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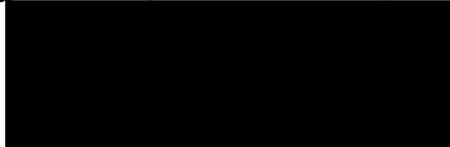
U.S. Department of Homeland Security

Citizenship and Immigration Services

B6

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



File: EAC-02-211-50608

Office: VERMONT SERVICE CENTER

Date:

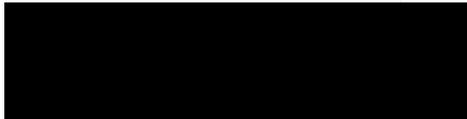
DEC 17 2003

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a health care placement firm. It seeks to employ the beneficiary permanently in the United States as an Education and Training Manager. 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)(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 turns 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is July 14, 1997. The beneficiary's salary as stated on the labor certification is \$76,107.20 per year.

The director apparently issued a request for evidence (RFE) dated December 12, 2002 requesting evidence on the issue of the petitioner's ability to pay the proffered salary and on the issue of the beneficiary's qualifications. A copy of that RFE is not now in the file, but counsel's submission to the director dated March 6, 2003 was characterized by counsel as a reply "[i]n compliance with your directive dated December 12, 2002." That submission included copies of the petitioner's 1997 U.S. Income Tax Return for an S Corporation, the petitioner's 1997 New Jersey Corporation Business Tax Return, and copies of documents pertaining to the beneficiary's education.

In a decision dated April 22, 2003 the director denied the petition. The director noted that for 1997, the year of the filing of the ETA 750, the corporate tax return showed that the petitioner lost

\$10,373.00 and had depreciation of \$8,060.00. The director's decision also noted that the petitioner had current assets of only \$100 in that year, apparently referring to the information on current assets and current liabilities as shown on Schedule L for the end of the tax year, which was December 31, 1997. The director found that the figures showed an inability of the petitioner to pay the offered wage at the time of filing.

In response to the director's decision, counsel filed on April 22, 2003 an I-290B Notice of Appeal, with a supplementary memorandum captioned "Motion for Reconsideration and/or Appeal." Documentary evidence submitted with that Notice of Appeal consisted of resubmissions of the federal 1120S and New Jersey corporate tax returns for 1997, plus federal 1120S tax returns for 1998, 1999, 2000 and 2001. Counsel also submitted a paper apparently downloaded from the Internet web site of Marist College which discusses taxation of S corporations and their shareholders. Those corporations are also known as Subchapter S corporations, after the subchapter in the Internal Revenue Code which covers that form of business corporation.

Counsel argues in his memorandum that because of the particular tax laws applicable to S corporations, the use of net taxable income does not provide an accurate indication of the ability of the petitioner to pay the proffered salary to the beneficiary in the instant I-140 petition. Counsel urges the Administrative Appeals Office to look primarily to the figures for total income. The submitted tax returns show those figures as follows:

1997: \$1,551,177; 1998: \$1,381,420; 1999: \$899,756; 2000: \$731,042; and 2001: \$787,705.

Although the director's decision was based on an analysis of the petitioner's ability to pay the proffered salary, an analysis of the evidence on appeal reveals an important threshold issue that was not addressed in the director's decision or in counsel's memorandum. The issue concerns the name of the petitioner. The name of the petitioner is different from the name that appears on the corporate tax returns submitted in support of the petitioner.

Forms ETA 750 and I-140 were both submitted by "United Health Care" of 50 Church Street, Montclair, New Jersey, 07042. Counsel's G-28 form and other submissions also identify counsel as representing the petitioner "United Health Care." All of the tax documents submitted by counsel, however, show the corporate taxpayer as "United Marketing Inc." of 50 Church Street, Montclair, New Jersey, 07043. Nothing in the file contains any explanation for the inconsistent names. Nor does the file contain any explanation for the use of two different zip codes for the same street address. It is noteworthy that the name of the petitioner "United Health Care" lacks any reference indicating the nature of that entity. Under general principles of corporation law, legal documents submitted by business corporations must contain some indication of corporate status in the name, such as by including "Incorporated," "Inc.," or "Ltd." as part of the name. Nothing in the documentation in the file indicates whether "United Health Care" is a trade name, or whether that name represents a sole proprietorship, a corporation, or some other legal entity.

All of the financial evidence submitted by counsel pertains to "United Marketing Inc." Yet the petitioner is "United Health Care." Since none of the petitioner's financial evidence pertains to "United Health Care," the petitioner's evidence fails to establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing until the beneficiary obtains lawful permanent residence.

The record contains no evidence that "United Marketing Inc." qualifies as a successor-in-interest to "United Health Care." This status requires documentary evidence that "United Marketing Inc." has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as a predecessor does not establish that the petitioner is a successor-in-interest. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In addition, even assuming that the tax documents submitted by counsel for "United Marketing Inc." relate to "United Health Care," the information in those documents fails to establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established or thereafter. The director's analysis of the income and assets of United Marketing Inc. was correct. Counsel's arguments on the special nature of S corporations are not relevant to the point at issue. Counsel's memorandum correctly notes that the income of an S corporation is not taxed to the corporation, but rather is passed through to the shareholders in proportion to their ownership shares. But counsel's argument fails to acknowledge that the shareholders maintain their legal protection from liability for the financial obligations of the S corporation. In fact, the protection of limited liability is the main legal benefit for choosing the corporate form of business, rather than some form of partnership. The shareholders of "United Marketing, Inc." would therefore not be liable for the proffered wages of the beneficiary or for the wages of any other employee. Therefore, even assuming that the financial information on "United Marketing, Inc." pertains to the petitioner "United Health Care," the director was correct in looking only to the corporate financial resources in evaluating the petitioner's ability to pay.

In addition, the Form ETA 750 states that the petitioner "United Health Care" has employed the beneficiary since March 1994. However, no financial information to corroborate that statement was submitted in support of the I-140 petition, such as W-2 forms or other records of payments to the beneficiary. The absence of such documentation is further support for the director's conclusion that the petitioner failed to establish its ability to pay the proffered salary.

Aside from the issues concerning the name of the petitioner and the petitioner's ability to pay the proffered salary, another issue raised in the evidence is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The director's RFE of December 12, 2002, which is not in the file, apparently referred to this issue, because counsel's submissions of March 6, 2003 included evidence pertaining to the beneficiary's qualifications. However, the director's decision of April

22, 2003 makes no reference to this issue. The director therefore apparently concluded that the documentary evidence on the beneficiary's qualifications was sufficient. A review of the record on appeal indicates that the evidence supports this conclusion.

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 with regard to the issue concerning the petitioner's ability to pay the proffered wage at the time the priority date was established and continuing until the beneficiary obtains lawful permanent residence

ORDER: The appeal is dismissed.