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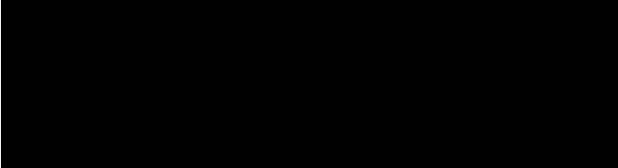
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

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FILE: [Redacted]  
SRC 05 038 51174

Office: TEXAS SERVICE CENTER

Date:  
DEC 18 2006

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:



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 service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it was a successor in interest to the initial petitioner who submitted the Form ETA 750. The director denied the petition accordingly.

On appeal, counsel states that the instant petitioner is a successor in interest to another corporation. Counsel submits additional documentation.

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 at 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is an annual salary of \$39,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the instant petitioner.<sup>1</sup>

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<sup>1</sup> The petitioner substituted the present beneficiary for the initial beneficiary AnilKumar Dokwal. The petitioner stated in its cover letter that accompanied the petition that the initial petitioner had submitted Mr. Dokwal's Form ETA 750. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996).

On the petition, the petitioner claimed to have been established on June 26, 1991, to have two employees, and in 2003 to have a gross annual income of \$828,273, and an annual income of \$67,196. In support of the petition, the petitioner submitted a letter of support that stated the beneficiary was substituted for the previous beneficiary, and that the previous petitioner, [REDACTED], had formerly leased its business premises from property owned by the current petitioner. The petitioner also stated that it is a convenience store and gas station located in Atlanta, Georgia, and established in June 1991. The petitioner stated that on October 1, 2001, it assumed control of the business premises. The petitioner then stated it was the successor in interest to [REDACTED]. The petitioner stated that it was also the successor in interest on behalf of the beneficiary. The petitioner also submitted its Forms 1120S, U. S. Income Tax Return for an S Corporation, for tax years 2001, 2002, and 2003. The petitioner's net income during these years was \$69,582, \$60,071, and \$69,196.<sup>2</sup>

The petitioner also submitted a document entitled "Settlement Statement." This document had a settlement date of October 13, 2000, and appears to indicate that a business, [REDACTED], was leased to a tenant identified as [REDACTED] c, by the current petitioner, who is identified as the landlord. This document itemized items such as rent for October 2000, inventory and security deposit amounts to be paid by the tenant to the landlord. The petitioner also submitted copies of checks made out to the current petitioner from [REDACTED] Atlanta, Georgia to the current petitioner, along with an inventory list.

On February 19, 2005, the director issued a Notice of Intent to Deny (NOID) the petition. The director requested that the petitioner submit evidence that it is the successor in interest to [REDACTED] Corporation. The director noted that successor in interest petitions are those in which the prospective employer of the beneficiary was bought out or merged. The director noted that if [REDACTED] Corporation was no longer in business and no other company had taken over for [REDACTED] Corporation and assumed liability for the debts and assets of the company, the petition may not be approved. The director stated that the petitioner that is a successor in interest has the burden of proof and must submit documentation showing the change of ownership and the assumption of rights, duties, obligations and assets of the original prospective employer.

On March 17, 2005, counsel responded to the director's NOID. In his response counsel stated that the current petitioner, [REDACTED] purchased the property located at [REDACTED] on June 14, 1991. Counsel submits a copy of the petitioner's purchase agreement to the record. Counsel further states that on October 12, 2000, the current petitioner entered into a commercial lease agreement with [REDACTED] Inc. to operate the Gas State and convenience, known as [REDACTED] located at [REDACTED] Parkway. Counsel submits a copy of the commercial lease agreement to the record. Counsel states that the term of this lease ran from October 12, 2000 to October 11, 2002. Counsel then noted that [REDACTED] Corporation filed a Form ETA 750 for the previous beneficiary on April 30, 2001.

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<sup>2</sup> Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S.

