

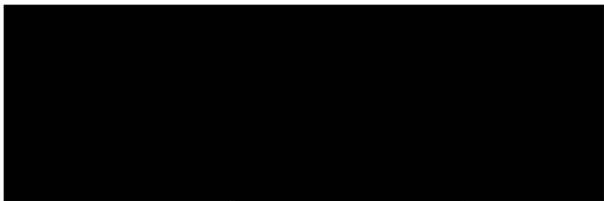
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Date: APR 03 2008

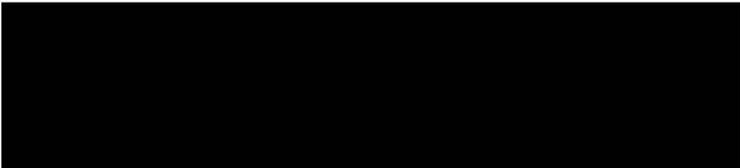
IN RE:

Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker Pursuant to § 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 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 residential care facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a nurse assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it is a successor-in-interest to the entity that filed the labor certification with DOL. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial, the issue in this case is whether or not the petitioner is a successor-in-interest to the entity that filed the labor certification with DOL.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The form ETA 750 in this matter was submitted on October 4, 1999 by Bacal Residential Care at 1182 Boulder Creek Dr., Hayward, CA 94544. The petitioner listed on the Form I-140 visa petition, which was submitted on May 15, 2003 was listed as the same as that on the form ETA 750. However, in response to a request for evidence (RFE), the petitioner explained that Bacal Residential Care (petitioner on I-140 and ETA 750) became part of a corporation, Diamond Residential Care, Inc. since February of 2002. Thus, the name of the petitioner was changed from that of Bacal Residential Care to that of Diamond Residential Care, Inc. on the Form I-140. The Form I-140 petition was correctly filed with the California Service Center on May 15, 2003, which issued the decision of denial.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

In the instant case, the record contains counsel's brief; a copy of a State of California license, issued to [REDACTED] to operate and maintain an elderly residential facility named Diamond Care Home (#435200102) at 1617 Begen Avenue, Mountain View, CA 94040, with an effective date of December 7,

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

1994; a copy of a filing, dated May 29, 1998, for a fictitious business name as Bacal Residential Care, 1182 Boulder Creek Dr., Hayward, CA 94544; a copy of the Articles of Incorporation, filed February 14, 2002, for Diamond Residential Care, Inc. at 1309 Brook Place, Mountain View, CA 94040; a copy of a common stock certificate issued to Rosalie Bacal, Trustee, of 500 fully paid and non-assessable shares of Diamond Residential Care, Inc.; a copy of the current petitioner's 2002 Form 1120S, U.S. Income Tax Return for an S Corporation; a copy of the 2002 Form W-2, Wage and Tax Statement, issued by Bacal Residential at 1182 Boulder Creek Rd., Hayward, CA 94544, on behalf of the beneficiary; a copy of the 2003 Form W-2, issued by Diamond Residential Care, Inc., at 1309 Brook Place, Mountain View, CA 94040, on behalf of the beneficiary; a letter, dated April 5, 2005, from the owner of Diamond Residential Care, Inc. explaining the difference in the name on the labor certification and the petitioner; a list of the monthly recurring expenses for the petitioner's owner; a statement showing the petitioner's owner's net worth; copies of the 1999 through 2002 Forms 1040, U.S. Individual Income Tax Return, including Schedule C, Profit or Loss from Business, for the sole proprietor of Bacal Residential Care; a copy of the petitioner's 2003 Form 1120S, U.S. Income Tax Returns for an S Corporation; copies of the 1999 through 2001 Forms W-2, issued by Bacal Residential Care on behalf of the beneficiary; copies of the petitioner's 2003 and first quarter 2004 Forms DE-6, California Employment Development Department (EDD) Quarterly Wage Reports; and copies of the petitioner's owner's utility statements.

The filing, dated May 29, 1998, for a fictitious name as Bacal Residential Care shows the business being conducted by an individual, [REDACTED], at 1182 Boulder Creek Drive, Hayward, CA 94544.

The Articles of Incorporation of Diamond Residential Care, Inc. lists the address of Diamond Residential Care, Inc. as 1309 Brook Place, Mountain View, CA 94040, lists the corporation's initial agent for service of process as [REDACTED], and lists the total number of shares which the corporation is authorized to issue as 500,000 with a par value of \$0.00 each.

