



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 19 2015

FILE#: [REDACTED]  
PETITION RECEIPT#: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page ([www.uscis.gov/i-290b](http://www.uscis.gov/i-290b)) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (the director) denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a software developer. It seeks to permanently employ the beneficiary in the United States as a support services representative. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "e" at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). 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).<sup>1</sup> The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is November 14, 2002. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification and for classification as a professional.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.<sup>2</sup> 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup>

### Classification

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. *See also* 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

<sup>1</sup> The labor certification was filed by [REDACTED] an entity which the petitioner claims is its predecessor.

<sup>2</sup> We note that the petitioner indicated on the Form I-290B that a brief and/or additional evidence would be submitted to us within 30 days. The Form I-290B is dated December 12, 2014 and as of the date of this decision, more than 6 months later, nothing further has been received. However, the petitioner included a statement of the basis for the appeal with the Form I-290B. The statement alleges errors in law in the denial of the petition. Therefore, we will consider the petitioner's statement as its brief and additional evidence.

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C). In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i)

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry; the beneficiary possesses at least a U.S. bachelor’s degree or a foreign equivalent degree from a college or university; and the job offer portion of the labor certification requires at least a bachelor’s degree or a foreign equivalent degree.

### **The Beneficiary Must Possess a U.S. Bachelor’s Degree or Foreign Equivalent Degree**

As is noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor’s degree or a foreign equivalent degree from a college or university. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now U.S. Citizenship and Immigration Services (USCIS) or the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree: “[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*” 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ requirement of a single “degree” for members of the professions is deliberate.

The regulation also requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) of the Act (relating to aliens of exceptional

ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snappnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary possesses a Bachelor of Science degree in Mathematics from [REDACTED] India completed in 1994. The record contains a copy of the beneficiary's Bachelor of Arts diploma from [REDACTED] India issued in 1997.<sup>4</sup>

The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for the [REDACTED] on September 23, 2007. The evaluation states that the beneficiary's three-year Bachelor of Arts degree in Mathematics is equivalent to a Bachelor of Science with a major in Mathematics from a regionally accredited institution of higher education in the United States.

The petitioner relies on the beneficiary's three-year bachelor's degree as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>5</sup>

<sup>4</sup> The record does not contain the beneficiary's transcripts. In any future filings, the petitioner must submit a copy of the beneficiary's transcripts.

<sup>5</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for our reliance on information provided by AACRAO to support its decision. In *Tisco*

According to EDGE, a three-year Bachelor of Arts degree from India is comparable to “three years of university study in the United States.”

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor’s degree in mathematics. The director informed the petitioner of EDGE’s conclusions in a request for further evidence (RFE) dated September 11, 2014.

In response to the RFE, counsel submitted a statement indicating that the petitioner was always willing to accept either a three-year or four-year bachelor’s degree.<sup>6</sup> After reviewing all of the evidence in the record, it is concluded that the petitioner has not established that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has not overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

#### **The Beneficiary Must Meet the Minimum Requirements of the Offered Position**

The beneficiary must also meet all of the minimum requirements of the offered position as set forth on the labor certification by the priority date. In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *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, 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

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*Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

<sup>6</sup> As discussed below, the minimum requirements stated on the labor certification require a 4-year degree.

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: 8 years

High School: 4 years

College: 4 years

College Degree Required: B.S.

Major Field of Study: Mathematics, Computer Science, or related field

TRAINING: None Required.

EXPERIENCE: Three (3) years in the job offered or in the related occupation of AS/400 Software Engineering or Analysis

OTHER SPECIAL REQUIREMENTS: None.

As is discussed above, the beneficiary possesses a three-year Bachelor of Arts diploma from [REDACTED] India, which is equivalent to three years of university study in the United States.

The terms of the labor certification require a four-year U.S. bachelor's degree in mathematics, computer science, or a related field, or a foreign equivalent degree. The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary. It is noted that, if the labor certification did not require at least a four-year U.S. bachelor's degree or a foreign equivalent degree, the petition could not be approved. See 8 C.F.R. § 204.5(l)(3)(i) (the labor certification underlying a petition for a professional must require at least a U.S. bachelor's degree or a foreign equivalent degree).

On appeal, the petitioner claims that *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), held that an employer may define its equivalency if it lists a "bachelor's degree or equivalent" as its requirements and that the petitioner's recruitment statement lists its requirements as a "bachelor's degree or equivalent." However, as discussed above, the labor certification defined the requirements as 4 years of college resulting in a Bachelor of Science. The labor certification does not indicate that an equivalent to a bachelor's degree would be accepted. Further, although the reasoning underlying a district judge's decision will be given due consideration when it is properly before us, the analysis does not have to be followed as a matter of law. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993).

