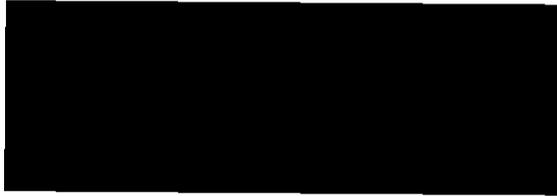


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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AUG 27 2012

Office: TEXAS SERVICE CENTER

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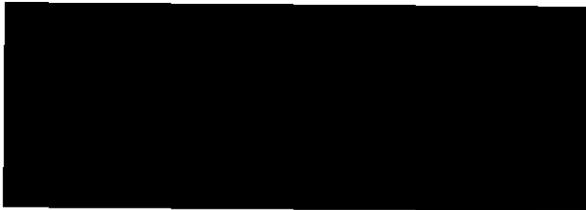
Petitioner:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a computer consulting and software development company. It seeks to employ the beneficiary permanently in the United States as a system analyst in the professional or skilled worker category pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(i) of 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii).

On November 13, 2008, the director denied the petition because the petitioner failed to submit evidence that a valid successor-in-interest relationship had been demonstrated and that the petition was accompanied by a valid labor certification. On appeal, the AAO identified additional issues concerning whether the petitioner had the ability to pay the proffered wage from the priority date onwards and whether the petitioner established that the beneficiary was qualified for the proffered position.

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

The record shows that the appeal is 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.

In the decision, the director noted that the petitioner was a different entity than the entity that filed the labor certification.

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 1981) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner

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).

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. 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 the successor-in-interest issue follows:

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).

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).

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* 1570 (9th ed. 2009) (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.² *Id.* at 1569 (defining “successor”). When considering other business 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.³

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.⁴ *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. In this case, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that

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 includes “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 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).

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 essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

the job opportunity is the same as originally offered on the labor certification. Third, the 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. 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, in this case the claimed successor on appeal must support its claim with all necessary evidence, including evidence of ability to pay. The 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 successor must establish its own 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.

Applying the analysis set forth above to the instant petition, the appealing party has not established a valid successor relationship with the petitioner. The Form ETA 750 was filed by Softlink Solutions, Inc. with an address in Mount Prospect, Illinois. No IRS Tax Number was provided on this document. The Form I-140 was filed by [REDACTED], with an address in Baton Rouge, Louisiana. The petitioner submitted a Purchase Agreement dated December 31, 2005 between two individuals, [REDACTED] and [REDACTED]. This agreement provides that [REDACTED] sells to [REDACTED] the business named [REDACTED] for \$2,000. The purchase agreement makes no mention of [REDACTED]. In addition, no evidence was submitted to establish the ownership of [REDACTED], or of [REDACTED] Inc. The transaction does not include either [REDACTED]. Counsel states on appeal that Infosys Solutions took over the business from [REDACTED]. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'I Comm'r 1972)). 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). As a result, we are unable to conclude that [REDACTED] is the successor-in-interest to [REDACTED]. As no successor-in-interest has been established, the director's decision finding that no successor-in-interest exists is affirmed. As the petitioner has not established that it is the successor-in-interest to the party that filed the labor certification, then a valid labor certification does not support the Form I-140.

The sole issue in the director's decision concerned whether a successor-in-interest could exist when the company that obtained the labor certification did business at an address in Illinois and the company

filing the petition had an address in Louisiana. The AAO agrees with the director's finding in this case that no successor-in-interest exists, although we disagree with the director's reasoning.

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

(i) Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program. Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is a shortage occupation with the Labor Market Pilot Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

The labor certification was certified on April 27, 2001 and lists [REDACTED] address as [REDACTED] [REDACTED]. The Form I-140 filed by [REDACTED] the address of the company as [REDACTED]. The director determined in his decision that because [REDACTED] was located in Louisiana and not in Illinois, the petitioner was no longer conducting business in the geographical location certified on the labor certification, thus nullifying the labor certification application.

On appeal, counsel notes that the labor certification states that the "alien will work at different sites in various cities of the United States" and, as a result, the original labor certification was not limited to a particular geographic area. Counsel submitted a copy of the original job advertisement as posted with [REDACTED] that states that the employee would work in various cities. The DOL accepted the statement that the alien will work at different cities in the United States by certifying the application. The AAO disagrees with the director that the labor certification cannot be national in scope in appropriate circumstances. Nevertheless, the petitioner has not established that it is the successor-in-interest to the company that obtained the labor certification for the reasons set forth above. Thus, the petition is not accompanied by a valid labor certification and is denied.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8

C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000 per year. The Form ETA 750 states that the position requires 4 years of college culminating in a Bachelor’s degree in Engineering, Computer Science, or a related degree and that the person filling the position must have and two years of experience in the position offered as a systems programmer or in the related occupation as systems analyst. In addition, the labor certification requires experience “develop[ing] websites using VB, VBScript & ASP. [and a] MCSE certificate.”

The record before the director closed on October 9, 2009 with the receipt by the director of the submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2007 federal income tax return was the most recent return available. However, the record does not contain any annual reports, federal tax returns, or audited financial statements for the petitioner or any predecessor-in-interest for 2001, 2002, 2003, or 2004.

The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Additionally, according to USCIS records, the petitioner has filed 17 Form I-140 petitions on behalf of other beneficiaries and 160 Form I-129 petitions for other workers. The petitioner would need to demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions. For this additional reason, the petition must be denied.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor

certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires four years of college culminating in a Bachelor's degree in Engineering, Computer Science or a related subject plus two years of experience in the job offered as a systems programmer or the related occupation of systems analyst. In addition, the labor certification contains the additional requirements of experience "develop[ing] websites using VB, VBScript & ASP. Must have MCSE certificate." On the labor certification, the beneficiary claims to qualify for the offered position based on a Bachelor of Engineering degree in Mechanical Engineering from University of Madras, India, completed in 1996. The beneficiary claims to qualify for the offered position based on experience as a web developer with [REDACTED] and a software engineer [REDACTED]. The petitioner did not submit a copy of the beneficiary's education documents or any letters verifying the beneficiary's previous employment.

The evidence in the record does not establish that the beneficiary possessed the required education or experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The appeal is denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.