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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 00 088 51391 Office: CALIFORNIA SERVICE CENTER Date: MAY 29 2002

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which 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 which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as a dental assistant. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it is a successorship-in-interest to the company for which the labor certification was approved.

On appeal, counsel provides a brief and additional evidence.

Section 203(b)(3)(A)(i) 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 capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available 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 hinges on the petitioner's ability to pay the wage offered as of the petition's filing 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is August 23, 1995. The beneficiary's salary as stated on the labor certification is $10.50 per hour or $21,840.00 per annum.

The petitioner initially failed to submit any evidence of its ability to pay the proffered wage as of the filing date of the

petition. On September 28, 2000, the director requested evidence of the petitioner's ability to pay the proffered wage as of August 23, 1995. The director noted that the labor certification was approved for Eagle Dale Family Dentistry, while the I-140 listed Thomas Ray Feder DDS as the petitioner.

In response, counsel stated that the original petitioner, Eagle Dale Family Dentistry is no longer in a position to proceed with the case, and that the beneficiary has a new employer, Thomas Ray Feder DDS. Counsel further stated that "the current Immigration Petition for Alien Worker, Form I-140, is a substitution of employers on a previously approved labor certification. Counsel submitted a copy of the 1995 Schedule C, Profit and Loss from Business Statement for Thomas R. Feder. Schedule C reflected gross receipts of $351,803; gross profit of $349,929; depreciation of $5,769; wages of $73,916 and a net profit of $121,396.

The director determined that this evidence did not establish that the original petitioner had the ability to pay the proffered wage as of the filing date of the petition and denied the petition accordingly. The director noted that:

> There is no provision in the C.F.R's or in the INA for a substitution of the petitioning employer. The provision for a successor in interest of the petitioner is as explained above. The petitioner in this case has clearly not become the owner of the original petitioner's business nor has the petitioner assumed the rights, duties, obligations, and assets of the original employer.

On appeal, counsel reiterates his argument that "the petitioner is requesting a substitution of employers pursuant to 20 CFR 656.30(c)(2), rather than reaffirmation based on a successor in interest."

The labor certification was issued to Eagle Dale Family Dentistry on August 23, 1995. On February 2, 2000, Thomas R. Feder filed an I-140 Immigrant Petition for Alien Worker on behalf of the beneficiary seeking to use the labor certification issued to Eagle Dale Family Dentistry. The center director denied the petition on March 8, 2001.

A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted and for the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750). C.F.R. 656.30(c)(2). If any of these factors change, the Employment and Training Administration's Technical Assistance

Guide No. 656-Labor Certifications provides at page 104 that a new labor certification is generally required.

In this case, the specific job offer was made by the prior petitioner, Eagle Dale Family Dentistry, and since the petitioner has changed, a new labor certification is required.

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition and continuing to present nor has it provided any persuasive documentation to establish that the current petitioner is a successor-in-interest to the prior owner.

Accordingly, after a review of the documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

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 not met that burden.

**ORDER:** The appeal is dismissed.