The beneficiary does not possess a four-year U.S. bachelor's degree or a foreign equivalent degree. Therefore, the petitioner has not established that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date.

Beyond the decision of the director,<sup>7</sup> we find that the petitioner did not establish that the beneficiary has the minimum experience required by the terms of the labor certification. Letters verifying the beneficiary's experience must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. See 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

The record contains a September 15, 2000 experience letter from [REDACTED] Vice President of Operations, on [REDACTED] letterhead, stating that the company employed the beneficiary as a Software Engineer from April 22, 1999 to August 14, 2000 and that the beneficiary worked on two projects (out of three listed) involving AS/400.<sup>8</sup> The record also contains an undated letter from [REDACTED] Application Development Manager, on [REDACTED] letterhead, stating that the beneficiary was a contract programmer with the company from September 1999 to June 2000, programming, maintaining and troubleshooting new as well as existing code using RPG, ILE RPG and CI/400 on the AS/400 system. This accounts for 480 days of qualifying experience.

The record contains an undated experience letter from [REDACTED] Vice President, on [REDACTED] letterhead, stating that the company employed the beneficiary as an Analyst Programmer from August 1997 to April 1999 in an AS/400 environment. However, the letter does not provide the beneficiary's specific dates of employment.

The record contains an undated experience letter from [REDACTED] President & CEO, on [REDACTED] letterhead, stating that the company employed the beneficiary as a Programmer Analyst Consultant from October 2000 until January 2001 working on AS/400 development and analysis. However, the letter does not contain a sufficient description of the beneficiary's job duties or the beneficiary's specific dates of employment.

Therefore, the petitioner also has not established that the beneficiary met the minimum experience requirements of the offered position set forth on the labor certification by the priority date.

#### Successor-in-interest

Also, beyond the decision of the director,<sup>9</sup> the petitioner has not established that it is a successor-in-interest to the entity that filed the labor certification, [REDACTED]. The petitioner, [REDACTED] claims that it is the successor-in-interest to [REDACTED] the entity that

<sup>7</sup> We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

<sup>8</sup> The description given for the beneficiary's experience on the [REDACTED] project does not specifically state that it involved the AS/400 system.

<sup>9</sup> We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

filed the labor certification. 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)). In support of these statements the record contains the following documentation:

- Unaudited Balance Statements and Consolidated Financial Statements for 2002 through 2007.
- Audited Consolidated Financial Statements for 2008 through 2010.
- Audited Consolidated Financial Statements for 2009 and 2010.
- Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, from [redacted] to the beneficiary reflecting [redacted] Federal Employer Identification Number (FEIN) as [redacted]
- IRS Forms W-2 from [redacted] to the beneficiary reflecting [redacted] FEIN as [redacted]
- A Hoover's 2013 Company Profile stating that the [redacted] was formerly [redacted]
- An April 7, 2011 article from [redacted] reporting that [redacted] acquired [redacted] on March 22.
- A March 11, 2011 article from [redacted] stating that [redacted] announced its acquisition of [redacted]

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.

*Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through the assumption of "all" or a totality of a predecessor entity's rights, duties, and obligations. Instead, the generally accepted definition of a successor-in-interest is broader: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1570 (9th ed. 2009) (defining "successor in interest").

With respect to corporations, a successor is generally created when one corporation is vested with the rights and obligations of an earlier corporation through amalgamation, consolidation, or other assumption of interests.<sup>10</sup> *Id.* at 1569 (defining "successor"). When considering other business

<sup>10</sup> Merger and acquisition transactions, in which the interests of two or more corporations become unified, may be arranged into four general groups. The first group includes "consolidations" that occur when two or more corporations are united to create one new corporation. The second group 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

organizations, such as partnerships or sole proprietorships, even a partial change in ownership may require the petitioner to establish that it is a true successor-in-interest to the employer identified in the labor certification application.<sup>11</sup>

The merger or consolidation of a business organization into another will give rise to a successor-in-interest relationship because the assets and obligations are transferred by operation of law. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). An asset transaction occurs when one business organization sells property – such as real estate, machinery, or intellectual property - to another business organization. The purchase of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and obligations of the predecessor necessary to carry on the business.<sup>12</sup> *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

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“shell” legal entity, is in fact merged into another through the acquisition of its assets and business operations. 19 Am. Jur. 2d *Corporations* § 2165 (2010).

