



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF T- LLC

DATE: JUNE 17, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a contractor, seeks to employ the Beneficiary as a carpenter-supervisor. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

The Director, Texas Service Center, denied the petition. The Director determined that the record did not establish the Petitioner's ability to pay the proffered wage to the Beneficiary from the priority date of the visa petition forward.

The matter is now before us on appeal. On appeal, the Petitioner asserts that the Director relied on an incorrect priority date in determining its ability to pay. The Petitioner further maintains that its ability to pay should be based on its gross income, not the net income and net current assets reported in its tax returns. Upon *de novo* review, we will dismiss the appeal.

I. PRIORITY DATE

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer files a Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If the Form I-140 is approved, the foreign national then applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

As required by statute, the Form I-140 (visa petition) is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL.¹

¹ *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i); *see also* 8 C.F.R. § 204.5(a)(2).

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The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must, therefore, establish the elements for the approval of a visa petition as of the date on which the underlying labor certification is filed with DOL. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

At the time it filed the labor certification, the Petitioner indicated (in Part A.) that it wished to use the April 30, 2001, filing date of a previously filed Form ETA 750, Application for Alien Employment Certification, filed by [REDACTED]. While the record reflects DOL approval of the application, the cover page of the labor certification states the priority date as February 21, 2013, and the labor certification itself (on page 9) reflects a filing date of April 30, 2001.

We notified the Petitioner of this inconsistency in a notice of intent to dismiss (NOID) and, further, that we had contacted DOL to seek its assistance in the matter, because we did not find the record to demonstrate that it was eligible to use the April 30, 2001, priority date. *See* section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring USCIS to consult with DOL in the adjudication of employment-based immigrant visa petitions). In our referral, we advised DOL that, based on our review of the record, the Petitioner did not appear to have met the requirements of the regulation at 20 C.F.R. § 656.17(d) for two reasons: 1) that the job opportunity in the ETA Form 9089 was not identical to the job opportunity in the Form ETA 750 because they were offered by two different employers, and 2) that the job order supporting the Form ETA 750 had already been placed.³

As of this date, the above issues have not been resolved with DOL. Therefore, as we indicated in our NOID, we will consider the priority date of the instant visa petition to be April 30, 2001, the filing date reflected on the ETA Form 9089. Accordingly, the Petitioner must establish that, as of April 30, 2001, it had met all the requirements for the approval of the visa petition.

II. PETITIONER AS SUCCESSOR-IN-INTEREST

A petitioner, under certain circumstances, may rely on a labor certification approved for another business entity if the petitioner is a successor-in-interest to the original labor certification employer. The generally accepted definition of a successor-in-interest is: "One who follows another in ownership or control of property. A successor in interest retains the same rights as the original

² The regulation at 20 C.F.R. § 656.17(d) stipulates the circumstances under which an employer may recapture the priority date of a Form ETA 750 filed before March 28, 2005. Specifically, in order to recapture the filing date of a previously filed Form ETA 750, the offered job must be identical and a job order must not have been placed in support of the earlier filing.

³ While the record does not include a copy of the job order, the Form ETA 750 filed by [REDACTED] was approved by the DOL on May 30, 2006. Because a job order must be placed before a Form ETA 750 can be approved, the job order in this case must have been placed before May 30, 2006, which is clearly before the February 21, 2013 request to recapture the filing date. We note that there is no record in USCIS databases that [REDACTED] filed a Form I-140 on the Beneficiary's behalf using the approved Form ETA 750. The record offers no explanation as to why that company did not proceed with the employment-based immigrant visa process at that time.

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owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009) (defining “successor in interest”). *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm’r 1986) (*Dial Auto*), a binding, U.S. Immigration and Naturalization Service (INS) decision, designated as a precedent by the INS Commissioner in 1986, outlines the circumstances under which a successor-in-interest may be established.⁴

Considering *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.

On appeal, the Petitioner asserts that, if not the same business as [REDACTED] it should be viewed as a restructured [REDACTED] with one owner rather than two. In a statement, the Petitioner’s owner asserts that, in his current business, “all business practices, elements, instruments, and executors remained the same which includes but is not limited to the same specific deck project work type; leads generated for potential sales of said specific work type; execution of sales for said specific work type; skilled labor to execute and supervise said specific work type; and completion of said specific work type.” Accordingly, we will consider whether the record demonstrates the Petitioner as a successor-in-interest to [REDACTED] and, therefore, as eligible to use the priority date established by the filing of the Form ETA 750.

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.⁵ *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.⁶

⁴ 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.

⁵ 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).

⁶ 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

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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.⁷ See generally 19 Am. Jur. 2d *Corporations* § 2170 (2010).

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. 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. *Dial Auto*, at 482.

In order to establish eligibility for the immigrant visa in all respects, a petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The petitioning successor must prove its 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, a petitioner must establish its successor's ability to pay the proffered wage from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); see also *Dial Auto*, at 482.

Here, the record contains no evidence that establishes the Petitioner as a restructured [REDACTED] involving the same business practices, elements, instruments, and executors. There is no documentation of the transfer of the ownership of [REDACTED] to the Petitioner. Neither is there any evidence indicating what assets and liabilities the Petitioner assumed as of the date on which it claims to have succeeded [REDACTED]

Moreover, the Petitioner's business was formed on March 12, 2007, a date on which records maintained by the Maryland Department of Assessments and Taxation Business Services reflect that

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.

