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FILE: LIN-06-002-52101 Office: NEBRASKA SERVICE CENTER Date: JUL 30 2007

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:



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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting company. The petitioner seeks to employ the beneficiary permanently in the United States as a database design analyst (“Application Developer”). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (“DOL”).<sup>1</sup> As set forth in the March 7, 2006 decision, the director denied the petition on the basis that the petitioner had not established that the petitioner listed on the I-140 Petition was the successor-in-interest to the entity listed on Form ETA 750. Further, the director denied the petition on the basis that the petitioner failed to establish its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>.

The record shows that the appeal is properly and timely filed, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

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 DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750

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<sup>1</sup> The petition, however, was filed with a Form ETA 750 filed by one petitioner, and a second and separate petitioner listed on Form I-140, which forms the crux of the basis for denial and will be discussed below.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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).

In the case at hand, the petitioner filed Form ETA 750<sup>3</sup> with the relevant state workforce agency on February 27, 2001. The proffered wage as stated on the Form ETA 750 is \$56,000 per year, based on a 40 hour work week. The labor certification was approved on June 8, 2001, and the petitioner filed the I-140 on the beneficiary's behalf on October 4, 2005.<sup>4</sup> On the I-140, counsel listed the following information related to the petitioning entity: date established: 1988; gross annual income: \$22 million; net annual income: \$472,726; and current number of employees: 312.

The Form ETA 750 submitted to DOL initially listed the employer as '██████████' with an address of 5550 W. Touhy Avenue, Skokie, IL 60077. The Form ETA 750 work location was listed as the same address. The petitioner listed on Form I-140 was ██████████ with an address of 125 East John Carpenter Freeway, Suite 1200, Irving, Texas, with the beneficiary's work location listed as: Buchanan Associates, 3005 Gill St., 3, Bloomington, IL 67101.

On December 6, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide either its most recent federal income tax return, an audited financial statement, or its annual report as primary evidence, before Citizenship and Immigration Services ("CIS") would consider the letter from the petitioner's Chief Financial Officer as evidence of the petitioner's ability to pay; and for the petitioner to submit documentation to establish that the petitioner was the successor-in-interest to Dunn Systems, Inc. The petitioner responded. On March 7, 2006, the director denied the petition on the basis that the petitioner had not established that the petitioner listed on the I-140 Petition was the successor-in-interest to the entity listed on Form ETA 750. Further, the petitioner failed to provide evidence requested by the RFE, and, therefore, failed to establish its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence. The petitioner appealed and the matter is now before the AAO.

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In a letter from the petitioner's Chief Financial Officer ("CFO"), dated October 3, 2005, the CFO provided that "██████████ is the successor in interest of the enclosed labor certification previously submitted by Dunn Systems, Inc. on behalf of [the beneficiary]." However, in contrast, counsel provides in his response to the director's RFE that:

Please note that we are not asserting a full successor-in-interest situation viz-a-viz Dunn Systems, Inc. and ██████████. Rather, ██████████ is in the same metropolitan area offering the same position and salary to [the beneficiary] as his prior employer. The labor certification application was given freely to [the beneficiary's] new employer and was not bartered, sold or purchased.

The director notes in his decision that under 8 CFR § 204.5(l)(3)(i):

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The Form ETA 750 submitted to DOL initially listed the employer as "Dunn Systems, Inc."  
The petitioner listed on Form I-140 was "██████████"

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for a Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Market Information Pilot Program.

Further, 20 CFR § 656.21 sets out the basic labor certification process:<sup>5</sup>

(a) Except as otherwise provided by Section 656.21a and 656.22, and employer who desires to apply for a labor certification on behalf of an alien shall file, signed by hand and in duplicate, a Department of Labor Application for Alien Employment Certification from and any attachments required by this part with the local Employment Service office serving the area where the alien proposes to be employed.

Based on the foregoing, the director noted that there is "no waiver of the general requirement that the petitioner must apply for labor certification." The petitioner, Buchanan Associates, must file a labor certification for the beneficiary for the specific position that he will work in for Buchanan Associates. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The job offer is tied to the petitioning employer.

A new petitioner can only assert continued processing under the same labor certification based on limited circumstances, such as in the case of a successor-in-interest, that Buchanan Associates had assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Counsel, however, asserts that it is not proceeding based on a successor-in-interest theory.

On appeal, counsel provides that the director "makes several errors of law and fact in denying the immigrant visa petition." The first mistake that counsel notes is that:

Labor certification application was submitted by Dunn Systems Inc., for its former employee [the beneficiary]. It was clearly set forth in the original petition that the approved labor certification was given to Buchanan Associates since [the beneficiary] was now an employee of that company and that Dunn Systems Inc. and Buchanan Associates are not related entities.

**Counsel continues:** "Despite Buchanan Associates clarification that it was not seeking to establish a 'successor in interest' scenario, the Director continued to be extremely confused on this point and denied the case in part because it was not a successor in interest scenario."

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<sup>5</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program ("PERM"), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). The present I-140 petition was filed with a Form ETA 750, prior to the implementation of PERM. Under the revised regulations, 20 C.F.R. § 656.17 now sets forth the basic labor certification process.

