examined the petitioner's ability to pay the proffered wage as of the 2001 priority date,<sup>6</sup> and concluded that successor restaurant had only established its ability to pay the proffered wage in 2001, 2002, 2006 and 2007.

The petitioner appealed the director's decision to the AAO on February 17, 2009. On January 3, 2011, the AAO incorrectly rejected the appeal as untimely filed, and remanded the matter to the director for reconsideration as a motion to reopen and reconsider. On January 7, 2011, the AAO reopened the matter on its own motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) to correct its error and enter a new decision, and gave notice to the petitioner of deficiencies in the record permitting the submission of additional evidence that it is a successor-in-interest to the predecessor restaurant.

The AAO notice requests that the petitioner submit additional evidence of the predecessor restaurant's ability to pay the proffered wage beginning on the priority date and continuing until the date the claimed transfer of ownership to the petitioner was completed. Second, the AAO notice requests that the petitioner submit additional evidence of its continuing ability to pay the proffered wage from the transaction date forward. Third, the AAO notice requests that the petitioner fully

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<sup>5</sup> The director made no reference to whether the predecessor restaurant had established its ability to pay the proffered wage in tax year 2003.

<sup>6</sup> As is explained below, the director should have examined the predecessor restaurant's ability to pay from the priority date until the date of the claimed acquisition, and the successor restaurant's ability to pay the proffered wage from the date of the claimed acquisition onwards. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

describe and document its claimed assumption of the ownership of the predecessor restaurant. Counsel filed a response to the AAO notice on February 7, 2011.

Therefore, at issue in this case is (1) whether the petitioner is a successor-in-interest to the predecessor restaurant, and, if so, (2) whether the predecessor restaurant, a sole proprietorship, possessed the ability to pay the proffered wage from the April 26, 2001 priority date until the December 27, 2006 date of the purchase agreement, and (3) whether the petitioner, a sole proprietorship until August 14, 2007 and a single-member LLC thereafter, possessed the ability to pay the proffered wage from the December 27, 2006 date of the purchase agreement until the present.

### Successor-in-Interest

In order for the petition to be approved, the petitioner must establish that it is a successor-in-interest to the predecessor restaurant that filed the labor certification on behalf of the beneficiary. Otherwise, it cannot be concluded that the petition is accompanied by a labor certification valid for the proffered position. See 8 C.F.R. § 204.5(1)(3)(i); 20 C.F.R. § 656.30(c)(2). In the decision denying the instant petition, the director concluded that the petitioner demonstrated that it is a successor-in-interest to the predecessor restaurant. For the reasons set forth below, the AAO concludes that the evidence in the record of proceeding does not establish that the petitioner is a successor-in-interest to the predecessor restaurant, and the appeal must be dismissed for this reason. As is stated at the outset of this decision, the AAO reviews appeals *de novo*, and any 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 at 1043; see also *Soltane v. DOJ*, 381 F.3d at 145.

The basis of the petitioner's successor-in-interest claim is a one-page asset purchase agreement between the petitioner and the predecessor restaurant. The agreement states:

[REDACTED] owners of [REDACTED] Mexican Restaurant located in [REDACTED] are selling this business with all the equipment and fixtures to [REDACTED] owners of [REDACTED] [f]or the sum of \$16,000,00.

The equipment listed in the agreement is as follows: six-burner Imperial stove; two-burner Imperial stove; stainless steel Victory double door refrigerator; stainless steel Victory double door freezer; Star 24"x 24" grill; Duke four-compartment steam table; True double door sandwich bar; Manitowoc ice machine; Thunderbird 20 quart dough mixer; dough roller; Hobart under-counter dishwasher; 10' hood with all Ansul fire equipment; all stainless steel sinks; grease trap; all cooking utensils; all tables, chairs and booths; cash register; inventory; Imperial deep fryer; all outside signage; stainless steel tables; and stainless racks and shelving.

Attached to the agreement is a notarized individual acknowledgement dated December 27, 2006, signed by [REDACTED]. The note states that [REDACTED] are selling their "restaurant business with all the equipment and fixtures to [REDACTED] for \$16,000.00. The notarized individual acknowledgement states that the agreement is an "Equipment Sale."

In the response to the AAO notice, counsel submits a letter from Mr. [REDACTED] dated February 2, 2011. The letter states that, on December 27, 2007, he and his wife sold "the restaurant business together with all equipment and other asset[s]." The letter states that "[w]hen we sold the restaurant business, Mr. [REDACTED] assumed all of our rights, duties, obligations and assets. This included our employee [REDACTED] who was our cook and had worked for us since 1995. She was the only cook for the business and without her [REDACTED] would not have been able to operate." The letter further states:

Please note that our restaurant was forcibly relocated by the State of Oregon from its original location about October 2004, but that the restaurant business never ceased operating although we moved to a new location in January 2005 where the restaurant continued to operate until it was sold to Mr. [REDACTED] in December of 2006.

