

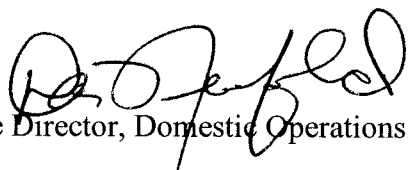


AUG - 6 2009

HQ 70/6.2
AD 09-37

Memorandum

TO: Field Leadership

FROM: Donald Neufeld 
Acting Associate Director, Domestic Operations

SUBJECT: Successor-in-Interest Determinations in Adjudication of Form I-140
Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5)
(AD09-37)

I. Purpose

This memorandum amends the current Adjudicator's Field Manual guidance on factors for making successor-in-interest determinations in the adjudication of Form I-140, Immigrant Petition for Alien Worker. This memorandum also supersedes all previously issued policy guidance on successor-in-interest relationship determinations.

II. Background

A. Department of Labor (DOL) Delegation of Successor in Interest Amendments to Labor Certifications

In March 1992, DOL delegated to legacy Immigration and Naturalization Service (INS) the authority to amend certain employer-related information on approved labor certifications.¹ Specifically, INS would handle requests for amendments related to the employer noted in an approved labor certification. INS would determine if a Form I-140 petitioning entity was a valid "successor" to the employer named on the approved labor certification. INS also would determine if requested amendments relating to changes in the location of the job or changes to other job-related requirements specified on the approved labor certification would have an impermissible and material impact on the

¹ DOL and INS executed an inter-agency agreement on March 17, 1992.

outcome of the labor market test in the labor certification application.²

B. Legacy INS Delegation Implementation Memo.

On December 10, 1993, the INS Office of Operations issued a memorandum entitled *Amendment of Labor Certifications in I-140 Petitions* ("Puleo Successor Memo"). The Puleo successor memo provided field guidance on how to reaffirm the validity of a previously approved I-140 petition in successor-in-interest scenarios (e.g., when a prior entity has been bought out, merged, or had a significant change in ownership) and factors to consider when making such determinations.

The Puleo successor memo instructed ISOs to reaffirm the validity of the initial I-140 petition and the labor certification only if the successor petitioner had assumed all of the rights, duties, obligations, and assets of the original employer and continued to operate the same type of business as the original employer. In addition, the new employer had to establish the ability to pay the proffered wage specified on the labor certification. The memo cited to the Board of Immigration Appeals ("Board") decision in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), as the basis for these successor-in-interest eligibility requirements.

III. Rationale for Updated Field Guidance

USCIS recognizes that business practices change over time, particularly in the areas of acquisitions, mergers, and transfers of assets and liabilities between entities. USCIS is cognizant that business entities do not always wholly assume the assets and liabilities of entities they acquire or merge with and that businesses may choose not to assume certain assets or liabilities in connection with a perfectly legitimate transaction. This updated guidance is intended to allow flexibility for the adjudication of I-140 petitions that present novel yet substantiated and legitimate successor in interest scenarios.

In addition, USCIS has determined that legacy INS applied a very restrictive reading of the Board's decision in *Matter of Dial Auto*. The Board found that the petitioner failed to adequately describe how it had acquired the business of its predecessor, Elvira Auto Body. As a result, Dial Auto Repair Shop failed to meet its burden and was not eligible to claim the continued validity of the original labor certification. The Board stated that if Dial Auto Repair Shop's "claim of having, assumed all of Elvira Auto's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification.... 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...." *Id.* at 482.

² DOL also issued two nearly identical memoranda: (1) *Amending Certified Labor Certifications*, on March 30, 1992, reproduced at 69 Interpreter Releases 505, Appendix III, (April 27, 1992) ("Kulick Memo"), and (2) DOL Field Memorandum No. 47-92, *Amending Labor Certification Applications*, on July 14, 1992 (57 FR 31219) ("DOL 47-52"). DOL 47-52 memo was almost identical to the March 30, 1992 Kulick Memo, but also noted that the DOL 47-52 memo would formally expire on April 30, 1993. However, legacy INS and now USCIS have continued to make determinations regarding requests to amend certain employer information on approved labor certifications as a matter of agency practice.

The Board did not state that a valid successor relationship could *only* be established through the assumption of *all* of a predecessor entity's rights, duties, and obligations. According to Black's Law Dictionary, 1473 (8th Ed, 2004), the definition of a successor in interest is:

“One who follows another in the ownership or control of property. • A successor in interest retains the same rights as the original owner, with no change in substance.”

