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

(b)(6)

DATE: JAN 3 1 2013 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 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,

Ron Rosenberg
Acting 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 describes itself as a contract staffing business. It seeks to employ the beneficiary permanently in the United States as a ship fitter. The petitioner requests classification of the beneficiary as a skilled worker.[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL).

The director determined that the petitioner had not established that it was the successor-in-interest to the entity that filed the labor certification with the DOL, and that the petitioner had not demonstrated the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

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.[2]

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, then it must establish that it is a successor-in-interest to that entity. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

The labor certification submitted in support of the instant petition lists the employer as International Marine & Industrial Services, LLC.[3] In a letter dated August 8, 2007, the petitioner explained that

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[1] 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.

[2] 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).

[3] The labor certification initially listed the name of the employer as International [redacted] however a line was drawn through "Inc." and "L.L.C." was added. This change was initialed and dated on April 7, 2003. Although the initials are illegible and the change lacks the approval stamp of the DOL, the cover letter accompanying the labor certification is addressed to [redacted] Accordingly, the AAO concludes that

acquired on November 1, 2002. The letter also stated, ' has assumed the rights, duties, obligations and assets of '

The director sent a request for evidence (RFE) on May 5, 2008 which stated, in part:

> Please submit evidence to show that is the successor in interest to [A] successor in interest must assume all of the rights, duties, obligations and assets of the original employer and continue to operate the same type of business at the original employer. The successor has the burden of proof and must submit documentation showing the change of ownership and assumption of rights, duties, obligations and assets of the original employer.

In response to the director's RFE, the petitioner submitted a copy of its August 8, 2007 letter, as well as a letter dated January 31, 2007 from its auditor stating essentially the same information as the August 8, 2007 letter. The auditor's letter also provided a general confirmation regarding the petitioner's ability to pay stating that they "are not aware of any matters that would impact the Company's ability to meet the payroll obligation of the offered salary."

On October 29, 2009, the director issued a Notice of Intent to Deny (NOID) which informed the petitioner that it had not submitted the requested documentary evidence to establish that is the successor-in-interest to The director instructed the petitioner to submit evidence such as a contract of sale; mortgage closing statements; SEC filings; audited financial statements; copies of financial instruments executing the transfer of ownership; and newspaper or media reports of the merger or acquisition.

The petitioner responded to the NOID on November 30, 2009 by submitting a number of documents characterized by counsel as an "Asset Purchase Agreement evidencing purchase of ." (Emphasis added). Counsel also states, "According to the attached Asset Purchase Agreement, purchased in 2002. Thus, is considered 'successor-in-interest' as it has assumed all rights and obligation of the company." Although counsel references the evidence as a single asset purchase agreement, more than one contract was submitted in response to the NOID. The director's decision provided an itemized list of the evidence submitted by the petitioner in response to the NOID.

A document with the heading Asset Purchase Agreement (agreement) submitted in response to the NOID is between , the buyer, and the seller. The agreement states it was made in October 2002. Neither the buyer nor the seller in the

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the DOL accepted the change to the employer's name and that the labor certification was certified for

agreement is the petitioner, The agreement references schedules A through F, but these schedules are not in the record. Thus, the submitted agreement is not only an incomplete copy, but it also involves two entities that are not the petitioner.

Page 17 of the agreement contains the signatures of the parties. The signature line for states:

By:
Its Sole Member
By: /s/
CEO

The signature block indicates that the petitioner, a corporation, is the sole member of a limited liability company. Corporations and limited liability companies are legal entities, separate and distinct from their owners and shareholders. Therefore, the purchase of an asset by would not make a separate entity, a successor-in-interest. Instead, would be the successor.

A note in Schedule A of the Asset Purchase Agreement states:

> An agreement has been made [between] and to continue operational business in the office located in MS for approximately the next 6 continuous calendar months until the decision of a permanent arrangement of either purchasing or disengaging the existing office is reached.

This is the first reference to " in the agreement.[4] It is unclear why Schedule A to an asset purchase agreement between as the buyer and as the seller references an outside agreement between a third entity, and (which could be either or . It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

[4] The AAO presumes that is a reference to the petitioner, , but nothing in the agreement indicates that will be referenced with the abbreviation As stated above, the only time " appears in the agreement is on the signature page.

The above notwithstanding, the agreement in the record does not address the disposition of the [redacted] Mississippi office, which is the address listed on the labor certification for the employer and the location of the offered position.[5]

On appeal, counsel asserts that the evidence in the record clearly establishes that the petitioner is the successor-in-interest to the labor certification employer. Counsel did not submit additional evidence on appeal. In his brief, counsel simply states that that the "Asset Purchase Agreement clearly shows that [redacted] bought out [redacted] in November 2002. Thus, Petitioner is successor in interest of [redacted] who originally filed the beneficiary's alien labor certification." As is discussed below, the asset purchase agreement in the record is from October 2002, and it is an agreement between [redacted] the buyer, and [redacted] the seller. The agreement does not establish that the assets of the labor certification employer, [redacted] were purchased by the petitioner, [redacted]

Immigrant visa petitions filed by a successor-in-interest employer are adjudicated in accordance with *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 precedent decision *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: "[O]ne 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 (defining "successor in interest"). A petitioner is not precluded from demonstrating a successor-in-interest relationship simply because it acquired a division of the predecessor entity instead of purchasing the predecessor in its entirety.

