

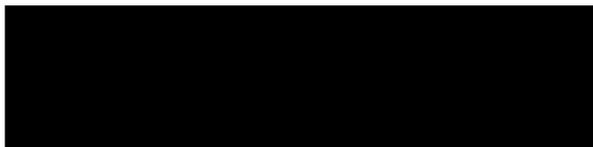
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

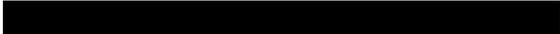
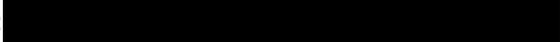
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FILE: 

Office: TEXAS SERVICE CENTER

Date:
FEB 14 2011

IN RE: Petitioner: 
Beneficiary: 

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:



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

The petitioner is a cleaning service, and seeks to employ the beneficiary permanently in the United States as a rug cleaner helper, pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). The petition was filed with an ETA Form 9089, Application for Permanent Employment Certification, (ETA Form 9089) approved by the Department of Labor (DOL) on September 7, 2007. The director determined that the petitioner failed to establish that it qualifies as the successor-in-interest to the employer on the labor certificate. Accordingly, the petition was denied due to the lack of an appropriate labor certification filed with the petition.

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 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.

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.¹

As set forth in the director's February 4, 2010 denial, the primary issue in this case is whether or not the petitioner has established that it qualifies to be the successor-in-interest to [REDACTED] the original employer that filed the labor certification application.

No regulations govern 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. 1981) ("*Matter of Dial Auto*"), a binding legacy Immigration and Naturalization Service ("INS") precedent that was decided by the Administrative Appeals Unit and 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.

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). However, counsel did not submit any new evidence on appeal but a brief.

The facts of the precedent decision are instructive in this matter. *Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to 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. In order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim of having assumed all of Elvira Auto Body's rights, duties, obligations, etc.*, is found to be untrue, then grounds would exist for invalidation of the labor certification under 20 C.F.R. § 656.30 (1987). Conversely, if the claim is found to be true, and it is determined that an actual successorship exists, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

19 I&N Dec. at 482-3 (emphasis added).

The legacy INS and United States Citizenship and Immigration Services (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. The Commissioner's decision, however, does not require a successor-in-interest to establish that it assumed all rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner 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 government could invalidate the underlying labor certification for fraud or willful misrepresentation. For this reason 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." *Id.* (emphasis added.)

Accordingly, the Commissioner clearly considered the petitioner's claim that it 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 of [the alleged predecessor]" and seeing a copy of "the contract or agreement between the two entities" in order to verify the petitioner's claims.

In view of the above, *Matter of Dial Auto* did not stand for the proposition that a valid successor relationship could 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 more broad: “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 1473 (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 interest.² *Id.* (defining “successor”). When considering other business organizations, such as partnership or sole proprietorship, 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.³

A mere transfer of assets, even one that takes up a predecessor’s business activities, does not necessarily create a successor-in-interest. *Id.* See also *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. While the merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligation are transferred by operation of law, 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.⁴ See generally 19 Am. Jur. 2d Corporations § 2170

² 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 comprehends “mergers,” consisting of a transaction in which one of the constituent companies remains in being, absorbing the other constituent corporation. The third type of combination includes “reorganizations” that occur when the new corporation is, either in law or in point of fact, the reincarnation or reorganization of one previously existing. To the fourth group belong those transactions in which a corporation, although continuing to exist as a legal entity, is in fact merged in another which, by acquiring its assets and business, has left the first with only its corporate shell. 19 Am. Jur. 2d Corporations § 2165 (2010).

³ 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.

⁴ 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

(2010).

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid success relationship for immigration purposes if it satisfies three conditions. First, the job opportunity offered by the petitioner must be the same as originally offered on the labor certification. Second, both the predecessor and the purported successor must establish eligibility in all respects by a preponderance of the evidence. The petitioner is required to submit evidence of the predecessor entity's ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) beginning on the priority date until the date the transfer of ownership to the successor is completed. The purported successor must demonstrate its continuing ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) from the transaction date forward. Third, the petitioner must fully describe and document the transfer and assumption of the ownership of all, or the relevant part of, the predecessor by the claimed successor.

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. The successor must continue to operate the same type of business as the predecessor and the essential business functions must remain substantially the same as before the ownership transfer.

In the instant mater, the ETA Form 9089 was filed on June 25, 2007 by and certified on September 7, 2007 to [REDACTED] with Federal employer identification number (FEIN): [REDACTED]. On February 12, 2008, the petitioner, [REDACTED] with FEIN: [REDACTED] filed the instant petition. With the initial filing of the petition, the petitioner did not submit any evidence to establish its successor-in-interest status to the original employer on the labor certification. In response to the request for evidence (RFE) issued by the director on December 16, 2008, counsel submitted a letter dated January 15, 2009 from an attorney, [REDACTED] addressed to counsel regarding the successor-in-interest [REDACTED] (January 15, 2009 letter). This letter states in pertinent part that:

Please be advised that [REDACTED] is the successor in interest to [REDACTED] ceased its operations in February of 2004. Since then [REDACTED] assumed all employees, assets and liabilities going forward.

[REDACTED] is the same owner and operator of both corporations. They have been located at the same physical address since 1999 and continue to operate from there.

