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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: JUN 20 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 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 with the field office or service center that originally decided your case by filing a 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,

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 gourmet food business. It seeks to employ the beneficiary permanently in the United States as a cook, Japanese sushi specialty. The instant petition was filed by [REDACTED] and is accompanied by a labor certification application submitted by [REDACTED], and approved by the United States Department of Labor (DOL). The director determined the instant petitioner had failed to establish it was the successor-in-interest to the organization that filed the application for labor certification. 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 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>

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, 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,

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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 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).

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 the present matter, the USCIS Texas Service Center Director issued a notice of intent to deny (NOID) on June 18, 2008, stating that the record contained no evidence that the petitioner was a successor-in-interest to the organization filing the application for labor certification. The director afforded the petitioner the opportunity to provide evidence that it had taken over [REDACTED] "and assumed liability for the debts and assets of the company."

*Matter of Dial Auto* limits a successor-in-interest finding to cases where the petitioner can show that it assumed the original employer'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 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.<sup>2</sup> *Id.* at 1569 (defining "successor"). When considering other business

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<sup>2</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

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>3</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. *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 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

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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).

<sup>3</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.

ownership transfer. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

Here, the petitioner fails to satisfy the first prong of the *Matter of Dial* analysis. We note at the outset, that the petitioner, throughout the record, does not purport to be a successor-in-interest to [REDACTED] in its entirety, but rather repeatedly styles itself as the successor-in-interest with regard to the labor certification only. Furthermore, at no point in the record has the petitioner provided documentation supporting a conclusion that it acquired the essential rights, duties, obligations and assets of [REDACTED] the organization who filed the application for labor certification.

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).

The record shows that [REDACTED] was closed in the aftermath of September 11, 2001. The petitioner was in operation at that same time. It does not appear from the record, nor does the petitioner allege, that it purchased assets of the now defunct [REDACTED]. The petitioner likewise does not allege to have inherited any obligations of that closed business either. [REDACTED] ceased operations six years prior to the filing of the instant petition. The instant petitioner did not allege, or provide evidence, that it maintained continuity of operations from [REDACTED]

The petitioner alleges that the its single owner [REDACTED] was also the owner of [REDACTED]. Counsel argues that this relationship somehow creates a bridge between these entities which would allow the petitioner to be the successor-in-interest to the labor certification, but to no other part of the now defunct [REDACTED]

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 are deemed to be distinct and separate, and ordinarily cannot be utilized in adjudicating an immigrant petition. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *see also Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) refusing to utilize a sister corporation's financial resources to supplement the petitioner's ability to pay the proffered wage.

The second prong of the analysis is likewise unsatisfied in this case. The petitioner, in attempting to establish that the beneficiary possessed the required experience for the offered position, provided the menu of the beneficiary's prior employer. Purportedly, this was meant to demonstrate that the beneficiary had the skill and training to produce Japanese specialty dishes. However, nothing in the record supports the claim that the petitioner is a Japanese restaurant or even serves Japanese specialty dishes. The petitioner could have provided a copy of its own menu to support a claim that the proffered job was the same as that on the application for labor certification; however, it did not

provide a menu or any other evidence relevant to this prong of the analysis.<sup>4</sup> Counsel alleges that the proffered job with the petitioner is the same as the job with [REDACTED]. However, 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).

To satisfy the third prong of the *Matter of Dial* analysis, the petitioner must show that petition is and was deserving of approval in all respects. A petitioner must establish that a job offer was realistic at the time of the priority date. This requires that the petitioner establish that it had the continued ability to pay the proffered wage from the year containing the priority date until the beneficiary adjust status to legal permanent resident. Here the application for labor certification was accepted in 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here the proffered wage is \$14.22 per hour, or \$25,880.40 per year based upon a 35 hour work week. In the instant case, the petitioner has not established that it or [REDACTED] paid the beneficiary the full proffered wage during any relevant timeframe, including the period from the priority date in 2001 or subsequently.<sup>5</sup>

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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<sup>4</sup> A search of various online restaurant reviews did not disclose that the petitioner served any Japanese specialty dishes. Rather, the only specialty attributed to the petitioner appears to be seafood.

<sup>5</sup> The record contains the personal federal income taxes (Form 1040) of the beneficiary for 2001 and 2002. On those returns, the beneficiary claims to have received nothing in wages or salary for those years. Rather, he claims to have received income from operation of a business (line 12 Form 1040). The Schedule C accompanying the return describes the petitioner's business as "freelance."

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses). Here, [REDACTED] had net income<sup>6</sup> as follows:

2001	-\$2,836
2002	\$16,032

At no time did [REDACTED] have sufficient net income to pay the proffered wage. The instant petitioner provided no documentation demonstrating when it purports to have become the successor-in-interest. The only evidence that provides a date for which the instant petitioner assumed an interest in the labor certification filed on behalf of the beneficiary is the Form I-140, which was filed in 2008. Thus, there is no evidence of [REDACTED] ability to pay the proffered wage after 2002.<sup>7</sup> for 2003 to 2007. The instant petitioner did not provide tax returns or audited financial reports for any period after it filed the petition in 2008.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. Here the record shows [REDACTED] net current assets were as follows:

2001	-\$2,836
2002	\$91,405

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<sup>6</sup> For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporate Income Tax Return.

<sup>7</sup> Although the record includes the petitioner's 2002, 2003, and 2004 federal income tax returns (Form 1120), the petitioner's net income as reflected on Line 28 is: \$4,117 (2002); \$6,525 (2003); and, \$3,818 (2004). These figures are below the proffered wage in all years.

<sup>8</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore [REDACTED] did not have had sufficient net current assets to pay the proffered wage from the priority date in 2001 onward. Although [REDACTED] did have sufficient net current assets in 2002, in light of the fact that it ceased operations in 2002, it did not have the ability to pay the beneficiary thereafter. As noted above, the instant petitioner asserted its interest for the first time in 2007, but provided evidence to show it had the ability to pay the proffered wage only for the years 2002, 2003, and 2004.<sup>9</sup>

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.

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<sup>9</sup> The petitioner's federal income tax returns show it had net current assets as follows: \$205,160 (2002); \$246,382 (2003); and, \$280,202 (2004).