

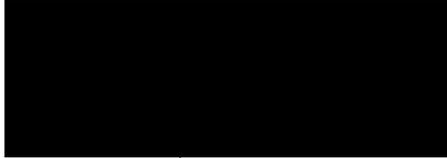
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services



B6

Date: FEB 01 2012

Office: TEXAS SERVICE CENTER FILE:



IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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,
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 masonry company. It seeks to employ the beneficiary permanently in the United States as a brickmason. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it is the successor-in-interest to the company that filed the labor certification, so that no approved labor certification supported the petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 July 30, 2008 denial, the issue in this case is whether or not the petitioner is a valid successor-in-interest to the company that filed the labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The Application for Alien Employment Certification accompanying the Form I-140, Form ETA 750, was filed on June 17, 2003 by [REDACTED] with an address of [REDACTED].

The application was signed by [REDACTED].

The Application was certified on July 24, 2007. The Form I-140 petition was then filed by [REDACTED]

on September 12, 2007 with an address of [REDACTED].

The Form I-140 lists the petitioner's Federal Employee Identification [REDACTED].

The director sent the petitioner a Request for Evidence dated June 2, 2008 requesting evidence to show that [REDACTED] a valid successor-in-interest to [REDACTED]

[REDACTED], and to show that the petitioner had the ability to pay the proffered wage.

In response, the petitioner submitted incomplete tax returns of [REDACTED] from 2003 to 2006; the 2006 and 2007 returns of [REDACTED]; and the beneficiary's 2003 through 2007 Forms W-2 and 1099 from both companies. The petitioner, through counsel, also submitted a

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).

letter dated July 4, 2008 from [REDACTED] an accredited business accountant and tax preparer who stated that the original owners of [REDACTED] were the [REDACTED]. [REDACTED] withdrew from [REDACTED] and transferred his stock to [REDACTED]. [REDACTED] stated that in 2003, [REDACTED] joined the firm as an employee and was never a stockholder of [REDACTED]. [REDACTED] stated that in July 2006, [REDACTED] terminated the business, [REDACTED] and that all of the assets of the business in the value of \$5,590 were transferred to [REDACTED]. Counsel in the accompanying brief dated July 10, 2008 stated that [REDACTED] as sole shareholder, closed the business [REDACTED] and formed a new entity, [REDACTED].

The response to the director is inconsistent with other evidence of record. The 2006 tax return of [REDACTED] were each 50% shareholders of [REDACTED]. The Form ETA 750 filed in June 2003 was signed by [REDACTED] and [REDACTED]. This evidence is inconsistent with the letter of [REDACTED] and with counsel's brief in response to the director's request for evidence which both indicated that [REDACTED] was not a shareholder of [REDACTED] as sole shareholder of [REDACTED]. [REDACTED] in 2006 terminated the business and started [REDACTED] simultaneously. Further, the 2006 tax return lists the year end assets in 2006 of [REDACTED] as \$80,756 and not the \$5,590 as stated by [REDACTED] both companies' tax preparer. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). No evidence of record resolves these inconsistencies. Thus, the statements of [REDACTED] and of counsel with respect to the termination of [REDACTED] are neither credible nor probative.

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 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, [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 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

██████████ counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of ██████████ 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 ██████████ 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 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* 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

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

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. 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

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. [REDACTED]

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).

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, 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.

As noted above, in response to the [REDACTED], counsel stated that [REDACTED]

was originally owned and operated by [REDACTED]. In early 2003 [REDACTED] withdrew from the corporation . . . and transferred his ownership interest to [REDACTED]. Later in 2003 [REDACTED] . . . as part of his employment he received a percentage of the profits. . . . As a result of business disputes, [REDACTED] decided to close down [REDACTED] and start fresh with a new entity so as to completely cut ties and connection with [REDACTED]. As such, in 2006, [REDACTED], as the sole shareholder, closed [REDACTED] and formed a new entity called [REDACTED].

Counsel stated that the new company hired all of the employees of [REDACTED] and operated the same type of business as [REDACTED]. Counsel also states that “[t]he existing assets of [REDACTED] were contributed to [REDACTED]. Though there were no liabilities on the books and records of [REDACTED] [REDACTED] did in fact assume the obligations associated with the immigration sponsorship of [the beneficiary] and another employee also undergoing sponsorship.” In support of these statements, the petitioner submitted a letter dated July 4, 2008 from [REDACTED] the petitioner's tax preparer. [REDACTED] states in his letter that [REDACTED] transferred his interest in [REDACTED] to his brother, [REDACTED] in 2003. Later that year, [REDACTED] “contributed employees and a vehicle to the business in exchange for a share of the profits and losses. He was never a stockholder and received no stock.” [REDACTED] then states that in July 2006, [REDACTED] “terminate[d] the business and start[ed] [REDACTED] . . . all the assets of [REDACTED] were transferred to [REDACTED]” and that all liabilities were paid from [REDACTED] before the transfer.

Counsel on appeal states that the sole shareholder of [REDACTED] “closed” that business and “formed a new entity,” [REDACTED] also as the sole shareholder. She further states that [REDACTED] transferred its assets to [REDACTED] “assume[d] . . . other obligations” of [REDACTED] which included two immigration petitions and a masonry project in process. The petitioner submitted a letter from [REDACTED] which

stated that the change from [REDACTED] was “seamless, and practically non-existent” so that the company retained the same employees and contact information.

The petitioner through counsel and [REDACTED] repeatedly state that [REDACTED] “closed” and that [REDACTED] was then formed albeit with the same sole shareholder. The petitioner submitted [REDACTED] Certificate of Incorporation from the Commonwealth of Virginia, the minutes of the Organizational Meeting, and a copy of the stock certificate issued to [REDACTED]. None of these documents references [REDACTED]. The petitioner did not submit a bill of sale, asset purchase agreement, or other evidence that [REDACTED] assumed the asserts and essential rights and obligations of [REDACTED]. Counsel and [REDACTED] represented that the transfer of assets and obligations occurred, but failed to submit documentation evidencing such a transfer. 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’l Comm’r 1972)). Similarly, 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).

The evidence in the record indicates that [REDACTED] were equal shareholders of [REDACTED] and that [REDACTED] opened up a second business, [REDACTED]. As stated by counsel in the response to the director’s RFE, [REDACTED] decided to close down [REDACTED] and start fresh *with a new entity.*” (emphasis added). On appeal, counsel states that [REDACTED] “form[ed] a new business entity” by creating [REDACTED]. Additionally, the tax returns in the record demonstrate that [REDACTED] have different federal tax identification numbers and the address for [REDACTED] on the Form ETA 750 is different than the address provided for [REDACTED] on the Form I-140. The evidence of record does not indicate any transfer of assets from [REDACTED]. Without such evidence, [REDACTED] has failed to establish that it is the successor-in-interest to [REDACTED], the labor certification applicant.

The regulation at 8 C.F.R. § 204.5(1)(3) provides, in part:

Initial evidence—(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.

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.

Every petition must be accompanied by an individual labor certification specific to the petitioning employer. As [REDACTED] has not been demonstrated to be a successor-in-interest to the labor certification applicant, [REDACTED] the instant petition was not accompanied by a valid labor certification and cannot be approved.

Counsel also asserts that another, separate Form I-140 was approved for the instant beneficiary's brother with the same petitioner, filed at the same time under the same circumstances as those presented here. The petitioner submitted no evidence of the other case or the information submitted with the petition so that we are unable to determine if the circumstances truly are the same as the ones presented here. Even if that evidence had been submitted and included the same set of evidence and circumstances presented here, USCIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.