Counsel noted the property's former address was [REDACTED]

Counsel then stated that on October 1, 2001, prior to the expiration date of the commercial lease, [REDACTED] and [REDACTED] agreed to terminate the lease of the property at [REDACTED]. Counsel stated that the parties of the termination agreement agreed to terminate the lease and return possession of the premises to the landlord as well as “transfer the assets and liabilities of the business to the landlord.” Counsel submitted a copy of the Termination Agreement to the record. Counsel also submitted to the record a document entitled “Affidavit of Assumption of Assets & Liabilities of a Going Concern,” executed by [REDACTED], President [REDACTED]. In his affidavit [REDACTED] stated that during the course of the lease, [REDACTED] violated the terms of the lease agreement by failing to make monthly rent payments, and that as a result [REDACTED] signed a termination agreement, ending the previous lease agreement, effective immediately. [REDACTED] stated that [REDACTED] once again assumed control of the [REDACTED], and the associated inventory and equipment, as a going concern. [REDACTED] concluded by stating that [REDACTED] had once again assumed all of the rights, duties, obligations, debts and assets of the business previously operated by [REDACTED]. Counsel stated that the petitioner by assuming the rights, duties, obligations and assets of the original petitioner was the successor in interest to the initial petitioner.

On March 29, 2005, the director denied the petition. In his denial of the petition, the director stated that the record did not establish that a successor in interest relationship existed in the instant petition. The director stated that two separate corporations were involved and that no buyout or merger had taken place. The director noted that the current petitioner, [REDACTED] could not use the certified ETA 750 unless a successor in interest relationship existed, and added that there is no regulatory or statutory provision that allows for the substitution of petitioners on Forms ETA 750. The director cited *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1986).

On appeal, counsel reiterates his statements made in response to the director’s NOID. He also states that the denial of the instant petition is contrary to Citizenship and Immigration Services (CIS) policy. Counsel refers to a letter from [REDACTED] Director of legacy INS Business and Trade Services, CIS Headquarters dated October 17, 2001, in which [REDACTED] states that it is CIS policy that a new employing entity that is a successor in interest file a new I-140 petition and submit documentation to establish that it has assumed the rights, duties, obligations and assets of the original employer and that it continues to operate the same type of business. Counsel asserts that the current petitioner has assumed the rights, duties, obligations, and assets of the original petition and that it continues to operate the same type of business, [REDACTED]. Counsel states that based on the [REDACTED] letter, the petitioner is the successor in interest to the original petitioner.

Counsel’s assertions with regard to CIS policy supporting the current petitioner being a successor in interest to the original petitioner are not persuasive. The [REDACTED] letter cited by counsel primarily explains the process by which a new petitioner that is a successor in interest to a previous petitioner would procedurally continue the I-140 petition eligibility process. The policy memo does not support in any manner counsel’s assertion that the current petitioner is a successor in interest. The record, in particular the lease agreement submitted by counsel in response to the director’s NOID, is very clear that the relationship between [REDACTED] and [REDACTED] is that of landlord to tenant. See page 6, Section 28 of the Commercial Lease Agreement. The Termination Agreement also does not state or suggest that any immigration matters begun by the former tenant of the landlord’s gas station and convenience store lease were passed on to the landlord, the

current petitioner. The termination agreement does state that the original petitioner, or the tenant, has to surrender all the inventory, equipment, and other personal property contained in the convenience/gas station back to the current petitioner, or landlord, and that the landlord, will assume all of the tenant's debts and obligations arising out of the business including, but not limited to, trade payables, taxes and employee compensation. This latter statement also does not suggest that termination of the original petitioner's lease would lead to the assumption of a pending immigration petition by the original petitioner's landlord. Finally, the termination of a business lease also does not support the idea that the current petitioner acquired the previous petitioner by way of merger, purchase, or a buyout.

The record contains no evidence that the petitioner qualifies as a successor-in-interest to [REDACTED] Inc. 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. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, this means that the current petitioner would have to establish that the previous petitioner, whose business lease was terminated early, had the ability to pay the proffered wage as of the April 2001 priority and onward. It is noted that the record contains no regulatory-prescribed evidence of [REDACTED]'s ability to pay the proffered wage as of the proffered wage and onward. Thus, the AAO concurs with the director's decision dated March 29, 2005.

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.