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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 045 54981 Office: CALIFORNIA SERVICE CENTER Date: MAR 2 5 2005

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)

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 Director, California Service Center, denied the preference visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision of the director will be affirmed. The petition will be denied.

The petitioner is a home nursing care facility. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a administrative assistant. The director determined that the petitioner had not established that the substituted petitioner named on the Form I-140 petition is the true successor-in-interest of the original petitioner identified on the Form ETA 750 labor certification, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion, counsel states,

> The appeal was denied solely on the ground that a brief was not filed within thirty (30) days of the Notice of Appeal, as indicated on the Notice. However, the parties indeed filed a written brief on March 14, 2003, setting forth the basis for the appeal. We hereby provide another copy with evidence showing its delivery by Federal Express to [CIS]

In fact, the basis of the dismissal of the appeal was not tardy filing, but counsel's alleged failure on appeal to specifically identify any error of law or fact. The appeal was therefore summarily dismissed pursuant to 8 C.F.R. §103.3(a)(1)(v).

A review of the decision dismissing the appeal, however, convinces this office that counsel's appeal may have sufficiently identified an error of law or fact such that the appeal should have escaped summary dismissal. This office shall exercise its discretion to reopen the matter and issue a decision on the merits of the point raised by counsel in the appeal.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner named on the Form ETA 750 labor certification, and for whom that labor certification was approved by the Department of Labor, is Alert Visiting Nurses, Incorporated. The substituted petitioner named on the Form I-140 petition, who seeks to rely on that approved labor certification, is CQI Home Care.

Under certain circumstances a petitioning company may rely on a labor petition approved for another company. Those circumstances are outlined in *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). *Dial Repair*

Shop states that the successor-in-interest petitioner must submit proof of a change in ownership of the original petitioner and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer.

With the petition counsel submitted an undated letter from CQI Homecare, the substituted petitioner, stating that Alert Visiting Nurse, Inc. had ceased operations and transferred its patients and personnel to the substituted petitioner. That letter contained no indication that the substituted petitioner acquired all of the rights, duties, obligations, and assets of the original petitioner and no indication, therefore, that it is the original petitioner's successor-in-interest within the meaning of *Dial Repair Shop, supra.*

Therefore the California Service Center, on June 5, 2002, issued a Request for Evidence in this matter. The Service Center specifically requested documentation to show that the substituted petitioner had assumed all of the rights, duties, obligations, and assets of the original petitioner and evidence to show how the substituted petitioner had acquired those interests.

In response counsel submitted a letter, dated August 21, 2002, from the substituted petitioner. This letter reiterates the facts stated in the previous letter; that is, that the original petitioner has ceased operations and that the substituted petitioner has acquired its customers and employees. Counsel also provided three copies of a memorandum from the original petitioner, dated January 28, 2000, stating that the original petitioner would cease operations on February 16, 2000. None of that evidence contained any indication that the substituted petitioner had assumed all of the rights, duties, obligations, and assets of the original petitioner and no indication, therefore, that it is the original petitioner's successor-in-interest within the meaning of *Dial Repair Shop, supra.*

On September 30, 2002 the California Service Center issued another Request for Evidence in this matter. Again the Service Center requested documentary evidence to show how the substituted petitioner acquired its interest in the original petitioner and documentary evidence to show that the interest acquired includes all of the rights, duties, obligations, and assets of the original petitioner.

In response counsel submitted a list of the clients the substituted petitioner acquired from the original petitioner. Counsel also submitted a list of the employees the substituted petitioner acquired from the original petitioner. Counsel submitted no evidence to demonstrate that the substituted petitioner acquired all of the rights, duties, obligations, and assets of the original petitioner.

On January 15, 2003 the Director, California Service Center, denied the petition, finding that the substituted petitioner had failed to demonstrate that it is the original petitioner's successor-in-interest within the meaning of *Dial Repair Shop.*

As was noted above, counsel argued, on appeal, that the evidence is sufficient to show that the substituted petitioner is the original petitioner's successor-in-interest. Although that appeal was summarily dismissed, this office shall now address the point raised by counsel.

The evidence submitted does not indicate what interest the substituted petitioner acquired in the original petitioner. The record contains no evidence that the substituted petitioner assumed all of the initial petitioner's rights, duties, assets, and obligations. Absent any evidence on that point, the substituted petitioner

has failed to demonstrate that it is the original petitioner's successor-in-interest within the meaning of *Dial Repair Shop*, and the instant petition may not be approved. The basis for the decision of denial has not been overcome on the motion.

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. Accordingly, the decision of the director will be affirmed, and the petition will be denied.

ORDER: The motion is granted. The decision of denial is affirmed. The petition is denied.