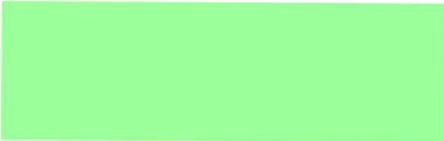


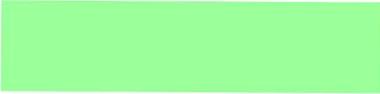
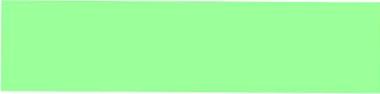


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **APR 10 2014** 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 (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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (the director), approved the immigrant visa petition on November 21, 2008. The director revoked the approval of the petition on July 19, 2013. The Administrative Appeals Office (AAO) rejected the subsequent appeal as untimely filed. On December 19, 2013, the AAO reopened the matter *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5)(ii), as the petitioner provided evidence that the appeal was indeed timely filed. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a wireless telecommunications firm. It seeks to permanently employ the beneficiary in the United States as president and CEO. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 25, 2005. *See* 8 C.F.R. § 204.5(d).

The Notice of Revocation (NOR) states that the petitioner failed to establish that the beneficiary is qualified for the job offered as of the priority date, that the petitioner has the continuing ability to pay the proffered wage as of the priority date or that there was a *bona fide* job offer. The director found that the evidence submitted by the petitioner in response to a Notice of Intent to Revoke (NOIR) failed to overcome these findings. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 8 C.F.R. § 103.2(a)(1). The record in the instant case

The Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. *See* Section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR dated April 19, 2013, the director gave the petitioner notice of the inconsistencies and insufficient documentation regarding the beneficiary's qualifications; that the petitioning business had ceased to exist prior to the filing of the Form I-140 immigrant petition and there was insufficient evidence that there was a successor-in-interest; evidence in the record indicated that there was no *bona fide* job offer; and that the petitioner had failed to establish its ability to pay the proffered wage. The director specifically asked the petitioner to submit additional evidence to overcome the inconsistencies and findings.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of

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).

intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence of the record, pointing out specific evidence or information relating to the inconsistencies and lack of evidence of the beneficiary’s qualifying experience, the lack of evidence of a *bona fide* job offer or, alternatively, a successor-in-interest, and the lack of evidence of the ability to pay the proffered wage that would warrant a denial if unexplained and un rebutted, and thus was properly issued for good and sufficient cause.

Beneficiary’s Qualifications

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, United States Citizenship and Immigration Services (USCIS) must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: Yes.

High School: Yes.

College: Yes

College Degree Required: B.S.

Major Field of Study: Computer Science or related discipline.

TRAINING: Blank.

EXPERIENCE: Five (5) years in the job offered or in the related occupation of Computer Science.

OTHER SPECIAL REQUIREMENTS: Technical written and oral communication in English. Knowledge of Java; C; Brew; Mysql; Dialogic/other voice boards; and carrier networks.

The record contains a copy of the beneficiary's Bachelor of Science in Computer Science diploma and transcripts from the [REDACTED] completed in 1997. The labor certification also states that the beneficiary qualifies for the offered position based on experience as a part-time senior developer with the [REDACTED] from March 1997 to September 1997; a senior developer and project manager with [REDACTED] Miami, Florida, from January 1998 to August 1999; a project manager with [REDACTED], from August 1999 to September 2000; a developer with [REDACTED] from October 2000 to December 2000; V.P. of sales with [REDACTED] from January 2001 to February 2003; and V.P. product development with the petitioner from September 2003 until March 24, 2005, the date on which the labor certification was signed. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter dated January 8, 2008, from [REDACTED] co-founder, on [REDACTED] letterhead stating that the company employed the beneficiary from September 2003 to the date of the letter in the positions of Vice President, product development and President and CEO. However, the letter does not describe the beneficiary's duties in detail or sufficiently specify the dates of employment. The letter is inconsistent with a Form G-325A, Biographical Information Sheet, regarding the beneficiary's dates of employment. The Form G-325A states that the beneficiary has been employed by [REDACTED] since November 2002. 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).