The common stock certificate, issued to [REDACTED], Trustee, shows that Ms. [REDACTED] is the owner of 500 fully paid and non-assessable shares of the corporation.

The petitioner's 2002 Form 1120S reflects an ordinary income or net income from Schedule K of \$46,711 and net current assets of \$11,763.

The 2002 Form W-2 issued by Bacal Residential on behalf of the beneficiary reflects wages earned by the beneficiary of \$5,822.50 in 2002.

The 2003 Form W-2 issued by Diamond Residential Care, Inc. on behalf of the beneficiary reflects wages earned by the beneficiary of \$13,796.00 in 2003.

The letter, dated April 5, 2005, from the petitioner's owner states:

This is to clarify and state that on May 29, 1998, I got a fictitious [sic] business name of Bacal Residential Care to simplify my banking processes. I had two separate facility licenses from the State of California, so I had two separate bank accounts yet the expenses were joint. I was having problems with all the transfers, so to be able to have both facility income and expenses under one bank account, I had to get a different fictitious [sic] name. My employer ID remained the same throughout the whole time, [REDACTED]. Since my first facility license in 1994, I was functioning as a sole proprietor.

In February of 2002, I went to a lawyer, Douglas Holt, in San Mateo, CA and filed for a corporate status. Because it took time to receive the corporate papers and changing employer ID number, I started using the new status and the new employer ID number mid-year. The new number for the IRS was now [REDACTED]. At this point, the old employer ID ceased to be used.

* * *

I hope this explanation is sufficient. I am the same person, the same employer, the same facility, that is petitioning for this individual. . . .

The sole proprietor's list of monthly recurring expenses totaled \$78,696 per year, and the statement showing the petitioner's owner's net worth reflected assets of \$5,107,000.00 and liabilities of \$2,425,000.00 for a net worth of \$2,682,000.00 as of December 2004.

The sole proprietor's 1999 through 2002 Forms 1040 for Bacal Residential Care reflect adjusted gross incomes of \$38,008, \$88,395, \$168,581, and \$176,415, respectively.

The petitioner's 2003 Form 1120S reflects an ordinary income or net income from Schedule K of \$97,977 and net current assets of \$19,349.

The 1999 through 2001 Forms W-2, issued by Bacal Residential Care, on behalf of the beneficiary reflect wages earned by the beneficiary of \$2,034 in 1999, \$14,262 in 2000, and \$12,723.50 in 2001.

The 2003 Form W-2, issued by the petitioner, on behalf of the beneficiary reflects wages earned by the beneficiary of \$13,796 in 2003.

The petitioner's 2003 Forms DE-6 corroborate the wages earned by the beneficiary of \$13,796 in 2003, and the first quarter 2004 Form DE-6 reflects wages earned by the beneficiary during that quarter of \$3,579.

The director denied the petition on April 28, 2005 based on the finding that Diamond Residential Care, Inc. (apparently the petitioner) is not the true successor of Bacal Residential Care within the meaning of the opinion in *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981) because the relationship between the sole proprietorship that originally applied for the labor certification and the actual petitioner is not established.

On appeal, counsel states:

A brief summary of the history leading to the transition of Bacal Residential Care as sole proprietorship, which became Diamond Residential Care, Inc., a corporation, is in order:

1. In 1994, California License Number 435200102 to operate a residential facility for the elderly was issued in the name of Diamond Care Home and was operated as sole proprietorship. The Employer ID No. for the business was [REDACTED]. (Exhibit A)
2. On May 29, 1998, Bacal Residential Care came into existence by virtue of a fictitious business name filing made in Alameda County, California in order to replace and resume the business started in 1994. This new business entity was also operated as sole proprietorship. (Exhibit B)

3. Bacal Residential Care continued using the same Employer ID No. [REDACTED] and the same California License Number 43500102. (Exhibit C)
4. On February 14, 2002, Diamond Residential Care, Inc. came into existence by virtue of the filing of its Articles of Incorporation. This new corporation was intended to replace and resume the business otherwise know[n] as Bacal Residential Care. Diamond Residential Care, Inc. continues to utilize California License Number 435200102; which was originally issued in 1994. The corporation, however, received a new Employer ID No. [REDACTED] from the Internal Revenue Service. (Exhibit D)

The most relevant evidence that Diamond Residential Care, Inc. is a successor in interest to the original employer, Bacal Residential Care is the fact the Schedule C (Profit or Loss from Business) of the income tax return file for the year 2002 shows that a partial return for the first half of the year reflects data and figures indicating Bacal Residential Care, Inc. filed its counterpart corporate return having taken over and resumed the business from the now defunct Bacal Residential Care in order to complete the annual return.

