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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

B6

[Redacted]

DATE: APR 08 2011

Office: [Redacted]

File: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:  
[Redacted]

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

The petitioner is an individual. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153 (b)(3)(iii) as a house worker, general. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that there was no successor-in-interest relationship between the employer who filed the Form ETA 750 and the petitioner and that in addition, the original employer submitted a letter stating that they no longer had need for the beneficiary's services, therefore nullifying the labor certification application. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 13, 2009 decision, the issue in this case is whether or not [REDACTED] may file a Form I-140 accompanied by a Form ETA 750 filed by, and certified for, [REDACTED]

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3) provides the following:

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 (if applicable), 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 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.<sup>1</sup>

The record does not establish that the petition is accompanied by an individual labor certification from the DOL which pertains to the proffered position. 8 C.F.R. § 204.5(l)(3)(i); 20 C.F.R.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

§ 656.30(c)(2). The original employer identified in the Form ETA 750 filed on April 30, 2001 was [REDACTED]. In a letter dated March 11, 2008 [REDACTED] stated that he no longer needed to employ the beneficiary as a general house worker, and that he has agreed to "give" [REDACTED] immigration rights, duties, and obligations. However, labor certifications are only valid for the specific job opportunity stated on Form ETA 750, i.e., as a housekeeper for [REDACTED]. The only way for the petitioner to be able to use a Form ETA 750 approved for a different employer is if the petitioner establishes that she is a successor-in-interest to that employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986) (*Matter of Dial Auto*). 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.

*Matter of Dial Auto* is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all United States Citizenship and Immigration Services (USCIS) employees in the administration of the Act.

By way of background, *Matter of* [REDACTED] involved a petition filed by [REDACTED] Inc. [REDACTED] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [REDACTED], filed the underlying labor certification. On the petition, [REDACTED] claimed to be a successor-in-interest to [REDACTED]. 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 [REDACTED] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [REDACTED] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [REDACTED] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [REDACTED] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of* [REDACTED] 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* [REDACTED] 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."

Considering *Matter of* [REDACTED] 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 in the same manner as the predecessor. 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.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

It is further noted that 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; *cf.* 20 C.F.R. § 656.12(a).

In the instant matter, there is no evidence in the record to demonstrate that [REDACTED] has assumed the financial and administrative responsibilities of [REDACTED] there is no evidence to show any transfer of ownership, obligations, or assets. Therefore, the two people are legally distinct from each other. The predecessor and successor are not corporations but private citizens. Accordingly, it does not appear that under any set of facts an individual could become a successor-in-interest of another individual within the context of employing a domestic servant.

Although [REDACTED] states in his letter that he and [REDACTED] have agreed to transfer all of his immigration related rights, duties, and obligations in reference to the beneficiary, there is no evidence in the record to demonstrate that one entity has succeeded to the business or corporate interests of the other entity. Furthermore, it does not appear that [REDACTED] has legal standing to transfer anything in that his name does not appear on either the Form ETA 750 or Form I-140 as a petitioner.

As noted above, the record is wholly devoid of evidence that the petitioner is the successor in interest to the employer identified in the Form ETA 750. On appeal, counsel states “as long as the alien is ‘working in the exact same position, performing the same duties, in the same area of intended employment for the same salary...the change in petitioner has...no effect on the job opportunity whatsoever.’” Counsel cites to [REDACTED] (BALCA June 13, 1990). Contrary to counsel’s claim, in [REDACTED] the two companies that employed the beneficiary were employment placement companies and they both placed the beneficiary to work for the same third entity. The procedural context of this decision — the denial of a labor certification application — renders the decision inapposite to the instant situation where the labor certification has already been approved. The decision is not relevant to whether a labor certification can be used by a different employer for a different job opportunity, which is prohibited by regulation.<sup>2</sup>

There is no evidence in this case of any legal or corporate affiliation or relationship between [REDACTED] or of any ongoing relationship between [REDACTED] and the beneficiary. Further, there is nothing in the record of proceeding to show that [REDACTED] ever filed a Form I-140 petition. The fact that both [REDACTED] and [REDACTED] planned to employ the beneficiary as a house worker does not establish that the petitioner is a successor-in-interest. Further, a mere statement by [REDACTED] indicating his willingness to transfer immigration rights, duties, and obligations does not establish the reliability of the statement. 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)). Therefore, no successor-in-interest relationship has been established.

As no successor-in-interest relationship has been established, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

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.

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<sup>2</sup> It is noted that, while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, decisions by the DOL’s Board of Alien Labor Certification Appeals (BALCA) are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Accordingly, counsel’s reliance on this BALCA decision is misplaced for this reason alone.

**ORDER:** The appeal is dismissed.