The record contains an experience letter dated December 7, 2007, from [REDACTED] Business Affairs Manager, on [REDACTED] employed the beneficiary as a senior developer and project manager from January 5, 1998 to August 15, 1999. However, the letter does not provide the address of the employer.

The record contains an experience letter dated January 31, 2000, from [REDACTED], program manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a

systems analyst/visual basic programmer from August 1999 to January 2000. However, the letter does not describe the beneficiary's duties in detail. The letter is also inconsistent with the labor certification regarding the beneficiary's dates of employment. The labor certification states that the beneficiary was employed by [REDACTED] from August 1999 to September 2000. *Matter of Ho*, 19 I&N Dec. at 591-92.

The record contains an experience letter dated January 17, 2008, from [REDACTED] Chairman, on [REDACTED] letterhead stating that the company employed the beneficiary from January 2000 to February 2003. The letter states that the beneficiary started as a Visual Basic Analyst Programmer and was employed as a project manager, VP of technical sales and lead project manager. However, the letter does not provide the address of the employer, sufficiently describe the beneficiary's duties in detail or sufficiently specify the beneficiary's dates of employment in each position. The letter is inconsistent with the labor certification and the Form G-325A regarding the beneficiary's dates of employment. The Form G-325A indicates that the beneficiary was already employed with [REDACTED] in November 2002 and the labor certification states that [REDACTED] employed the beneficiary from October 2000 to December 2000. *Matter of Ho*, 19 I&N Dec. at 591-92.

On appeal, counsel submitted affidavits from [REDACTED]. A September 20, 2013 affidavit from [REDACTED] states that he believes the inconsistencies between the experience letters and the labor certification are harmless errors. A September 19, 2013 affidavit from [REDACTED] states that she was employed by [REDACTED] as HR director from January 1998 to August 1999 and that the company has not been operational since at least 2007. A September 18, 2013 affidavit from [REDACTED] states that he was chairman of the board and CEO of [REDACTED] during the beneficiary's employment with the company and confirms the beneficiary's employment with [REDACTED] as a visual basic analyst programmer from October 2000 to February 2003.

All of the above-referenced affidavits confirm the beneficiary's employment with [REDACTED] as a senior developer and project manager from January 1998 to August 1999; with [REDACTED] as a systems analyst/visual basic programmer from August 1999 to January 2000; with [REDACTED] as a visual basic programmer from January 2000 to February 2003; and with [REDACTED] as vice president, product development and president and CEO since September 2003. A September 20, 2013 affidavit from [REDACTED] general counsel to [REDACTED], also confirms the beneficiary's employment with [REDACTED] as a senior developer and project manager from January 1998 to August 1999; with [REDACTED] as a systems analyst/visual basic programmer from August 1999 to January 2000; with [REDACTED] as a visual basic programmer from January 2000 to February 2003; and with [REDACTED] as vice president, product development and president and CEO since September 2003. All of the affiants state that they have personal knowledge of the beneficiary's career. However, none of the affidavits meet all of the requirements of 8 C.F.R. § 204.5(g)(1) or overcome the noted inconsistencies with independent, objective evidence. *Matter of Ho*, 19 I&N Dec. at 591-92.

In response to the AAO's December 19, 2013 notice of reopening/notice of intent to deny and derogatory information (NOID/NDI), counsel fails to provide any further documentation regarding the beneficiary's experience and contends that the affidavits are independent, objective evidence of

the beneficiary's experience. Counsel contends that affidavits from former employers signed under penalty of perjury are normally deemed to be independent, objective evidence. The AAO does not consider affidavits from the same individuals who wrote the initial deficient and inconsistent experience letters to be independent and objective evidence. Counsel fails to cite any precedent that such affidavits are independent and objective evidence. Independent and objective evidence would be evidence such as Forms W-2, Wage and Tax Statements, tax records, contemporaneous employment contracts and letters, etc. As discussed above and noted in the AAO's NOID/NDI, independent, objective evidence is required to overcome the inconsistencies between the experience letters, affidavits, labor certification and Form G-325A.