Another important evidence to prove that there was in fact a transition and continuity from one business to another is reflected in the W-2's of the beneficiary for the year 2002-2003. (Exhibit F)

Petitioner contends that the foregoing facts are more than sufficient evidence to prove that Diamond Residential Care, Inc. is a successor in interest to Bacal Residential Care, the original employer listed on the original labor certification.

If an entity wishes to rely on a labor certification issued to another entity it must establish that it assumed all of the rights, duties, obligations, and assets of the original employer. *See Matter of Dial Auto Repair Shop* 19 I&N Dec. 481 (Comm. 1981). It must also show that both entities have the ability to pay the proffered wage.

Dial Auto Repair Shop, 19 I&N Dec. at 481 states that all of the assets of the petitioning business must have been acquired by the substituted petitioner in order for that substituted petitioner to qualify as a true successor and to rely on the labor certification issued to the original petitioner. In the instant case, we are applying that abstract language to the acquisition of a sole proprietorship.

Counsel claims that the petitioner has submitted substantial evidence in the form of tax returns, Forms W-2s, license, fictitious business name, and Articles of Incorporation. The director determined that the evidence submitted "could not establish a clear link between the two companies, Bacal Residential Care and Diamond Residential Care, Inc." Counsel claims that the petitioner has carried its burden of proof pursuant to § 291 of the INA, 8 U.S.C. § 1361 by submitting the above mentioned documentation to show that it is the successor-in-interest.

Counsel is mistaken. First, the license 435200102, issued to [REDACTED], with an effective date of December 7, 1994 was for a facility named Diamond Care Home at 1617 Begen Avenue, Mountain View, CA 94040. The address for this facility is different from either Bacal Residential Care or Diamond Residential Care, Inc., and no link has been shown between this facility and Bacal Residential Care or Diamond Residential Care, Inc. No documentation was submitted that shows that Diamond Care Home was the predecessor of Bacal Residential Care. Second, the fictitious business name filing shows that the business is conducted by an individual, and does not, in any way, indicate that it represents the two companies the

petitioner's owner said it was formed to handle. The only evidence that remotely connects Bacal Residential Care and Diamond Care Home is the beneficiary's 1999 through 2002 Forms W-2 that show the beneficiary's address to be the same as Diamond Care Home in 1999 and 2000. The EIN counsel refers to, [REDACTED], is only shown on the Bacal Residential Care documentation, not on the license information for Diamond Care Home. The AAO will not assume that both companies used the same EIN number without appropriate evidence. Third, the Articles of Incorporation of Diamond Residential Care, Inc. do not indicate that it is just the incorporation of Bacal Residential Care. In fact, the Articles of Incorporation show that Diamond Residential Care, Inc. is located at a different address than Bacal Residential Care, and the petitioner's Forms 1120S reflect a different EIN for Diamond Residential Care, Inc. The petitioner has not submitted any evidence that shows that Bacal Residential Care and Diamond Residential Care, Inc. are one and the same business entities. The fact that these entities have the same owner does not imply that Diamond Residential Care, Inc. is the successor in interest to Bacal Residential Care. In addition, a review of public records³ indicates that Bacal Residential Care's fictitious business name did not expire until May 28, 2003, after the incorporation of Diamond Residential Care, Inc. If Diamond Residential Care, Inc. were the successor in interest of Bacal Residential Care, Bacal Residential Care would have ceased to exist upon the incorporation of Diamond Residential Care, Inc. Furthermore, there is no evidence in the record that establishes that Diamond Residential Care, Inc. assumed all of the rights, duties, obligations, and assets of the original employer. See *Matter of Dial Auto Repair Shop* 19 I&N Dec. 481 (Comm. 1981). For these reasons, the petition may not be approved.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do not overcome the decision of the director.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

³ See the website at <http://rechart1.acgov.org/results.asp> (accessed on March 26, 2008).