Further, counsel asserts that a “plain reading” of the regulations “makes clear that a labor certification from the Department of Labor must accompany the I-140. 8 CFR § 204.5(l)(3)(i). The regulation does not state that the labor certification must have been filed by the employer named on the I-140 petition.”

Counsel is mistaken. Absent a showing of a successor-in-interest, Buchanan Associates has no basis for filing the I-140 Petition, as the petition lacks a valid Form ETA 750 job offer relevant to the I-140 petition. The Form ETA 750 job offer cannot be “given” to a new employer. Counsel cites no precedent for his novel theory of “giving” the labor certification to a new employer, as there is no precedent for such an interpretation. The petitioner has not asserted that the beneficiary qualifies to change employment based on a concurrently filed pending adjustment of status,<sup>6</sup> and clearly asserts that the new employer is not a successor-in-interest. There is no legal authority to support counsel’s proposition.

Regarding counsel’s assertion that 8 CFR § 204.5(l)(3)(i) “does not state that the labor certification must have been filed by the employer named on the I-140 petition,” that provision alone cannot be read separately from a review of the supporting ETA 750 job offer. The job offer listed on ETA 750A is specific to Dunn Systems, Inc. located at 5550 W. Touhy Avenue, Skokie, Illinois, for the beneficiary to work at 5550 W. Touhy Avenue, Skokie, Illinois as an application developer.

Counsel asserts that DOL’s main objective is to ensure that there are no U.S. workers available for a position or occupation in a specific metropolitan or statistical area of employment. Therefore, according to counsel, the labor certification initially filed demonstrates that there are no available U.S workers in that area, and the petitioner listed on the I-140 intends to employ the beneficiary in the same geographic area in a similar position and cites to Section 212(a)(5)(A) of the Act in support.<sup>7</sup>

The petitioner has failed to establish that it filed Form I-140 with a certified Form ETA 750 job offer related to the instant petition. Accordingly, as the petition is not supported by a proper job offer, and the petitioner is not the successor-in-interest to the petitioner on Form ETA 750, the petition was properly denied.

The director also denied the petition on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner must establish that its job offer to the beneficiary is a realistic one. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (“CIS”) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages.

The regulation 8 C.F.R. § 204.5(g)(2) provides that a petitioner must provide, “Evidence of [ability to pay the proffered wage] 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

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<sup>6</sup> On July 31, 2002, CIS published an interim rule allowing for the concurrent filing of Form I-140 and Form I-485. *See*: 67 Fed. Reg. 147 (July 31, 2002).

<sup>7</sup> We note that the labor certification was filed in February 2001 and certified in June 2001. The labor market test would have taken place between September 2000 and February 2001. The I-140 was not filed until October 2005 over four years after certification. Based on the later date of filing the I-140 Petition, the labor market would have been different. A new employer is required to test the market and file a Form ETA 750 for the new position. 20 CFR § 656.21.

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 DOL. *See* 8 CFR § 204.5(d).

The regulation 8 C.F.R. § 204.5(g)(2) further provides that, “in a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer’s ability to pay the proffered wage.”

In support of the petitioner’s ability to pay the proffered wage, the petitioner provided a statement from its Chief Financial Officer, which provided that “Buchanan Associates is a privately held company with approximately 312 employees. Revenue for 2004 was in excess of \$22 million dollars, providing us with more than enough resources to pay [the beneficiary] as well as our other employees.”

In accordance with 8 C.F.R. § 204.5(g)(2) that the director “may” accept such evidence, the RFE requested documentation in the form of an annual report, audited financial statement or federal tax return. The regulations provide discretion to the director, based on the use of the word “may,” to accept the letter, or in appropriate cases to request further information. The petitioner failed to provide any further evidence, and the director denied the petition on this basis as well, as he determined that based on the petitioner’s failure to submit evidence that precludes a material inquiry, the petitioner could not demonstrate its ability to pay the proffered wage. Further, we note that failure to submit evidence that precludes a material line of inquiry may result in denial. *See* 8 C.F.R. § 103.2(b)(14).

On appeal, counsel provides that the director “misconstrued” the regulations in his determination that the petitioner failed to provide evidence of its ability to pay. He cites to 8 C.F.R. § 204.5(g)(2) that an employer with over 100 workers may provide a statement from a financial officer regarding the organizations ability to pay. Counsel asserts that it is “utter nonsense” that the petitioner must additionally provide “primary evidence” in the form of a tax return, audited financial statement or annual report.

As noted above, acceptance of the letter regarding the petitioner’s ability to pay is discretionary, and the director may request further information in appropriate cases. *See* 8 CFR § 204.5(g)(2). In the case at hand, the director properly requested information to supplement the petitioner’s letter. The petitioner failed to provide any further information related to its ability to pay. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner has not provided any further information related to its ability to pay on appeal. Therefore, the petition was properly denied on this basis as well.

Based on the foregoing, the petitioner failed to show that it was the successor-in-interest to the petitioner listed on the Form ETA 750, or that it filed the petition with a valid job offer. Further, the petitioner has failed to establish that it has the ability to pay the beneficiary the required wage from the priority date until the time of adjustment. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.