Similarly, the term “*successor*” with reference to corporations is defined therein as “*a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation.*” These definitions are consistent with the determinations made in *Matter of Dial Auto*, which highlight three factors that should be considered when determining if a previously approved labor certification remains valid for I-140 petition adjudications: (1) whether it's the same job; (2) if the successor has established eligibility for the requested visa classification in all respects; and (3) if the successor has adequately detailed the nature of the transfer of rights, obligations, and ownership of the prior entity. If a business can establish these three factors, it is possible to find a valid successor-in-interest relationship even in situations where a successor does not wholly assume a predecessor entity's rights, duties and obligations.

IV. Field Guidance

For all I-140 petitions pending or filed after the date of this memo, ISOs should focus on the factors noted below in section A in determining whether a valid successor-in-interest relationship exists. ISOs are reminded that there can be instances where a valid successor relationship exists even though the successor entity has not assumed *all* of the assets, rights, obligations, and liabilities of the predecessor entity. Section B contains several examples of complex or multi-factor successor-in-interest scenarios that illustrate a valid successor-in-interest, notwithstanding less than 100% acquisition by the succeeding company.

A. Three Successor-In-Interest Factors

1. The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;
2. The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL, and;
3. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully

describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Reminder: Petitioners have the option to file a new, amended Form I-140 petition for any petition that they believe may have been wrongly decided under the guidance provided in this memo. However, USCIS ISOs may not accept requests for the reopening of previously denied or revoked petitions in untimely filed motions to reopen or reconsider.

V. AFM Update

The Adjudicator's Field Manual is revised as follows:

1. Chapter 22.2 (b)(5) is revised to read as follows:

(5) Successor-In-Interest Determinations

(A) Interpretation of Matter of Dial Auto Repair Shop, Inc.

USCIS has determined that legacy INS applied an very restrictive reading of the Board of Immigration Appeal's (Board) decision in Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986). The Board found that the petitioner failed to adequately describe how it had acquired its predecessor, Elvira Auto Body's, business. As a result, Dial Auto Repair Shop failed to meet its burden and was not eligible to claim continued validity of the original labor certification.

The Board stated that if Dial Auto Repair Shop's "claim of having, assumed all of Elvira Auto's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for invalidation of the labor certification....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...." Id. at 482. The Board did not state that a valid successor relationship could only be established through the assumption of all of a predecessor entity's rights, duties, and obligations. According to Black's Law Dictionary, 1473 (8th Ed, 2004), the definition of a successor in interest is:

One who follows another in the ownership or control of property. • A successor in interest retains the same rights as the original owner, with no change in substance.

Similarly, the term "successor" with reference to corporations is defined therein as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an

earlier corporation.” These definitions are consistent with the determinations made in Matter of Dial Auto Repair Shop, Inc., which highlight three factors that should be considered when determining if a previously approved or pending labor certification remains valid for I-140 petition adjudications: (1) whether it's the same job; (2) if the successor has established eligibility for the requested visa classification in all respects; and (3) if the successor has adequately detailed the nature of the transfer of rights, obligations, and ownership of the prior entity. If a business can establish these three factors, it is possible to find a valid successor-in-interest relationship even in situations where a successor does not wholly assume a predecessor entity's rights, duties and obligations.

(B) Factors for Successorship Determinations

Three Successor-In-Interest Factors:

1. The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification;
2. The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage, as of the date of filing of the labor certification with DOL, and;
3. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petition must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Factor #1: The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification.

The job offered in the successor-in-interest petition by the successor must remain unchanged with respect to the rate of pay, job description and job requirements specified on the labor certification. A successor in interest claim will fail if the successor is requesting that USCIS accept any changes to the items specified on the labor certification that relate to the labor market test. In other words, USCIS ISOs should deny any successor claim where the successor is requesting changes to the labor certification that, if made at the time that the labor certification was filed with DOL, could have affected the number or type of available U.S. workers that applied for the job opportunity. Note: An increase in the rate of pay due to the passage of time does not affect the successor-in-interest claim.

The job opportunity must also remain valid and available from the time of the filing of the labor certification with DOL until the issuance of an immigrant visa abroad or the alien beneficiary's adjustment of status to lawful permanent resident while in the United States. Otherwise, a new test of the labor market and new labor certification application by the successor employer is required.

Prior to the transfer of ownership: the original job opportunity ceases to exist if, at any time prior to the transfer of ownership, the predecessor ceases business operations entirely or, even partially so that the alien beneficiary's services are no longer required.