While the affidavits did not meet the requirements of 8 C.F.R. § 204.5(g)(1), 8 C.F.R. § 103.2(b)(2) does provide that when primary evidence is not available, such as when an employer is no longer in business, evidence must be submitted to establish the need for secondary evidence with any documentary evidence of the qualifying employer's closing, and requires affidavits from two persons to establish the fact of the beneficiary's employment. Therefore, the affidavits in the record cannot establish the beneficiary's experience with [REDACTED] as the petitioner has failed to establish that secondary evidence is required.³ Further, even though the businesses have closed and secondary evidence is necessary to establish the beneficiary's experience with [REDACTED], not all of the affiants providing information regarding the beneficiary's experience with those employers are in a position to provide such testimony. While all the affiants claim to have personal knowledge of the beneficiary for many years, only [REDACTED] was employed with the beneficiary at [REDACTED] was in a position with [REDACTED] to be cognizant of the beneficiary's position and duties there. Therefore, the petitioner has failed to provide affidavits from two people who were in a professional position within the qualifying employers and able to verify the beneficiary's experience. Finally, none of the affidavits provide detailed descriptions of the beneficiary's job duties.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Bona Fide Job Offer

On appeal, counsel contends that Musicphone, the entity which filed the labor certification and Form I-140 immigrant petition, remained operational after a July 2007 partial sale of assets to [REDACTED] and that a *bona fide* job offer continued to exist at the time the petition was filed on January 11, 2008. Counsel further states that [REDACTED] successor-in-interest.⁴ In support of these statements counsel submitted the following documentation:

³ There is no evidence and the petitioner has not even asserted that these businesses are no longer in existence.

⁴ Counsel also asserts on appeal that [REDACTED] in January 2013 and that [REDACTED] created a subsidiary, [REDACTED] to continue the business operations of [REDACTED]. Counsel did not specify on appeal whether [REDACTED]

- 2005, 2006 and 2007 Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statement, from [REDACTED] to the beneficiary.
- IRS letter reflecting [REDACTED] Federal Employer Identification Number (FEIN) as [REDACTED]
- 2005, 2006 and 2007 IRS Forms [REDACTED] and incorporation date of November 15, 2002.
- 2008, 2009, 2010 and 2011 IRS Forms 1120 for [REDACTED] and incorporation date of October 23, 2007.
- 2012 IRS Form W-2 from [REDACTED] to the beneficiary.
- State of California Secretary of State Certificate of Status Domestic Corporation reflecting incorporation of [REDACTED] on November 15, 2002.
- May 17, 2013 letters from [REDACTED] and the beneficiary, stating that the sale between [REDACTED] and [REDACTED] was a limited acquisition of certain assets and that [REDACTED] continued to operate following this acquisition.
- July 10, 2007 Asset Purchase Agreement between [REDACTED]
- November 17, 2008 Settlement and Release Agreement between [REDACTED]
- A May 17, 2013 declaration from the beneficiary stating that [REDACTED] was in operation on December 23, 2009.
- Various 2008 paystubs from [REDACTED] to the beneficiary.
- Bank Statements for [REDACTED] for February 28-March 27, 2009; October 30-November 25, 2008; May 29-June 26, 2008; October 30-November 28, 2007; September 27-October 29, 2007; July 28-August 29, 2007; and June 28-July 27, 2007.⁵
- Email correspondence between the beneficiary and [REDACTED] regarding the final shut-down of [REDACTED] transfer.⁶
- [REDACTED] invoice dated January 3, 2008, to [REDACTED] regarding hosting fees.
- [REDACTED] dated April 23, 2008 and March 23, 2008 regarding closure of account with [REDACTED]
- Consulting agreement and invoice between [REDACTED] for services rendered in 2005.

