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U.S. Department of Homeland Security  
Citizenship and Immigration Services

**PUBLIC COPY**

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 I Street, N.W.  
Washington, DC 20536

**BS**

File:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

**JAN 27 2004**

IN RE: Petitioner:  
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

**INSTRUCTIONS:**

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a consulting engineering firm. It seeks to employ the beneficiary permanently in the United States as an environmental engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor and continuing. The petition's priority date in this instance is July 6, 2000. The beneficiary's salary as stated on the labor certification is \$57,443 per year.

The petitioner, through counsel, initially submitted a letter, dated June 12, 2001, from [REDACTED] P.E., president of E & C Integration Systems, making a permanent job offer stating that the petitioner, E & C Consulting Engineers, Inc., had merged with E & C Integration Systems, Inc. on June 30, 2000; a copy of an unaudited financial statement for E & C Integration Systems, Inc. for the year ending December 31, 2000; and documentation relating to the beneficiary's qualifications.

In a request for evidence (RFE), dated April 30, 2002, the director required additional evidence regarding the petitioner's ability to pay the proffered wage, and the beneficiary's qualifications.



The director requested complete legible copies of the petitioner's income tax returns for the years 2000 and 2001; if the business is a partnership or sole proprietorship, documentary evidence of U.S. citizenship of all owner(s); the employer's Quarterly Federal Tax Return (Form 941) for all four quarters of the year 2001, along with all attachments; and, if the position of environmental engineer requires a license, documentary evidence to show that the beneficiary has the required license. The director's request for evidence of licensure would not seem to have been necessary. The labor certification in this case does not require a license, and, generally, presentation of a license is not required in employment-based preference cases. *See Matter of Bozdogan*, 12 I&N Dec. 492 (Reg. Comm. 1967).

In response to the RFE, counsel provided copies of IRS tax returns Form 1120S for E & C Consulting Engineers, Inc. for 2000, and for E & C Integration Systems, Inc. for 2000 and 2001; a copy of the beneficiary's Form 8452 IRS tax declaration for 2001, showing that he received \$54,230 in salary that year; E & C Integration Systems, Inc. quarterly tax returns for all four quarters of 2001 with attachments; and a copy of the beneficiary's professional engineer license from the State of Georgia. In a covering letter, counsel stated that the petitioner is an S Corporation, and not a partnership or sole proprietorship.

On October 24, 2002, the director issued a Notice of Intent to Deny. The director found the evidence in the record to be insufficient with regard to the continued existence of the petitioner, E & C Consulting Engineers, Inc. and with regard to a claimed merger of the petitioner with E & C Integration Systems, Inc. The director noted that a letter in the record said that E & C Consulting Engineers, Inc. had been merged into E & C Integration Systems, Inc. on June 30, 2000, and thereafter had ceased to exist as a legal entity. The director further observed that the ETA-750 labor certification application had been filed by E & C Consulting Engineers, Inc. on July 6, 2000, and that the I-140 had been filed by E & C Consulting Engineers, Inc. on July 2, 2001, even though E & C Consulting Engineers, Inc. no longer had legal existence on either of those dates. Finally, the director stated that the petitioner had failed to establish its ability to pay the salary offered from the priority date through the present time.

In response to the notice, counsel provided a copy of a letter, dated July 23, 2000, to the Internal Revenue Service, from [REDACTED] Vice President, E & C Integration Systems, Inc., in which she stated that dissolution of E & C Consulting Engineers, Inc. would be complete on August 31, 2000, and that all employees of that firm were transferred to E & C Integration Systems, Inc. effective July 1, 2000. Counsel also furnished a letter, dated November 14, 2002, to the director from [REDACTED] P.E., owner and CEO, and [REDACTED] president, E & C Integration Systems, Inc., regarding the merger of the two entities. Other documentation submitted included a business information printout, dated November 12, 2002, from the Georgia Secretary of State showing the corporate status of E & C Consulting Engineers, Inc. as of August 30, 2000, to be "DISS/CANCEL/TERMINAT;" a copy of a Certificate of Incorporation, dated September 20, 1996, and issued by the Georgia Secretary of State for E & C Integration Systems, Inc., with

attached Articles of Incorporation for that corporation signed September 18, 1996; a printout summarizing Gwinnet County, Georgia, business licenses issued to E & C Consulting Engineers, Inc. on 5/2/96, 2/19/97, and 9/3/98 and to E & C Integration Systems, Inc. on 7/19/00, 2/14/01, and 2/8/02; copies of pay checks and pay stubs for the beneficiary from E & C Integration Systems, Inc. for pay periods ending 6/24/2000 through 11/08/2002; copies of W-2 forms for the beneficiary for wages received from E & C Consulting Engineers, Inc. in 2000 in the amount of \$11,279.97, for wages received from E & C Integration Systems, Inc. in 2000 in the amount of \$37,959.60, and for wages received from E & C Integration Systems, Inc. in 2001 in the amount of \$53,376.95; and a copy of a Form 1120S federal tax return for 2001 for E & C Integration Systems, Inc.

The director denied the petition on April 14, 2003. The director determined that the petitioner, E & C Consulting Engineers, Inc., stopped employing anyone and was in the processing of dissolving prior to the filing of the labor certificate application with the Department of Labor. Further, the director found that the petitioner ceased doing business on June 30, 2000, and another corporation was activated on July 1, 2000, but there was no evidence to prove that the two companies merged, or that the new company qualified as a successor in interest which had assumed all the rights, duties, obligations, and assets of the original employer. Finally the director noted that the petitioner had claimed that no other immigrant visa petition had ever been filed by or on behalf of the beneficiary when, in fact, another I-140 filed by the same employer for the same beneficiary had been denied. The director found this omission to be an apparent willful misrepresentation of a material fact. Although, in her decision, the director quoted the regulation relating to the ability of a petitioner to pay the proffered wage, her decision seems more to be that the petitioner no longer exists and, therefore, is in no position to make a legitimate job offer.