This letter contradicts the earlier letter of [REDACTED] dated July 8, 2005, submitted with the response to the director's May 11, 2005 RFE for the petition filed by the predecessor restaurant. That letter states:

We reopened [REDACTED] in March of 2005 in a different location on Highway 97. We are in a more obscure location[] and it will take time for our clientele to find us. But business is picking up and we are starting to do well. We have downsized our business considerabl[y] and have made it more efficient. . . . We expect to do well in the future and we will be able to give [the beneficiary] 40 hours per week. But it takes time to get a business off the ground again. . . . We have streamlined out personal finances also and I, [REDACTED] will be working for the United Postal Services on a part time basis. This is a Government job and we will be getting Government benefits such as health insurance.

The record also contains a notarized letter dated September 7, 2005 by [REDACTED]. The letter describes the relocation of the predecessor restaurant. The letter states:

We did manage to relocate the business in March, 2005 as a substantially down sized restaurant. From October, 2004 until March, 2005 we had no business at all, and we suffered great losses during that time period.

Therefore, the statements in the February 2, 2011 letter that the predecessor never ceased operating and moved to a new location in January 2005 directly contradict the July 8, 2005 and September 7,

2005 letters.<sup>7</sup> 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591. Accordingly, the statement by Mr. [REDACTED] in the February 2, 2011 letter that "Mr. [REDACTED] assumed all of [the predecessor restaurant's] rights, duties, obligations and assets" must be substantiated by competent objective evidence.

To summarize the facts in this case, the petitioner is a Mexican restaurant named [REDACTED] in La Pine, Oregon. Forty five miles to the north on the same highway, there was another Mexican restaurant named [REDACTED] (the predecessor restaurant); with different owners. The predecessor restaurant had been struggling financially since it was forced to relocate to a new location due to a highway expansion project. Therefore, approximately 21 months after relocating, the owners of the predecessor restaurant decided to close the business and sell their equipment, signage and inventory to the petitioner on December 27, 2006. In addition, the predecessor restaurant's cook, the beneficiary of this petition, allegedly went to work for the petitioner. The petitioner did not continue to operate a restaurant on the predecessor restaurant's premises. Instead, the petitioner appears to have used the predecessor restaurant's equipment in its existing business. Counsel claims that these facts are sufficient to establish that the petitioner is a successor-in-interest to the predecessor restaurant.

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 1986)(hereinafter "*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. (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 [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]

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<sup>7</sup> The record also contains a letter dated April 6, 2006 from [REDACTED] who claims to have been the predecessor restaurant's accountant since 1991. The letter states that the sole proprietor "finished remodeling the new restaurant location in April/May, 2005."

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* [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).

The Commissioner's decision in *Matter of Dial Auto*, 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* at 1570 (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.<sup>8</sup> *Id.* at 1569 (defining "successor"). When considering other business

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<sup>8</sup> 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

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.<sup>9</sup>

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 in the same manner with regard to the assets sold.<sup>10</sup> *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.

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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).

<sup>9</sup> 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.

<sup>10</sup> 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 in the same manner. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

Therefore, a successor-in-interest must not only show that it purchased assets from the predecessor, but assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. 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.

Applying the analysis set forth above to the facts of the instant petition, the evidence submitted by the petitioner to document its purchase of the predecessor's restaurant is insufficient to establish that the petitioner is a successor-in-interest. Specifically, the evidence in the record reflects that the petitioner only purchased the predecessor restaurant's equipment, inventory and signage. The evidence in the record does not demonstrate the continuity required to establish a successor-in-interest. While the restaurants have the same name, are in the same Metropolitan Statistical Area, and offer the same type of position to the beneficiary, the fact remains that the predecessor restaurant simply terminated its business and sold its assets to the petitioner. There is no evidence in the record that the petitioner assumed any rights and obligations of the predecessor restaurant. The petitioner did not assume a lease, existing contracts or any other obligations. The mere statement from Mr. [REDACTED] dated February 2, 2011 that the petitioner "assumed all of our rights, duties, obligations and assets" is not sufficient to establish a successor-in-interest without documentary support, particularly given that some of the statements in that letter directly contradict two prior letters and other evidence in the record.

Further, the fact that the beneficiary now works for the petitioner does not mean that the petitioner has assumed the predecessor restaurant's obligations. The petitioner did not assume an employment contract. The beneficiary is not an asset to be sold. Instead, she appears to have been an at-will employee who was hired by the petitioner after the predecessor restaurant terminated its business. This does not constitute assuming the essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

In short, the predecessor restaurant was going out of business, and the petitioner, an existing restaurant with the same name, purchased its equipment, inventory and signage. In addition, the predecessor restaurant's cook, the beneficiary, now works for the petitioner as a cook. Based on these facts, the petitioner is not a successor-in-interest to the predecessor restaurant because the petitioner did not assume the essential rights and obligations of the predecessor. Instead, the evidence in the record does not establish that the purchase agreement was anything more than a mere transfer of assets. Therefore, beyond the decision of the director, the appeal is dismissed because the petitioner has not demonstrated that it is a successor-in-interest to the entity that filed the underlying labor certification. The petition is not accompanied by a labor certification valid for the job offered by the petitioner.

#### **Ability to Pay the Proffered Wage**

The petitioner has also not established its ability to pay the proffered wage. A petitioner claiming to be a successor-in-interest must establish that the predecessor entity possessed the ability to pay the