⁷ The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the bona fide acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. See 19 Am. Jur. 2d *Corporations* § 2170; see also 20 C.F.R. § 656.12(a).

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_____ was still incorporated in Maryland.⁸ For this reason, as well, the evidence of record does not support the Petitioner's claim to be a successor-in-interest to _____. Therefore, the record does not satisfy the first of the conditions established by *Dial Auto*.

Further, the record, for the reasons discussed below, does not establish either _____ or the Petitioner's ability to pay during the relevant periods and, therefore, does not establish that the Petitioner is eligible for the immigrant visa in all respects. Accordingly, the record does not demonstrate the Petitioner as a successor-in-interest to _____.

As the record does not establish the Petitioner as a successor business to _____ it may not rely on the evidence of _____ to demonstrate its eligibility for the immigrant visa from the 2001 priority date.

III. ABILITY TO PAY THE PROFFERED WAGE

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.

A petitioner must establish that its job offer to a beneficiary is realistic as of a visa petition's priority date and that its offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A 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, USCIS requires a petitioner to demonstrate financial resources sufficient to pay the beneficiary the proffered wage throughout the relevant period, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

Here, as previously indicated, the priority date of the visa petition is April 30, 2001, and the labor certification (Part G.1.) reflects that the proffered wage is \$22 per hour or \$45,760 per year. Therefore, the Petitioner must establish a continuing ability to pay the Beneficiary the annual wage of \$45,760 from April 30, 2001, forward.

⁸ Maryland records indicate that _____ was forfeited on October 2, 2009, because it did not file a property return in 2008.

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In his denial of the visa petition, the Director concluded that the record did not establish the Petitioner's ability to pay the proffered wage in the years 2001 through 2005, 2007, 2008, and 2012. In his decision, the Director noted that the Petitioner, an S corporation, had originally been structured as a partnership, [REDACTED] from 2001 through 2007. Consequently, he considered both the Petitioner's and [REDACTED] financial evidence before determining that the Petitioner had not established its ability to pay the proffered wage in this matter.

However, the record does not establish the Petitioner and [REDACTED] as the same business entity, and offers no evidence that the Petitioner is the result of the reorganization, restructuring or renaming of [REDACTED]. Instead, as discussed above, the two companies' corporate tax returns establish them as separate, independent business entities. The Forms 1065, U.S. Returns of Partnership Income, filed by [REDACTED] reflect a federal employer identification number (FEIN) of [REDACTED] while the Petitioner's Forms 1120S, U.S. Income Tax Returns for an S Corporation, report its FEIN as [REDACTED].

Although the record shows that the Petitioner's owner was previously a co-owner of [REDACTED], his ownership of both businesses does not allow us to consider [REDACTED] financial resources in determining the Petitioner's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders. As a result, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In considering this issue, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In that the Petitioner, founded in 2007, cannot rely on the financial resources of [REDACTED] in this matter, the record of proceedings does not contain the regulatory prescribed evidence of its ability to pay the proffered wage from the April 30, 2001, priority date in all relevant years.

The Petitioner on appeal also asserts that the Director erred as a matter of law in requiring it to demonstrate its ability to pay the proffered wage prior to the September 5, 2013, approval of the labor certification by DOL. It further contends that the Director should have relied on its gross income in determining its ability to pay the proffered wage. However, the Petitioner provides no legal authority in support of these claims. The Petitioner cannot meet its burden of proof in this matter simply by claiming a fact to be true, without supporting documentary evidence. *See 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)); *see also Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010). A petitioner must support assertions with relevant, probative, and credible evidence. *Chawathe*, at 369.

In asserting that it should not be required to establish its ability to pay the proffered wage prior to the date on which the labor certification was approved, the Petitioner ignores the regulation at 8 C.F.R. § 204.5(g)(2), which, as previously indicated, requires that a petitioner's ability to pay be established

as of a visa petition's priority date. Here, the visa petition's priority date is April 30, 2001, the date requested by the Petitioner, and the filing date listed on page 9 of the ETA Form 9089.

We also find the Petitioner's reliance on gross income as a measure of its ability to pay to be misplaced. Our use of federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by judicial precedent.⁹ In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985), the court held that the former INS, now USCIS, had properly relied on a 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 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011) (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

For the above stated reasons, the record does not establish the Petitioner's ability to pay the proffered wage from the April 30, 2001, priority date forward. Accordingly, the appeal must be dismissed.

IV. CONCLUSION

A petitioner must establish the elements for the approval of a petition as of that petition's priority date. A petition may not be approved if the beneficiary was not qualified as of the petition's priority date, but expects to become eligible at a subsequent time. *Katigbak*, at 49. Here, as previously discussed, the record does not demonstrate the Petitioner's ability to pay the proffered wage as of the April 30, 2001, priority date.

In visa petition proceedings, it is a 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 (BIA 2013). Here, that burden has not been met. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of T- LLC*, ID# 15277 (AAO June 17, 2016)

⁹ See *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).