After the transfer of ownership: the original job opportunity ceases to exist if the business operation in which the job opportunity was originally offered has a substantial lapse in business operations after the transfer of ownership.

For example, a predecessor was involved in the operation of a restaurant and the job opportunity specified on the labor certification is for a specialty cook. The successor acquires the business and closes the restaurant for extensive renovations. The restaurant reopens six months later. In this case, the original job opportunity is no longer valid as there was a substantial lapse in business operations after the transfer of ownership. The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a labor certification application with DOL.

Conversely, if in the example described above the restaurant did not close during the renovations to the property but continued business operations in a manner that would require the beneficiary's services as a specialty cook, then the job offer would remain valid during the business transition and no new labor certification would be required.

Factor #2: The successor bears the burden of proof to establish eligibility for petition approval, as of the date of filing of the labor certification with DOL.

In order to establish its eligibility as a successor in interest petitioner and the alien's eligibility for the visa classification, the successor must demonstrate that all of the criteria have been met for the visa classification. This includes but is not limited to, the predecessor's ability to pay the proffered wage from the date of the filing of the labor certification with DOL until the date of the transfer of the ownership of the predecessor to the successor. The successor must meet the definition of "employer" and demonstrate the ability to pay the proffered wage as of the date of the transfer of ownership of the predecessor to the successor, continuing until the time of immigrant visa issuance or the alien beneficiary's adjustment of status in the United States. In cases of sales of discrete operational divisions or units of the predecessor (see "partial transfers" discussed below) the predecessor's ability to pay the proffered wage should be analyzed by considering the financial data relating to the predecessor entity, not just the business unit.

Reminder: The evidence in the petition must also show that the alien beneficiary possessed the minimum education and work experience requirements specified on the labor certification, as of the filing date of the labor certification with DOL. (See AFM Chapter 22.2 (j) & (k).)

For example, a petitioner files and obtains a DOL-approved labor certification for an architect. The petitioner then became insolvent in the following year and is unable to meet its existing financial obligations. The firm is ultimately acquired by another architectural firm which files an I-140 successor petition on the beneficiary's behalf. In this case factor #2 is not met because the predecessor entity did not possess the ability to pay the beneficiary's wage from the time of filing of the labor certification until the acquisition of the predecessor by the successor. The successor would have to conduct a new test of the labor market for the job opportunity through the filing of a labor certification application with DOL.

Conversely, in the example above, if the predecessor remains solvent up until the time that it is acquired by the successor, then Factor #2 may be met if all other areas of eligibility are established.

Factor #3: For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

Note, for successor in interest purposes, the transfer of ownership may occur at any point after the approval of the original labor certification.

Documentary evidence

Evidence of business transactions resulting in the transfer of ownership may include, but is not limited to:

- A contract of sale for the acquisition of the predecessor;
- Mortgage closing statements;
- A Security Exchange Commission (SEC) Form 10-K for the successor entity;
- Audited financial statements of the predecessor and successor for the year in which the transfer occurred;
- Documentation of the transfer of real property and business licenses from the predecessor to the successor;
- Copies of the financial instruments used to execute the transfer of ownership; and
- Newspaper articles or other media reports announcing the merger and acquisition of the predecessor.

The evidence provided must show that the successor not only purchased the predecessor's assets but also 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 successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled and carried on by the successor must remain substantially the same as it was before the ownership transfer. However, a valid successor-in-interest relationship may still be established in certain instances where liabilities unrelated to the original job opportunity are not assumed by the successor; e.g., where the successor does not assume the liability of pending or potential sexual harassment litigation, or other tort obligations unrelated to the job opportunity in the labor certification.

Contractual agreements or other arrangements in which two or more business entities agree to conduct business together or agree to provide services to each other without the transfer of the ownership of the predecessor to the successor do not create a valid successor-in-interest relationship for I-140 purposes.

For example, "Company A" filed a labor certification application with DOL for a computer systems analyst, which is ultimately approved. Company A subsequently signs a contract with "Company B" for the provision of computer systems analyst services to Company A by Company B, effectively outsourcing the computer systems analyst duties that were to be performed by the alien beneficiary to Company B. A valid successor-in-interest relationship between Company A and Company B does not exist in this instance. The contractual agreement between the companies did not result in the transfer of the ownership of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Conversely, in the example above, Company A sells its computer software development unit to Company B and the computer systems analyst position specified within the approved labor certification is located within that business unit. A valid successor-in interest relationship may exist between Company A and Company B if the sale of the business unit results in the transfer of the ownership of Company A to Company B in a manner so that its business interests are carried on and controlled in the same manner by Company B.

