

(b)(6)

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: FEB 07 2014

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[REDACTED]

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 employment-based visa petition was denied by the Director, Nebraska Service Center (director). The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). A subsequent motion to reopen and motion to reconsider and a second motion to reconsider were dismissed by the AAO. The matter is now before the AAO on a third motion to reconsider. The motion will be granted. The appeal will be dismissed and the petition will remain denied.

The petitioner describes itself as an electric engineering firm. It seeks to employ the beneficiary permanently in the United States as an electrical engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had gone out of business and that the successor had not established that it was the "successor in interest" to the petitioner. Therefore, the director concluded that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the petitioner had not established that the beneficiary possessed the required work experience detailed on the labor certification. The director denied the petition accordingly. The AAO affirmed the director's decision and dismissed the appeal on May 22, 2012. In its decision the AAO found that the appellant had not established it was a successor in interest to the the petitioner.

On June 4, 2013, the AAO granted a motion to reopen and motion to reconsider and again affirmed the director's finding that the appellant had not established it was a "successor in interest" to the petitioner. The AAO also affirmed the director's determination that the petitioner had not established the ability to pay the proffered wage since the priority date. The AAO withdrew the director's finding that the petitioner had not established that the beneficiary possessed the minimum work experience required by the labor certification. The AAO again dismissed the appeal.

A subsequent motion to reconsider was dismissed on September 20, 2013, because the AAO determined that the movant had not cited any specific incorrect application of law or Service policy by the AAO in its previous determination that the appellant was not a "successor in interest" to the petitioner. The AAO also pointed out that its previous decision had considered, *arguendo*, the combined net incomes and combined net current assets of all companies claimed by counsel to have been successors in interest. The AAO determined that even the combined net incomes of these companies would have been insufficient to establish the ability to pay the proffered wage since the July 21, 2003 priority date. Counsel did not discuss the AAO's analysis of the combined net incomes or combined net current assets for the years in question.

The AAO erroneously found that the motion to reconsider did not address the issue of the beneficiary's eligibility for the offered job. Counsel is correct that the AAO's previous decision on June 4, 2013, determined that the evidence satisfied the beneficiary's qualifying work experience. Therefore, this portion of the AAO's September 20, 2013, decision will be withdrawn. The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3).

A threshold issue in this case is whether the movant and appellant [REDACTED] is a valid successor-in-interest to the petitioner ([REDACTED] United States Citizenship and

Immigration Services (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).

As correctly stated by counsel, 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 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

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.

³ The mere assumption of immigration obligations, or the transfer of immigration benefits derived

(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 appellant has submitted the following documentation regarding the relationship between the appellant and the petitioner:

- A May 30, 2012, letter from the company president, [REDACTED] who affirmed that "Both [REDACTED] and [REDACTED] perform all the remaining and executory obligations of the [REDACTED] and [REDACTED] under all contracts without modification, and continue to operate the same type of business, and the manner in which the business structured, controlled and carried on remain substantially the same as it was before."
- A May 30, 2012, letter from the company president, [REDACTED] who explained that while he simply wanted to change the name of the petitioning company, "my then CPA suggested to open separate companies."
- Copies of organizational charts for the petitioning company, the appellant, and [REDACTED] showing the same president and project managers in all three companies.
- An April 12, 2012, letter from the company president, [REDACTED] who affirmed that two

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).

- separate companies were created to take over the functions of the petitioning company.
- Copies of documentation from the Illinois Secretary of State confirming the creation of [REDACTED] and [REDACTED]
 - Copies of various invoices, paychecks, insurance documents, and tax records for both [REDACTED] and [REDACTED]

Counsel states on motion that “it was shown that [REDACTED] purchased the assets of the previous company.” However, the record does not contain documentation regarding the transfer of any of the assets of the petitioning company to either of the subsequently created companies. Counsel does not point to any specific document that demonstrates that [REDACTED] purchased the assets of [REDACTED] Inc. None of the documents listed above describe any transfer of assets from the petitioner to any other company. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also states on motion that “the essential rights and obligations were retained.” However, counsel did not specify which of the newly-created successors retained these “rights and obligations” and the evidence of record suggests that the rights and obligations of the petitioning company were divided between the two successor companies. The company president stated that two companies were created on his CPA’s advice, but did not explain or document the distribution of assets, contracts and responsibilities between the companies.

The organizational charts were prepared by the petitioner’s owner and are self-serving. Further, these charts demonstrate only that the president and four employees remained with [REDACTED] and [REDACTED] from 2006 to 2007. Nothing in these charts describes a transfer of assets, rights, or obligations.

The invoices, paychecks, insurance documents, and tax records submitted demonstrate the existence and operation of [REDACTED] In various years from 2006 to 2011. None of these documents demonstrates the transfer of assets, rights, or obligations from one company to any other. Rather, the documents show that since 2006, the original petitioner’s owner has incorporated several businesses with different FEINs that perform electrical work.

The AAO notes that the only Articles of Incorporation in the record are for [REDACTED], filed on October 15, 2007. These Articles make no mention of any transfer of assets, rights, or obligations from any prior entity.

Applying the analysis set forth above to the instant petition, it must be determined that the appellant has failed to establish that a valid “successor-in-interest” relationship exists between itself and the petitioner. Therefore, it has not been established that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In addition, it is noted for the record that in its June 4, 2013 decision the AAO considered, *arguendo*, the combined net incomes and combined net current assets of all companies claimed by counsel to

have been successors in interest to the petitioner. The AAO determined that even the combined net incomes of these companies would have been insufficient to establish the ability to pay the proffered wage since the July 21, 2003 priority date.

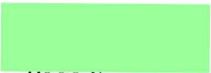
On motion, counsel asserts that the question “is not whether employer’s income is established but whether there is credible evidence it can guarantee the salary.” Counsel states that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security’s AAO, citing to *Continental Sys. USA, Inc.*, 9-PER-441 (BALCA Apr. 7, 2010). Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a guaranty to be utilized in lieu of proving ability to pay through prescribed financial documentation.

Counsel asserted on motion that the company president had attested to the petitioner’s ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2) provides: “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.” However, counsel has failed to submit any evidence suggesting the petitioner employed 100 or more workers. In this case, the regulation does not allow for a mere attestation regarding the ability to pay, but requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage.

Counsel points to an attestation from Accounting and Taxing Center, Corp., that “the companies have the resources to increase its payroll expenses up to an additional \$50,000 based on companies’ net profit and/or decreasing contract labor.” However, the accountant’s attestation is not accompanied by any documentation of how the company would be able to increase profit or decrease contract labor.

Counsel also asserts that the petitioner’s gross income demonstrates its ability to pay the proffered wage. However, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner’s net income figure, as stated on the petitioner’s corporate income tax returns, rather than the petitioner’s gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer’s ability to pay because it ignores other necessary expenses).

On motion, counsel states that the “AAO ignored the fact that the employer is not required to pay the offered wage until after permanent residence is granted...and the fact that a person may be paid a lower wage, even below the prevailing wage, up until the time they take up the certified employment.” While counsel is correct that the proffered wage need not be *paid* until the



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beneficiary attains permanent residence, the petitioner fails to comply with 8 C.F.R. § 204.5(g)(2), which requires that the petitioner demonstrate its *ability* to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onwards.

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 that burden.

ORDER: The motion is granted. The appeal is dismissed. The petition remains denied.