On appeal, counsel submits a brief and extensive documentation. Nearly all the documents, however, are additional copies of documents previously submitted. The only new documents submitted on appeal are a letter, dated June 10, 2003, to the director from Attorney [REDACTED] the corporate attorney for E & C Consulting Engineers, Inc. and for E & C Integration Systems, Inc., and a copy of a letter, dated June 5, 2003, to the director from [REDACTED] CPE, the accountant for E & C Consulting Engineers, Inc. and E & C Integration Systems, Inc.

The director's decision is primarily based on her reading of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986), with regard to documentation to show successorship in interest. Dates and timeframes in the instant case also led the director to the conclusion that the petitioner was no longer a viable one.

To establish that one entity is a successor in interest to another, *Matter of Dial Auto Repair Shop, Inc.*, *supra* indicates that an explanation of the process of succession along with a copy of any contract or agreement between the two entities is needed. Such documentation should indicate that the successor in interest has assumed all rights, duties, obligations, etc. of the predecessor entity. Just exactly what this documentation is going to look like is bound to vary from case to case. It

would not seem that such documentation must quote verbatim the language of *Matter of Dial Auto Repair Shop, Inc., supra*; rather, the supporting documentation must be persuasive enough to convince one that one entity legally succeeded another.

On appeal, counsel has submitted letters from the petitioner's corporate counsel and corporate accountant which use language which quite clearly follow the language of *Matter of Dial Auto Repair Shop, Inc., supra*. Each letter contains the following statements: "All employees of E & C Consulting Engineers, Inc. were transferred to E & C Integration Systems. All existing contracts, and work in progress at the time of transfer (merger and dissipation) continued, obligations and assets likewise transferred and continue."

In review, the documentation submitted by the petitioner prior to the director's decision to deny the petition is sufficient to establish that E & C Integration Systems, Inc. succeeded E & C Consulting Engineers, Inc. Specifically, the letter from the president of E & C Integration Systems, Inc., dated June 12, 2001; the more detailed joint letter of the owner/CEO and president of E & C Integrations Systems, Inc., dated November 14, 2002; acknowledgement by the State of Georgia that E & C Consulting Engineers, Inc. had ceased operations as of August 30, 2000; the letter of July 23, 2000, to IRS from the vice president of E & C Integration Systems, Inc., indicating the employees of E & C Consulting Engineers, Inc. had been transferred to E & C Integration Systems, Inc. Taken as a whole, these documents are sufficient evidence that E & C Integration Systems, Inc. is a successor in interest, and that it assumed the predecessor's rights, duties, and obligations.

As far as the sequence of events is concerned, it is noted first that the labor certification application was accepted for processing on July 6, 2000. The petition was filed on June 27, 2001. In both instances, the employer is identified as E & C Consulting Engineers, Inc. The petition was accompanied by a letter explaining that E & C Consulting Engineers, Inc. had merged into E & C Integration Systems, Inc. At this point, it would have been wise to change the name of the petitioner on Form I-140. The letter will be treated as an amendment to the petition, and the petitioner will be E & C Integration Systems, Inc.

The merger date in the letter which accompanied the petition is given as June 30, 2000. The later letter from the vice president of E & C Integration Systems, Inc. states that as of July 1, 2000, all employees of E & C Consulting Engineers, Inc. were transferred to E & C Integration Systems, Inc., and that the dissolution of E & C Consulting Engineers, Inc. would be complete by August 31, 2000. The joint letter from the owner/CEO and president of E & C Integration Systems, Inc. states that E & C Consulting Engineers, Inc. operated through June 2000, that the merger took place on July 1, 2000, and that E & C Consulting Engineers, Inc. dissolved effective August 30, 2000. Finally, the letter from the State of Georgia acknowledged that E & C Consulting Engineers, Inc. ceased to exist as of August 16, 2000. Despite some rather loose use of dates by the petitioner, it is concluded, therefore, that as of this date, E & C Consulting Engineers, Inc.



ceased to exist, and that E & C Integration Systems, Inc. was its successor in interest.

The final issue is whether the predecessor and the successor had, and continue to have, the ability to pay the proffered wage of \$57,443. As previously noted, the priority date in this case is July 6, 2000. In calendar year 2000, the beneficiary's Forms W-2 show that he was paid \$11,279.97 by the predecessor and \$37,959.60 by the successor for a total of \$49,239.57, a figure \$8,203.43 below the wage offered. That same year the predecessor showed a loss of \$12,252, but the successor showed ordinary income of \$71,958. The additional \$8,203.43 was available. In 2001, the beneficiary's W-2 shows that he was paid \$53,376.95, which is \$4,066.05 below the offered wage; however, in that year the successor showed ordinary income of \$108,364. The proffered wage could, therefore, have been met in 2001.

With regard to the fact that the petitioner did not indicate that a previous employment-based immigrant petition for or by the beneficiary had been denied, obviously this information should have been included on the petition, but its omission is not material to these proceedings.

In conclusion, it is found that E & C Integration Systems, Inc. is the successor of E & C Consulting Engineers, Inc, and that the predecessor and successor had and have the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

**ORDER:** The appeal is sustained.