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.[6] *Id.* at 1569 (defining "successor"). When considering other business

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[5] The petition states that the beneficiary will work in [redacted] Mississippi. [redacted] and [redacted] are in the same Metropolitan Statistical Area. Therefore, the change in location of employment is not material in this case.

[6] 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).

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. *See e.g. Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984).

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 or asset transaction, 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.[7] *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 the relevant parts 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 can establish eligibility 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 acquired 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 successor's 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

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[7] 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).

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 petitioner has not established a valid successor relationship for immigration purposes because the evidence in the record does not satisfy all three conditions. First, as the director indicated in his decision, while the petitioner provided a number of documents to show that a business transaction occurred between and , the evidence in the record does not fully describe and document a transaction transferring ownership of the predecessor to the petitioner,

Second, the evidence does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether the claimed successor and the predecessor possessed the ability to pay the proffered wage for the relevant periods. The petitioner's ability to pay will be discussed in detail below.

Accordingly, the appeal must be dismissed because the petitioner has failed to establish that it is a successor-in-interest to the employer that filed the labor certification.

Regarding the petitioner's ability to pay, the regulation at 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In a successor-in-interest case, the petitioning successor must establish 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.

Here, the Form ETA 750 was accepted on March 13, 2002. The proffered wage as stated on the Form ETA 750 is $15.00 per hour for 40 hours per week, and $22.50 per hour for eight hours of overtime per week. This equals $780 per week or $40,560 per year.

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. The record contains no evidence that the petitioner employed and paid the beneficiary at any time since the priority date of December 1, 2003.

If, as in this case, 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 petitioner's net income and net current assets. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *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. 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). USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

The petitioner provided a 2002 Form 1120S for [redacted] which indicates that it covers a short fiscal year from June 20, 2002 to December 31, 2002. Notably, the Form 1120S also indicates that [redacted] was incorporated on June 20, 2002. Therefore, additional evidence regarding ability to pay from [redacted] is necessary for the period beginning on the priority date of March 13, 2002 until June 20, 2002.[8] The 2002 Form 1120S states that [redacted] had net income of $39,647[9] and net current assets of $0.[10]

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[8] *See* footnote 3, *supra.*

[9] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed January 11, 2013) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the [redacted] had no additional income, credits, deductions or other adjustments shown on its Schedule K for 2002, its net income is found on line 21 of page one.

[10] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. Net current assets are the difference between the petitioner's current assets and current liabilities. A corporation's year-end current assets are shown on Schedule L, lines 1 through

The petitioner, indicated on the petition that it was established in 2002 and currently employs 500 workers. The petitioner provided the director a letter from its auditors and a letter from its controller attesting to the petitioner's ability to pay the proffered wage.

The director informed the petitioner in the NOID that the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of ability to pay to be in the form of copies of annual reports, federal tax returns, or audited financial statements, and that USCIS may, in its discretion, accept a statement from a financial officer of the organization if the petitioning employer employs 100 or more workers. The director then instructed the petitioner to "please submit evidence of ability to pay in the form of one of the documents listed above for the years 2003 through present date." Therefore, as permitted by regulation, the director was not satisfied with the submitted letters and he instructed the petitioner submit annual reports, federal tax returns, or audited financial statements.

The director also noted in the NOID that USCIS records show that the petitioner filed multiple I-140 petitions. The petitioner was instructed to provide receipt numbers of all approved and pending petitions, along with evidence of the petitioner's ability to pay each beneficiary the proffered wage.

The petitioner's response to the NOID included a copy of the letter from the petitioner's controller. In the response letter, counsel stated "Petitioner employs well over 100 employees [and the] previously provided letter sufficed to establish the petitioner's ability to pay the beneficiary." Counsel also stated that the petitioner filed only one I-140 petition with a priority date on or after March 13, 2002 and provided the receipt number of that petition. However, the NOID did not limit the request to petitions with priority dates on or after March 13, 2002. USCIS records show that at the time the director issued his NOID on October 29, 2009, the petitioner had filed 28 Forms I-140. 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 Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 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). Accordingly, petitions filed on behalf of other beneficiaries with priority dates that are before or after the priority date of the instant case may be relevant to the petitioner's ability to pay the proffered wage. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The director's decision reiterated that, "It is within the discretion of USCIS to accept a statement from a financial officer of the organization if the petitioning employer employs 100 or more workers." The director also stated, "The federal tax return for the predecessor company does not adequately demonstrate that both the petitioner, and the predecessor company" had the continuing ability to pay the proffered wage beginning on the priority date.

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6. Its year-end current liabilities are shown on lines 16 through 18.

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. Accordingly, the AAO affirms the director's conclusion that the petitioner failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.