As of the successor-in-interest, the director called the bona fides of the job offer into question since [REDACTED] was not operating at the time of the filing ETA 9089. In response to the director's December 24, 2009 notice of intent to deny (NOID), counsel submitted a letter

essential rights and obligations of the predecessor necessary to carry on the business in the same manner.

dated January 12, 2010 from [REDACTED] (January 12, 2010 letter). In this letter, [REDACTED] states in pertinent part that:

I was the original owner of the original employer, [REDACTED]. I am also the owner of [REDACTED]. [REDACTED] I have previously submitted documentation regarding the [REDACTED] matter stating that [REDACTED] has assumed all employees, assets, and liabilities going forwards. This is true and correct.

The misunderstanding regarding the original employee is because I hired [the beneficiary] prior to [REDACTED] ceasing operations. I was used to her employment file being under that original employer that when I went to file a labor certification on her behalf, it slipped my mind that the company wasn't operating under the old name.

In his letter, [REDACTED] confirmed that [REDACTED] ceased its operations before he filed the labor certification application, and that the labor certification application was mistakenly filed by [REDACTED] because he forgot that [REDACTED] was no longer in operation. However, counsel asserts on appeal that the assertion in [REDACTED] January 15, 2009 letter that [REDACTED] ceased its operation in February 2004 is incorrect. 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)). The successor-in-interest status requires documentary evidence 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. The record does not contain any documentary evidence showing that the petitioner purchased assets from [REDACTED] and accordingly assumed the essential rights and obligations of [REDACTED] necessary to carry on the business in the same manner as the predecessor. Nor does the record contain any certificate of merger and agreement and plan of merger filed with the State of Pennsylvania showing that [REDACTED] was merged into the petitioner. As discussed previously, the only evidence counsel submitted for the petitioner's successor-in-interest status is the letters from counsel and the petitioner. These letters are not sufficient to document that the petitioner not only purchased assets from the predecessor, but also assumed the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor.

In addition, the record shows that both the petitioning entity and the original employer are structured as corporations under Pennsylvania laws. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass.

Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly, claiming that both corporations are owned by the same individual does not automatically establish that they are the same business entity or one qualifies as a successor-in-interest to the other. Without an ownership transfer, opening the same type of business at the same location itself cannot establish the petitioner's successor-in-interest status to [REDACTED]. The record contains no other documentary evidence that the petitioner qualifies as a successor-in-interest to [REDACTED] for the purposes of this petition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Therefore, the petitioner cannot use the underlying labor certification to file an immigrant petition.

Further, these letters from counsel and the petitioner contain inconsistent information about the two corporations. The Pennsylvania Department of State official website reveals that [REDACTED] was incorporated on December 1, 2000 and remains active as of this date and [REDACTED] was incorporated on February 3, 2004 and remains active as of this date. See <https://www.corporations.state.pa.us/corp/soskb/Corp.asp?> (accessed February 1, 2011). USCIS records show that [REDACTED] filed two I-140 immigrant petitions in 2007.⁵ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." "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." The record does not contain any independent objective evidence to resolve the inconsistencies in this matter.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which 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

⁵ The two I-140 immigrant petitions filed by [REDACTED] in 2007 are as follows:
-- [REDACTED] was filed for [REDACTED] on July 13, 2007 and denied on April 9, 2008. The subsequent appeal was dismissed by the AAO on July 21, 2010.
-- [REDACTED] was filed for [REDACTED] on July 17, 2007 with the priority date of March 5, 2005 and approved on April 28, 2008.

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

The labor certification is not valid for the petitioner to file an immigrant petition with USCIS, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i). As the labor certification is not valid for the petitioner to use, the petition is not accompanied by a valid labor certification. Therefore, the petition cannot be approved.

In the instant petition, the AAO notes that this petition can be denied for lack of a valid labor certification for the petitioner because the new petitioner failed to establish its successor-in-interest status to the original employer who filed the ETA Form 9089. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). As noted by the director, the petition may also be denied because the petitioner failed to establish its continuing ability to pay the proffered wage from the priority date to the present even if assuming that the petitioner had established that it qualified as a successor-in-interest to Bi County Cleaning with a required documentary evidence.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. Therefore, the successor-in-interest must not only establish its ability to pay the proffered wage from the time the successorship established to the present, but also establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The record does not contain any evidence showing that when the petitioner qualified as the successor-in-interest to [REDACTED] and the petitioner did not submit [REDACTED] financial documents for any year. Therefore, the petitioner failed to establish that [REDACTED] paid the beneficiary the full proffered wage or that it had sufficient net income or net current assets to pay the instant beneficiary the proffered wage or the difference between wages actually paid to the instant

beneficiary and the proffered wage for the priority date to the date that allegedly became its successor-in-interest.

Moreover, if a petition were the only petition filed by a petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

USCIS records indicate that filed two immigrant petitions in 2007 and one of them was approved. Therefore, the petitioner would need to demonstrate that as the predecessor company in this matter had its ability to pay the proffered wage to each beneficiary of the approved and pending immigrant petitions for the year of the priority date until the establishment of the successorship. *See* 8 C.F.R. § 204.5(g)(2). The record does not contain any financial documents of . Therefore, the petitioner failed to demonstrate that had the ability to pay the instant beneficiary the proffered wage and further failed to demonstrate that the predecessor company had the ability to pay the proffered wages to all beneficiaries of the approved and pending petitions.

Counsel's assertions on appeal cannot overcome the ground of denial in the director's February 4, 2010 decision. The petitioner failed to establish that it qualifies as the successor-in-interest to the original employer on the labor certification and failed to demonstrate that the predecessor company had the ability to pay the proffered wages to the instant beneficiary and the other beneficiary of the approved petition as of the priority date to the time when the successor ship was established. Therefore, the petition cannot be approved.

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.