U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

B6

[redacted]

FEB 24 2004

FILE: [redacted] Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

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 dismissed.

The petitioner is a fundraising firm. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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. The petition's priority date in this instance is November 16, 1999. The beneficiary's salary as stated on the labor certification is $35,500 per year.

Counsel initially submitted insufficient evidence of the petitioner's identity, of its ability to pay the proffered wage as of the priority date and continuing to the present, and of the qualifications of the beneficiary in connection with the Immigrant Petition for Alien Worker (I-140), received September 25, 2001. In a request for evidence (RFE) dated April 9, 2002, the director exacted, for 1998-2001, the petitioner's complete federal income tax returns and, for the four quarters of 2001, its employer's quarterly wage reports (Form 941). The RFE, also, requested the partnership agreement, lease, occupancy license, and tax license of the petitioner. Further, it specified the submission of documentary evidence of the beneficiary's education, training, and experience, as set forth in Form ETA 750.

In response, the petitioner submitted a memorandum of partnership o[redacted] (RAB) and [redacted] JCF), dated July 31, 1997 (partnership agreement). It created the titled petitioner, the partnership named in the I-140. RAB states, in a letter of April 29, 2002, that the titled partnership filed its final Form 1065, U.S. Return of Partnership income in 2001, reorganized as a Texas corporation in August 2001, and filed its initial Form 1120, U.S. Corporation Income Tax Return for 2001.

On September 24, 2001, the partners executed an agreement to dissolve the partnership (the Dissolution Agreement). The Dissolution Agreement identified the partnership as both EZ Fundraising and as ezfund.com (the predecessor). The Dissolution Agreement instituted an agreement to transfer partners' interests, including all assets and liabilities, to a corporation. An Agreement to Incorporate Partnership, also dated September 24, 2001 (the Incorporation Agreement), completed the transfer of each partner's interest, to include all assets and liabilities, to the corporation, namely, EZFUND.COM, Inc. (the successor). The Incorporation Agreement specified that the primary purpose of the successor would continue unchanged and provided for the formation and name of the successor.

The director considered the Dissolution Agreement and concluded that the petitioner did not exist when the I-140 was filed on September 25, 2001. The director observed that the approval of an I-140 is automatically revoked upon the termination of the employer's business under 8 C.F.R. § 205.1(a)(iii)(D). The director determined that it would serve no useful purpose to approve the petition and denied it.

Counsel asserts on appeal that Citizenship and Immigration Services (CIS), formerly the Service or INS:

> . . . invoked [8 C.F.R. § 205.1(a)(iii)(D)] incorrectly because **EZFundraising** did not terminate the business as employer and there is no evidence of the supposed termination. [CIS] has deemed and made this erroneous conclusion on the fact that **EZFundraising** was subject by agreement of the partners, to dissolve the partnership and continue its existence under a corporate entity known as **Ezfund.com, Inc.**
>
> . . .All the evidence, contrary to the [CIS] position, points that **EZFundraising** a/k/a **Ezfund.com** continues to operate as a corporation which has undertaken the responsibility of continuing the same business with the same personnel as demonstrated by evidence submitted previously and herewith. Therefore, the reference regulation is not applicable to the situation at hand without first analyzing if a successor-in-interest exists.

Counsel's contention is well taken. The partnership and corporate documents support the claim that the petitioner assumed all of the rights, duties, obligations, assets and liabilities of the predecessor. An actual successorship exists. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm. 1986).

The successor stands in the position of any United States employer under 8 C.F.R. § 204.5:

> (c) *Filing petition.* Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section. . . 203(b)(3)(A)(i) of the [Act, 8 U.S.C. § 1153(b)(3)(A)(i)].

The case of Matter *of Dial Auto Repair Shop, Inc.* cautions that the petitioner must show eligibility, including the ability of both the predecessor and successor, respectively, to pay the proffered wage, from the priority date and continuing until the beneficiary obtains lawful permanent residence. Only 45 days of 365 (12.36%) remained at the priority date in 1999, and the product of 12.36% of the proffered wage is $4,388.73. A Wage and Tax Statement confirms that the predecessor paid the beneficiary $22,584.39 in 1999, equal to, or greater than, the prorated amount of the proffered wage.

The calculation for 2001 is more comminuted yet. The petitioner offered Forms 941, as well as federal tax returns, Form 1065 and Form 1120 for, respectively, the predecessor and the successor. The director assumed August 1, 2001 as the date of change of ownership. Of 365 days, the predecessor employed the beneficiary for 212 (58.08%), and the product of 58.08% of the proffered wage is about $20,619.18. The predecessor reported ordinary income from trade or business activities on its final, 2001 Form 1065 of $27,327, equal to, or greater than, the prorated amount of the proffered wage. The successor employed the beneficiary for 153 days, and the product of 41.92% of the proffered wage is about $14,881.60. The successor reported taxable income before net operating loss deduction and special deductions on its initial, 2001 Form 1120 of $38,974, equal to, or greater than, the prorated amount of the proffered wage.

The petition must be denied, in part, because the petitioner's evidence did not establish the predecessor's ability to pay the proffered wage in 2000. The RFE exacted the petitioner's complete 2000 income tax returns, including Forms W-2 and 1099. The proceedings contain only page 1 without the petitioner's signature and a corrected Form W-2.

The record lacks a credible federal tax return for 2000 and does not establish ordinary income, as equal to or greater than, the proffered wage. This defect of proof requires the dismissal of the appeal. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989).

As noted, the record contained a corrected 2000 Form W-2, showing the petitioner's payment to the beneficiary in 2000 of $31,296.62, less than the proffered wage. The appeal contends that the director should request more evidence. On the contrary, the regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R.103.2 (b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2 (b)(8).

The petitioner was given notice of required evidence and a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and provided no explanation for its failure. The AAO will not consider further evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

A like problem affects the petitioner's burden to establish 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 Form ETA 750 indicated that the position of market research analyst required a bachelor's degree and one (1) year of experience in the job offered or the related occupation of assistant market research analyst. The bachelor's degree justified the requirement of only one (1) year of experience under Form ETA 750.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating I-140. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, it is November 16, 1999.

The RFE set forth the regulatory requirements for a letter verifying experience. Counsel's transmittals, dated May 13, 2002 and September 10, 2001, referred to a letter verifying experience. The proceedings include the letter of the President of the predecessor and successor, dated August 27, 2001, stating:

> Please be advised that [the beneficiary] worked for our company Ez Fundraising from 1998 to 1999 as an Assistant Market Research Analyst and from 1999 to present as a Market Research Analyst.

The letter does not state a beginning date of employment, and, thus, does not establish whether the beneficiary worked one (1) year before the priority date. The petitioner submitted the Internal Revenue Service's computer printout (IRS printout) of the beneficiary's 1998 tax return. It named the payer of the beneficiary's 1998 wages as "Staff Leasing, LP," not the petitioner. It contradicted the petitioner's claim of the beneficiary's 1998 experience with it in a permanent, full-time position. No letter verified the "Staff Leasing, LP" employment or stated the duties performed. The IRS printout contains none of the information about the position required by 8 C.F.R. § 204.5(g)(1).

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The petitioner has not established that the beneficiary had one (1) year of experience on the priority date, as required by Form ETA 750. The RFE exacted the proof in terms of the regulation, but the record does not contain it. For this additional reason, the petition may not be approved.

A petitioner must establish the elements for the approval of the petition at the time of filing. 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. 1971).

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.