Corporate Records for [REDACTED] reflect that the business was incorporated in California on November 15, 2002 and that the business was suspended from January 3, 2005 to July 10, 2007, the date on which [REDACTED] filed a reviver. Corporate records reflect that the beneficiary resigned as agent for the corporation on June 2, 2008 and that the corporation was again suspended on January 4, 2010 and remains suspended to this date.

or [REDACTED] is the purported successor-in-interest to the petitioner.

⁵ Counsel did not submit all pages of all of these statements.

⁶ The email address for the beneficiary during the correspondence between October 2008 and November 2008 implies that the beneficiary was already employed with [REDACTED]. This contradicts counsel's, the petitioner's and the beneficiary's statements that the beneficiary was still employed by [REDACTED] during this period.

The evidence in the record establishes that, at the time [REDACTED] filed the Form I-140 immigrant petition and replied to a request for evidence (RFE) in 2008, the company had already started to wind down its activities. The bank account statements and invoices reflect decreased activity and the closure of [REDACTED] as an active business. The sale agreement reflects that [REDACTED] was to continue to provide hosting services to [REDACTED] for a period of no less than six months and no more than twelve months and the beneficiary admits in her statements that she performed president and CEO responsibilities for [REDACTED] after July 2007 purely to “wrap-up” the business. Further, corporate records reflect that the beneficiary had already started to move on to a new venture with [REDACTED] as early as 2006, as the beneficiary is listed as the registered agent for [REDACTED] the purported predecessor of [REDACTED], in its Articles of Incorporation dated August 12, 2006. Although the evidence submitted on appeal demonstrates that [REDACTED] was an operating business as of January 11, 2008, all evidence submitted on appeal suggests that as of that date, it was clear that [REDACTED] would no longer continue to operate to a degree which required a permanent, full-time President and CEO, the proffered position listed on the labor certification application. Moreover, the record reflects that an agreement of sale was entered into, securing the closing of [REDACTED] on July 10, 2007, prior to the filing of the instant Form I-140 immigrant petition. As such the record does not reflect that a *bona fide* job offer with the petitioner, [REDACTED], existed as of the time the petition was filed on January 11, 2008.

In response to the AAO’s NOID/NDI, counsel asserts that the AAO has not considered that there was a successor-in-interest to the petition which was developing in inverse proportion to [REDACTED] cessation of activities. Specifically, counsel asserts that, while [REDACTED] was winding down activities in 2007/2008, [REDACTED] acquired a business unit of [REDACTED] and became a “spin-off” entity of the petitioner.

Successor-In-Interest

On appeal, counsel claims that [REDACTED] is the successor-in-interest to the petitioner. 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). 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)).

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).

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.⁷ *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.⁸

⁷ 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).

⁸ 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 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.⁹ *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 “business unit” 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* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*, HQ70/6.2 ADO9-37 (August 6, 2009); and *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

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.

⁹ 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.

reflect that the business was originally incorporated in Florida as “ ” on August 14, 2006 and changed its name to ” on November 16, 2006. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). In response to the NOID/NDI, counsel asserts that ” was the successor-in-interest to the petitioner, as ” acquired a business unit of ” 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 AAO informed the petitioner in the NOID/NDI that the evidence in the record was not sufficient to establish that either ” is the successor-in-interest to ”. A valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

In response to the NOID/NDI, counsel contends that ” acquired a business unit of ” and admits that there is no evidence of a definitive transfer between ” Inc. and ”. Instead, counsel relies on the financial records of ” to demonstrate the inverse relationship between the two companies. There is no evidence in the record, therefore, that establishes the transfer of assets/liabilities from ” to ”.

The evidence does not establish that the successor acquired the essential rights and obligations of the predecessor 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 any business unit of ” as the predecessor.¹⁰ The evidence does not establish that the manner in which the business is controlled by the successor is substantially the same as it was before the ownership transfer.

