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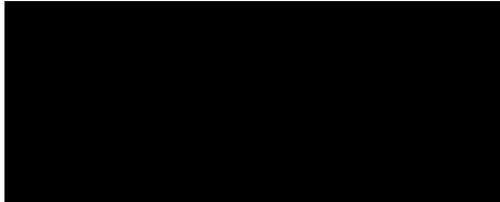
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date: AUG 01 2006

SRC 04 104 50429

IN RE:

Petitioner:
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:

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, Chief
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 rejected.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook specializing in Chinese cuisine. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, not that the beneficiary had the qualifying work experience. The director denied the petition accordingly.

The director denied the petition on January 24, 2005, finding that the evidence submitted with the petition and in response to its Request for Evidence did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the beneficiary had the minimum experience to qualify for the proffered position.

On appeal, in a February 21, 2005 letter, the general manager of Joey Tomato's Deli, Inc., on that company's letterhead, asserts that the beneficiary has the required experience, and states further:

As for Joe's World, it was closed during May of 2003 and its functions, product line, menu and catering was assumed by my son's restaurant Joey Tomato's Deli as of August 2003. We had asked the attorney to submit this information but apparently it was not. We are asking that the case remain open and the petition be amended to Joey Tomato's Deli. We can submit tax returns for 2003 and in a couple of weeks for 2004. The IRS Forms 940 and 941 are available as are any W-2 for employees as you may request.

We would still like to hire [REDACTED] and request your favorable decision.

At the outset, it appears that the petitioner is no longer in business and that someone claiming to be the petitioner's successor in interest seeks to continue with appeal. The Department of Labor does not issue a Form ETA 750 labor certification to a potential employee/beneficiary but rather to a potential employer/petitioner. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership 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 and continues to operate the same type of business as the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). While the letter of February 21, 2005, offers to be a substitute for the petitioner, it has submitted none of the documentation called for in *Dial Auto Repair Shop*.

The appeal will be rejected pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(I).

The regulation at § 8 C.F.R. 103.3(a)(1)(iii) states, in pertinent part:

(B) *Meaning of affected party.* For purposes of this section and sections 103.4 and 103.5 of this part, *affected party* (in addition to [CIS]) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The regulation at § 8 C.F.R. 103.3(a)(2)(v) states:

Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

The appeal was not filed by the petitioner or by any entity with legal standing in this proceeding, but by the general manager of a company that took over certain aspects of the petitioner's business. Furthermore, if the general manager is speaking on behalf of the beneficiary, the beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). Only the affected party is permitted to file an appeal. 8 C.F.R. § 103.3(a)(2)(i).

Therefore, the appeal has not been properly filed, and must be rejected.

ORDER: The appeal is rejected.