Transfers in Whole or In Part

The transfer of the ownership of the predecessor to the successor may occur through a merger, acquisition or reorganization. These business transactions may involve business entities with differing organizational structures, such as:

- General Partnerships
- Limited Partnerships
- LLPs (Limited Liability Partnerships)
- LLCs (Limited Liability Company)

- Regular "C" Corporations, or
- Subchapter "S" Corporations.

The structure of business transactions resulting in the transfer of ownership of the predecessor to the successor vary from case to case. Frequently, the acquiring entity (successor) purchases a discrete operational division or unit, resulting in the sale or "spin off" of only a part of the predecessor. For I-140 petition successor-in-interest purposes, the operational division or unit of the business entity that is being transferred to the successor must be a clearly defined unit within the predecessor entity and that unit must be transferred as a whole to the successor, with the exception of certain unrelated liabilities such as those previously outlined. The job offered to the alien beneficiary in the successor petition must have been, and must continue to be, located within the operational division or unit of the business entity that is transferred from the predecessor to the successor. The three successor-in-interest factors must also be met.

For example, the manufacturing division of a chemical wholesale corporation, which utilizes plant and equipment, management, accounting and operational structures that are readily divisible from the general structure of the predecessor entity might qualify if the manufacturing division is sold to another business entity engaged in chemical manufacturing. Another example might involve the sale of a branch office of a bank to another entity engaged in the provision of banking services as a member organization in the banking industry.

Conversely, the sale of a patented chemical formula by Company A to Company B, which allows Company B to manufacture a product using the chemical formula, does not create a successor-in-interest relationship between the two companies, even if Company A ceases to manufacture the product and starts to purchase the product from Company B. This transaction did not result in the transfer of a clearly defined business unit. Rather, Company A merely sold the manufacturing rights for a given product to Company B without the transfer of the other related assets located within its business unit.

ISOs should issue an RFE to the petitioner if the petitioner has failed to demonstrate a qualified successor-in-interest relationship. The RFE should explain why the labor certification that was originally provided in support of the petition is not valid for the proffered position, based on one or more of the reasons outlined above, and other reasons, if any. If the petitioner does not provide a new original labor certification that was valid at the time of filing of the Form I-140 petition or sufficient evidence to overcome the concerns outlined in the RFE, then the petition should be denied.

(C) Implications of AC21 §106(c), INA § 204(j) Portability on Successor-In-Interest Filing Requirements

Section 204(j) of the INA allows for certain I-140 petitions to "remain valid" even if the alien is no longer seeking to adjust status on the basis of employment with the petitioner which originally filed the I-140 petition on that alien beneficiary's behalf.

(See Chapter 20.2(d) of the Adjudicator's Field Manual for information regarding for AC21 §106(c) eligibility requirements.)

Please note that, in cases where an alien is eligible for AC21 "portability" pursuant to INA 204(j), a successor entity need not file a new petition on the alien's behalf, provided that all the requirements of that section have been met. For instance, the alien would have to show for purposes of adjustment that the successor job opportunity is the "same or similar" as the job opportunity on the labor certification according to applicable guidance on the INA 204(j).

(D) Successor-In-Interest Analysis Not Applicable to I-140 Visa Preference Categories that Do Not Require Labor Certification:

Successor-in-interest determinations are principally relevant to the continuing validity of a labor certification. Successor-in-interest petitions are not required to reaffirm the validity of the initial I-140 petition for petitions that are filed requesting visa preference categories that do not require a labor certification, such as the EB1 Alien of Extraordinary Ability and the EB2 National Interest Waiver (Non-NIW Physician cases). An employer seeking to classify the alien as an EB1 Multi-National Executive or Manager or EB1 Outstanding Professor or Researcher, must file a new I-140 petition and establish the alien's eligibility under the requested category's specific eligibility requirements.

(E) New Approved Labor Certification Requirements

The submission of a new original labor certification in support of the Form I-140 petition is required when any of the following conditions exist:

- (1) The successor entity (petitioner) has not established that a successor-in-interest relationship exists between the successor and the predecessor in accordance with the three successor-in-interest factors described in this memorandum;
- (2) The labor certification is not valid for the new geographic area of the alien beneficiary's proposed employment; or
- (3) There has been any other material change in the job opportunity covered by the original labor certification.