¹⁰ The petitioner listed its type of business on the petition and the labor certification as “ ”. The record includes a Company Overview of ” that identifies its mission as providing “innovative Mobile Music Services while building key partnerships with Wireless Carriers and Record Labels.” In his brief on appeal, counsel refers to the type of business ” as a “high-tech company that provides environmentally friendly solutions on the Internet for retailers and consumers.” Counsel goes on to explain that ” business focuses on the development and sale of an application called “MyReceipts” that is used for central storage of receipts. The beneficiary’s involvement in the software application development used by both companies does not demonstrate that the successor operates the same business unit as the original petitioner. *See Memorandum from* ”, Acting Associate Director, Domestic Operations, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*, HQ70/6.2 ADO9-37, August 6, 2009; and *Matter of Dial Auto*, 19 I&N Dec. at 482.

Therefore, the evidence in the record is not sufficient to establish that any entity is the successor-in-interest to [REDACTED]

In response to the NOID/NDI, counsel submits an organizational chart for [REDACTED] and a December 12, 2012, joint venture agreement between [REDACTED] creating a new company, [REDACTED]. However, as discussed above, the petitioner has failed to establish the transfer of assets/liabilities from [REDACTED] Inc. at any point. Therefore, the additional entities created from [REDACTED] are irrelevant.

Further, in a successor-in-interest case, the petitioner must also establish that the original employer possessed the ability to pay the proffered wage from the priority date until the date the petitioner assumed the original employer's rights and responsibilities. *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481, 482 (Comm. 1981). As discussed in detail in the NOR, the record does not demonstrate that the petitioner possessed the ability to pay the proffered wage from the priority date to the date it was acquired by the successor.¹¹ 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on March 25, 2005. The amended proffered wage as stated on the Form ETA 750 is \$164,653.00 per year. The evidence in the record of proceeding shows that the petitioner and [REDACTED] are structured as C corporations. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of \$360,911.00, and to currently employ 1 worker. On the Form ETA 750B, signed by the beneficiary on March 24, 2005, the beneficiary claimed to have worked for the petitioner since September 2003.

¹¹ The director noted in the NOR that the petitioner's ability to pay the proffered wage was established for 2007, as the 2007 Form W-2 issued by the petitioner to the beneficiary reflects that the beneficiary was paid more than the proffered wage. The AAO concurs with the director's conclusion that the ability to pay the proffered wage has been established for 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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. As reflected in the table below, in the instant case, the petitioner provided Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements reflecting partial payment of the proffered wage from 2005 through 2007 and Third Solutions, Inc.'s payment of the full proffered wage in 2012. The petitioner has not provided IRS Forms W-2 reflecting payment of wages by either the petitioner or [REDACTED] from 2008 through 2011.¹²

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 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.

¹² Counsel asserts that the beneficiary was paid in excess of the proffered wage in 2008, but fails to provide a 2008 Form W-2 issued to the beneficiary. However, the record does contain 2008 pay stubs which reflect only partial wages (\$151,038.51). In any future filings, the petitioner must submit the 2008 IRS Form W-2 to establish payment of any wages in 2008.

The court specifically rejected the argument that the Service 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).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang*, 719 F. Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹³ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. The tables below reflect the information provided

¹³According 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.

by the petitioner regarding its ability to pay the proffered wage and [REDACTED] ability to pay the proffered wage:

Petitioner

Tax Year	Net Income	Calculation of Net Current		Balance Due
		Assets	W-2 Wage	
2005	-\$146,845.00	-\$598,400.00	\$149,999.98	\$14,653.02
2006	-\$11,600.00	-\$1,658,840.00	\$149,999.98	\$14,653.02
2007	\$67,440.00	-\$2,534,240.00	\$194,192.37	\$0.00

Third Solutions

Tax Year	Net Income	Calculation of Net Current		Balance Due
		Assets	W-2 Wage	
2008	-\$340,261.00	BLANK	\$0.00	\$164,653.00
2009	-\$558,667.00	BLANK	\$0.00	\$164,653.00
	-			
2010	\$2,165,372.00	\$668,735.00	\$0.00	\$164,653.00
	-			
2011	\$2,095,379.00	BLANK	\$0.00	\$164,653.00
2012	UNKNOWN	UNKNOWN	\$220,000.04	\$0.00

Therefore, for the year 2007, the petitioner paid the beneficiary the full proffered wage. However, for the years 2005 and 2006, the petitioner did not pay the full proffered wage and did not have sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid to the beneficiary.

