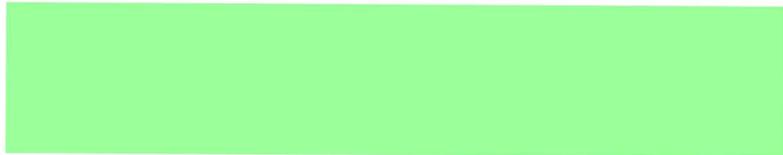


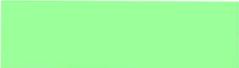
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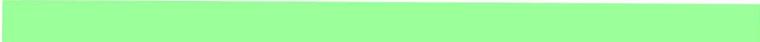
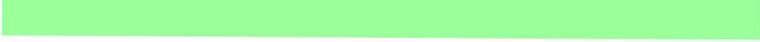
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **NOV 27 2013** OFFICE: NEBRASKA 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the employment-based immigrant visa petition. The petitioner filed a Motion to Reopen/Reconsider the director's decision. The director subsequently dismissed the motion. The petitioner thereafter filed an appeal with the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The matter is now before the AAO on a Motion to Reopen/Reconsider. The motion will be dismissed, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner was an IT consulting and staffing business. It sought to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a labor certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and that the petitioner had submitted false evidence in support to the instant petition. Therefore, the director denied the petition and dismissed a subsequent motion.

The AAO previously determined that the petitioner had failed to establish its ability to pay the proffered wage, that there was insufficient evidence in the record to demonstrate that the petitioner is a successor-in-interest to the business entity that filed the labor certification – [REDACTED], and that the petitioner had failed to establish that the beneficiary is qualified for the offered position with the work experience required by the terms of the labor certification. Accordingly, the AAO dismissed the appeal. The petitioner subsequently filed the instant Motion to Reopen/Reconsider. With the motion, the petitioner submitted copies of the AAO's decision, the beneficiary's Form W-2s from 2003 to 2011, [REDACTED] corporate tax returns for the tax years 2004 to 2011, Fictitious Name Statement dated October and November 2001 for the company known as [REDACTED] Certificate of Status from Secretary of State for the State of California, dated December 11, 2006, Form I-140 and Form ETA 750, and letters of employment from [REDACTED]. These documents were previously submitted by the petitioner and remain a part of the record.

The AAO finds that the motion to reopen does not qualify for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner has failed to provide new facts with supporting documentation not previously submitted. The AAO additionally finds that the motion to reconsider does not qualify for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel does not assert that the director and/or the AAO made an erroneous decision through misapplication of law or policy.

On September 13, 2013, this office notified the petitioner that according to publicly available records, [REDACTED] (the petitioner) was suspended in the state of California and that [REDACTED] (the entity that filed the labor certification) was dissolved.

If the petitioner is currently not in good standing, this is material to whether the job offer, as outlined on the immigrant petition filed by this organization, is a *bona fide* job offer. Moreover, any such concealment of the true status of the organization by the petitioner seriously compromises the credibility of the remaining evidence in the record. See *Matter of Ho*, 19 I&N Dec. 582, 586 (BIA

1988)(stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.). It is incumbent upon 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. *See id.*

This office allowed the petitioner 30 days in which to provide proof that its business is currently in active status and in good standing. Counsel for the petitioner responded on October 11, 2013 stating that [REDACTED] (the petitioner), merged with [REDACTED] and that they are now conducting business as [REDACTED]. Counsel further stated that according to the printout form the California Secretary of State website, [REDACTED] business status is "ACTIVE." The petitioner submitted a copy of a statement dated April 22, 2013 and bearing the heading [REDACTED]. The letterhead does not include an address. The statement is not signed, but indicates that it is from the partners and associates of [REDACTED] DBA [REDACTED]. The declarant states that [REDACTED] is pleased to announce a merger with [REDACTED] and that the merger was scheduled to take place on May 1, 2013, and that on that date, the combined firm would begin conducting its business as [REDACTED].

The AAO finds that this letter constitutes insufficient evidence to demonstrate a successor-in-interest relationship with the petitioner. There is no merger agreement indicating the parameters of the transaction between the petitioner and [REDACTED]. The record does not list the dates or the parties to the agreement, and does not describe any consideration, or the terms of any agreement between the petitioner and [REDACTED].

Moreover, as indicated in the AAO decision dated May 15, 2013, the record does not establish that the petitioner, [REDACTED] is a successor-in-interest to the entity that filed the labor certification. On motion, the petitioner states that the petitioner was doing business as (DBA) [REDACTED] and that the companies are the same company. The evidence reflects otherwise. The labor certification indicates that [REDACTED] FEIN [REDACTED] (at bottom of page 1 of Form ETA 750A), [REDACTED] California, filed the labor certification. The petition, however, was filed by [REDACTED] FEIN [REDACTED] [REDACTED] corporate tax returns at box B), [REDACTED].