(F) Form I-140 Successor-In-Interest and Other Labor Certification Amendment Filing Procedures

1. I-140 Petitions Involving a Subsequent Employer Name Change or Change in Business Location.

A petitioning employer may change its name or, in certain cases, the location where the alien beneficiary is to be employed. A new I-140 petition does not have to be filed to amend a previously filed or approved petition to evidence:

- A legal change in the name of the petitioning employer so long as the ownership and legal business structure of the petitioning employer remains the same. Likewise, a change to a petitioning employer's "doing business as" (DBA) name does not require the filing of an amended I-140 petition, or;
- A new job location, as long as the new business location and job are within the area of intended employment stated on the labor certification.

Please note, when the alien beneficiary files a Form I-485 adjustment of status application with USCIS or applies for an immigrant visa with the Department of State (DOS), the alien beneficiary may need to document that the employer is the same employer that filed the I-140 petition, and/or that the job opportunity is still located in the area of intended employment specified on the labor certification.

2. Initial I-140 Petitions Filed by a Successor that Request the Use of a Predecessor's Approved Labor Certification.

A successor may file I-140 petitions that request the use of approved labor certifications filed by a predecessor with DOL that have never been submitted in support of an I-140 petition filed with USCIS. Such petitions must be filed within the validity period of the labor certification and should be supported by:

- Documentation to establish the qualifying transfer of the ownership of the predecessor to the successor;
- Documentation from an authorized official of the successor which evidences the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary;
- Documentation to demonstrate that the alien beneficiary possesses the requisite minimum education, licensure and work experience requirements specified on the labor certification;
- The original approved labor certification; and
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor.

3. Pending or Approved I-140 Petitions with a Subsequent Change in Employer Due to a Transfer of Ownership to a Successor.

Successor-in-interest entities which need to reaffirm the validity of an I-140 petition and the labor certification filed by a predecessor entity must file an amended I-140 petition that demonstrates that a qualifying successor-in-interest relationship exists in accordance with the three successor-in-interest factors described in Section B. above.

Each amended I-140 petition should be supported by:

- Documentation, such as a copy of the Form I-797 approval or receipt notice, that provides the previously filed I-140 petition's receipt number, and the petitioner's name and address;
- A statement that provides the alien beneficiary's name, date of birth, and alien registration number (if any);
- Documentation to establish the ability to pay the proffered wage by the predecessor and the successor;
- Documentation to establish the qualifying transfer of ownership of the predecessor to the successor; and
- Documentation from an authorized official of the successor evidencing the transfer of ownership of the predecessor, the organizational structure of the predecessor prior to the transfer, and the current organizational structure of the successor; and the job title, job location, rate of pay, job description and job requirements for the permanent job opportunity for the alien beneficiary.

4. Consolidated Processing of Multiple Successor-In-Interest Petitions at a Service Center.

Each successor-in-interest petition must be evaluated according to the three factors previously outlined in this section and will be adjudicated on its own merits with regard to eligibility for the requested visa preference classification in the petition. However, multiple filings based on the same transfer and assumption of the ownership of the predecessor by the successor may have duplicative evidence provided in each case to establish Factor #3. In the interest of efficiency and consistency, center directors may elect to accept consolidated evidence (e.g., one copy of the SEC Form 10-K for 20 petitions instead of 20 copies the SEC Form 10-K), coordinate the adjudication of multiple pending successor petitions so that the petitions are adjudicated at a single service center and/or at the same time, to the extent that other pressing work priorities permit. Petitioners can initiate a request for the consolidated processing of multiple successor-in-interest cases affected by the same transfer of ownership through the National Call Center.

Note: The decision to grant a request for consolidated case processing rests solely with the service center director(s) with jurisdiction over the filing of Form I-

140 petitions based upon the location of the intended employment of the affected alien beneficiaries.



2. The AFM Transmittal Memoranda button is revised by adding a new entry, in numerical order, to read:

AD-07-26 Chapter 22
[INSERT
SIGNATURE
DATE OF THIS
MEMO]

This memorandum revises Chapter 22 of the *Adjudicator's Field Manual (AFM)* by amending section 22.2.

VI. Use

This memorandum is intended solely for the instruction and guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

VII. Questions

Questions regarding this memorandum should be directed through appropriate channels to Alexandra Haskell in the Business and Trade Services Branch of Service Center Operations.

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