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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 16 2005
WAC 03 012 55404

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

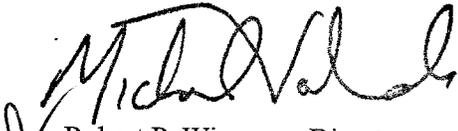
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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

The petitioner is a sole proprietor dentist. He seeks to employ the beneficiary permanently in the United States as a dental laboratory technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition initially prepared by the beneficiary's earlier employer, [REDACTED] Laboratory [REDACTED]. The director found that the petitioner was not the successor-in-interest to the entity that filed the ETA 750, and had not established its ability to pay, and accordingly, denied the petition.

On appeal, the counsel submits 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 nature, for which qualified workers are not available in the United States.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 8, 1998. The proffered wage as stated on the Form ETA 750 is \$20.41 per hour or \$42,452.80 per year. The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents:

- The original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor;
- The petitioner's Form 1040 return for 1998–2000; and,
- Documentation to establish the beneficiary's qualifications.

On February 10, 2003, the director issued a request for evidence (RFE) pertinent to ability to pay.

In response, counsel submitted:

- The petitioner's Form 1040 returns for years 1998, 1999, 2000, and 2001, and a request for extension to file for 2002;
- The petitioner's employer's quarterly return for the last two quarters of 2002 and the first quarter of 2003; and,
- The petitioner's unaudited CPA compilation balance sheet and income statement for the first six months of 2002.

On October 23, 2003, the director issued an RFE seeking:

- Documentation for the petitioner's successor in interest claim;
- Tax returns from the petitioner for 2002 and returns from Dragan through the claimed year of the petitioner's buyout. of Dragan;
- Clarification of the petitioner's claimed partnership with Dragan;
- Evidence establishing the beneficiary's qualifications.
- A list of the petitioner's and of Dragan's monthly expenses.

In response, the petitioner submitted:

- The petitioner's 1002 Form 1040;
- The petitioner's unaudited financial statement for nine months in each of 2002 and 2003;
- The petitioner's monthly household expenses as of December 22, 2003, totaling \$3,310; and,
- A credential's evaluation certifying that the beneficiary has the equivalent of a two-year associate's degree from a U.S college; and,
- A letter from a prior employer certifying her two-plus years as a dental lab technician in college.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and further, that the petitioner did not establish that he succeeded to [REDACTED] interest, on January 28, 2004, denied the petition.

On appeal, counsel asserts that he is a successor in interest to Dragan's business and submits no further evidence.

On appeal, the petitioner asserts that he is a successor in interest, that he needs the beneficiary's laboratory services, and that he and [REDACTED] "informal arrangement was for me to compensate him for the [dental lab] equipment once the business became viable with [the beneficiary] doing the laboratory work. This has never happened." He further asserts that the beneficiary's expertise will itself generate income for the petitioner and thereby establish his ability to pay the proffered wage.

A successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred; as well, he must show that he assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. See *Matter*

of *Dial Auto Repair Shop* 19 I&N Dec. 481 (Comm. 1981). The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage continuously beginning on the priority, and further that as successor-in-interest, he, too, has had the continuing ability to pay the proffered wage beginning on the date he acquired the business. *Matter of Dial Repair Shop, Supra.*

Here, the record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED]. This status requires documentary evidence that the petitioner 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 the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. The only evidence submitted is prospective and the petitioner has not submitted evidence establishing the petitioner's successor in interest to [REDACTED] business, which the petitioner must establish, in order to claim under the certified Form ETA 750.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. Here, however, where the petitioner has not established that he succeeds to the business interests and obligations of [REDACTED]. Accordingly, the petitioner has not met the requirements of *Matter of Dial Auto Repair Shop* and has failed to sustain his burden of proof.

The petitioner failed to submit evidence sufficient to demonstrate that [REDACTED] had the ability to pay the proffered wage during the salient portion of 1998 or continuously thereafter. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.