Therefore, for the year 2010, the petitioner established that [REDACTED] had sufficient net income and net current assets to pay the proffered wage. For the year 2012, [REDACTED] paid the beneficiary the full proffered wage, but failed to provide required information regarding its net income and net current assets in the form of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2). For the year 2011, the petitioner established that [REDACTED] had sufficient net income to pay the proffered wage. For the years 2008 and 2009, [REDACTED], Inc. did not pay the beneficiary the full proffered wage and did not have sufficient net income to pay the proffered wage. The petitioner failed to provide completed 2008, 2009 and 2010 L Schedules for [REDACTED], thereby preventing the AAO from rendering a decision as to whether [REDACTED] had sufficient net current assets to pay the proffered wage in those years.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it and [REDACTED] had the continuing ability to pay the beneficiary

the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal and in response to the NOID/NDI, counsel contends that the petitioner need not pay the proffered wage if it has paid the prevailing wage in the years 2005 through 2007. However, counsel fails to cite any authority to support this contention. Alternatively, counsel contends that the proffered wage of \$164,653.00 per year should not be used for all years, as the DOL amended the proffered wage in 2007.¹⁴ However, the proffered wage as of the priority date is the wage of \$164,653.00, as amended on June 14, 2007. The fact that the original wage listed by the petitioner on Form ETA 750 was lower than the amended wage does not excuse the petitioner from paying the full amended proffered wage from the priority date onwards.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has failed to provide full tax returns for 2008, 2009 and 2012, preventing the AAO from making a determination as to whether the petitioner had the ability to pay the proffered wages in those years. In addition, there is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses

¹⁴ The record contains a letter reflecting that the DOL approved an amendment to Item 12 (rate of pay) from \$140,000.00 per year to \$164,653.00 per year on June 14, 2007.

from which it has since recovered, or of the business' reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it and [REDACTED] had the continuing ability to pay the proffered wage.

Therefore, [REDACTED] has failed to establish that it is a valid successor-in-interest to the petitioner.

AC21

In response to the NOID/NODI, counsel asserts that the petition is still "approvable" due to the terms of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*¹⁵ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, USCIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer. *See Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010).

¹⁵ The AAO notes that after the enactment of AC21, USCIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A USCIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. This memorandum was superseded by *Matter of Al Wazzan*, 25 I&N Dec. 359 (AAO 2010), which determined that the petition must have been valid to begin with if it is to remain valid with respect to a new job.

Counsel contends that after the beneficiary's adjustment application had been pending for more than 180 days, i.e. on October 10, 2011, the beneficiary was entitled to port to a new employer under AC21 and that, since the immigrant petition had been approved for more than 180 days with a pending I-485, the beneficiary is entitled to port from [REDACTED] LLC.¹⁶ A USCIS memorandum signed by William Yates, May 12, 2005, clearly states that an I-140 no longer remains valid for porting purposes if it is revoked at any time, except when it is revoked based on a withdrawal that was submitted after an I-485 had been pending for 180 days. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* at 3. In the instant case, the revocation of the underlying Form I-140 immigrant petition was not based on a withdrawal. The petitioner failed to establish that a *bona fide* job offer existed at the time the petition was filed and that a valid successor-in-interest existed at any time after the petition was filed. Therefore, the beneficiary's portability to a new employer after the petition was revoked is irrelevant.

The AAO concurs with the director regarding his conclusion that the petitioner failed to establish that there is a valid successor-in-interest to the entity that filed the labor certification and that a *bona fide* job offer existed.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met.

ORDER: The appeal is reopened *sua sponte*. The AAO affirms the director's revocation. The appeal is dismissed and the petition remains revoked.

¹⁶ As discussed above, the petitioner has failed to establish that [REDACTED] is a valid successor-in-interest.