The two companies are each separately incorporated as indicated on the California Secretary of State website (accessed November 13, 2013). They each have a different FEIN for tax purposes, and a different address. As noted in the AAO decision dated May 15, 2013, the petitioner, [REDACTED] doing business as (DBA) [REDACTED] is a different entity than the one that filed the labor certification, [REDACTED]. See 20 C.F.R. §§656.3, 656.17(i)(5)(i) (entities with different FEINs are not the same "employer" for labor certification purposes). As noted by the director in his original denial dated December 13, 2011, records of the California Secretary of State's office shows that the labor certification employer was incorporated on April 13, 1999 and dissolved on July 31, 2006, which is prior to the filing date of the Form I-140 on September 20, 2006. Furthermore, the record shows and the copy of the Articles of

Incorporation submitted by the petitioner confirm that the petitioner, [REDACTED] was incorporated on September 26, 2001. The petitioner has failed to explain these inconsistencies. Regardless, a review of the Secretary of State for the State of California's website (assessed November 21, 2013) shows that [REDACTED] business status is suspended, and that the business entity [REDACTED] has been dissolved.

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 1986) ("*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, 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.¹ *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.²

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

¹ 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).

² 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.

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.³ 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 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.

The record contains no evidence to establish a valid successor relationship or merger between [REDACTED] or between [REDACTED] and [REDACTED]. There is also no evidence of the organizational structure of the predecessor companies prior to any transfer or merger or of the current organizational structure of each claimed successor. The evidence does not establish that there has been a merger of the essential rights and obligations of the predecessor and [REDACTED] necessary to carry on the business in the same manner as the predecessor. The evidence also does not establish that the successor is continuing to operate the same type of business as the predecessor or that the job duties of the beneficiary are unchanged. There is insufficient evidence in the record to establish that [REDACTED]

³ 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).

intends to employ the beneficiary. The evidence also does not establish that the manner in which the business is controlled as a result of any merger by the successor is substantially the same as it was before the ownership transfer, as noted by the AAO in its May 15, 2013 decision.

Therefore, the evidence in the record is not sufficient to establish that any successor-in-interest relationship exists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As noted in the director's decision and in the AAO's decision regarding the appeal, a successor-in-interest relationship has not been established between the petitioner and . As noted in the AAO's September 13, 2013 Notice of Intent to Dismiss and Request for Evidence, the current status of is suspended and is dissolved. Therefore, the petition and the motion in front of the AAO have become moot. 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 appellant is a different entity than the petitioner/labor certification employer, 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). As no successor-in-interest has been established with the entity that filed the labor certification, the petition is not accompanied by a valid labor certification. In addition, the AAO requested the petitioner to submit evidence to establish its ability to pay the proffered wage for 2012 onwards, including Forms W-2 or Forms 1099, MISC, corporate tax returns, audited financial statements, or annual reports. The petitioner was cautioned that, if it did not respond, the AAO would dismiss the Motion to Reopen/Reconsider without further discussion. *See* 8 C.F.R. § 103.2(b)(13)(i). The AAO stated that 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 AAO further noted that it would be unable to substantively adjudicate the motion without a meaningful response to the line of inquiry set forth in this notice. In the instant matter, the petitioner has failed to submit the requested ability to pay evidence. Therefore, the motion will also be dismissed for this reason.

As is noted in the AAO's decision dated May 15, 2013, the petition will also be dismissed because the petitioner has failed to establish that the beneficiary is qualified for the offered position with two years of experience in the job offered or two years of experience in a related occupation, e.g., any position in software development or software testing. The AAO determined that the employment letters were insufficient to establish the beneficiary's work history, that the declarant's statements were contradictory to statements made by the beneficiary on Form G-325A, and that the H-1B visa approval notice and copies of IRS Forms W-2 issued by the petitioner to the beneficiary indicated information that was contrary to the employment letters and to the beneficiary's statements. *See* AAO decision dated May 15, 2013. On motion, the petitioner failed to overcome this issue. Counsel states that the beneficiary's former employer, Motorola was unable to issue the beneficiary a new letter to confirm the employment with the company, so the petitioner submits a copy of a

printout from the Work Number Verifier, an employment and income verification service, copies of various paystubs for the year 1993, and a copy of the Forms W-2 for 1994, 1995, 1996, 1997, and 1998. This evidence is insufficient to demonstrate the beneficiary's past employment. The petitioner failed to address the contradictory statements by the beneficiary between Form G-325A and the former employer letters. There is no evidence in the record to show that the verification service has first-hand knowledge of the beneficiary's employment, and the paystubs and Forms W-2 are insufficient to demonstrate the beneficiary's job duties or whether he was employed full-time. Therefore, the petitioner has failed to overcome USCIS's determination with respect to this issue.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden.

For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met the burden.

ORDER: The Motion to Reopen/Reconsider is dismissed and the decision of the AAO dated May 15, 2013 is affirmed. The petition is denied.