<sup>11</sup> For example, unlike a corporation with its own distinct legal identity, if a general partnership adds a partner after the filing of a labor certification application, a Form I-140 filed by what is essentially a new partnership must contain evidence that this partnership is a successor-in-interest to the filer of the labor certification application. *See Matter of United Investment Group*, 19 I&N Dec. 248 (Comm'r 1984). Similarly, if the employer identified in a labor certification application is a sole proprietorship, and the petitioner identified in the Form I-140 is a business organization, such as a corporation which happens to be solely owned by the individual who filed the labor certification application, the petitioner must nevertheless establish that it is a *bona fide* successor-in-interest.

<sup>12</sup> 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).

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.

While the business articles in the record state that [REDACTED] acquired [REDACTED] in March 2011, there is no contemporaneous evidence which fully describes and documents the transaction transferring ownership of all, or a relevant part of, [REDACTED]. Instead, the petitioner relies on news articles to demonstrate the relationship between the entities. There is no evidence, such as purchase agreements, in the record, that establishes the actual transfer of assets/liabilities from one entity to another.

In any future filings the petitioner should submit contemporaneous evidence to establish the transfer of ownership from [REDACTED] to the petitioner.

#### **Ability to Pay**

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). The record does not demonstrate that [REDACTED] possessed the ability to pay the proffered wage from the November 14, 2002 priority date to the date it was purportedly acquired by the petitioner. The record also does not demonstrate that the petitioner had the ability to pay the proffered wage from the date of acquisition onwards. 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 proffered wage as stated on the labor certification is \$68,000.00 per year. There is no evidence in the record of the petitioner's and [REDACTED] entity type/structure.

The petitioner must establish that the 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).

USCIS examines the net income figure reflected on the petitioner's federal income tax return (or annual reports or audited financial statements), 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.

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.<sup>13</sup> If the total of the petitioner'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 record contains Aldon's audited consolidated financial statements for 2008 through 2010 reflecting net income and net current assets of -\$2,888,077.00 and -\$4,611,771.00 in 2008, -\$1,520,341.00 and -\$4,068,120.00 in 2009 and -\$484,386.00 and -\$3,041,120.00 in 2010, respectively. However, the record does not contain one of the three enumerated forms of evidence to establish Aldon's ability to pay the proffered wage for 2002 through 2007. *See* 8 C.F.R. § 204.5(g)(2).

The record contains the petitioner's audited consolidated financial statement for 2010 reflecting net income of \$5,323,000.00. However, the record does not contain one of the three enumerated forms of evidence to establish the petitioner's ability to pay the proffered wage for 2011 through 2013. *See* 8 C.F.R. § 204.5(g)(2).

In determining a petitioner's ability to pay the proffered wage during a given period, USCIS will 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

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<sup>13</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains IRS Forms W-2, reflecting payment of wages by [REDACTED] to the beneficiary of at least the proffered wage of \$68,000.00 from 2002 through 2012.<sup>14</sup> The record also contains an IRS Form W-2 reflecting payment of wages by the petitioner of at least the proffered wage in 2013. However, as discussed above, the regulation does not provide that a petitioner may submit evidence such as a beneficiary's IRS Forms W-2 in place of one of the three enumerated forms of evidence of ability to pay. Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

USCIS records indicate that the petitioner has filed at least four (4) Form I-140 immigrant petitions on behalf of other beneficiaries. The petitioner would need to demonstrate its ability to pay the proffered wage for each Form I-140 immigrant beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In any future filings, the petitioner must demonstrate [REDACTED] and its ability to pay the proffered wages to all of its beneficiaries.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner has not established that it and [REDACTED] had the continuing ability to pay the beneficiary the proffered wage as of the priority date. In any future filings, the petitioner should submit one of the three enumerated forms of evidence to establish ability to pay for 2011 through 2013.

In summary, the petitioner has not established that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The petitioner also has not established that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act. Additionally, the petitioner has not established that a valid successor-in-interest relationship exists between it and [REDACTED] the entity that filed the labor certification, or that it and [REDACTED] had the ability to pay the proffered wage from the priority date onwards.

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 dismissed.

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<sup>14</sup> The petitioner claims that it acquired [REDACTED] in March 2011. Therefore, [REDACTED] IRS Form W-2 for 2012 may not be used by the petitioner to establish *prima facie* proof of the petitioner's ability to pay the proffered wage.