U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: WAC-02-087-54736 Office: CALIFORNIA SERVICE CENTER Date: MAR 21 2006

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: 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, Director
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 landscaping and gardening service. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The name of the employer on the ETA 750 is a different name than the name of the petitioner in the instant petition. 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 and denied the petition accordingly.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

Employment-based immigrant petitions depend on priority dates. A petition's priority date is date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 1, 1997. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200.00 annually. On the Form ETA 750B, signed by the beneficiary on October 30, 1997, the beneficiary claimed to have worked for the employer which submitted the ETA 750 beginning in October 1987 and continuing until the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on August 2, 2001.

The I-140 petition was submitted on January 14, 2002. On the petition, in the item for the date on which the petitioner was established, the petitioner wrote "January 1973, February 2000." (I-140 petition, Part 5). On the petition, the petitioner claimed to currently have 200 employees. The items on the petition for gross annual income and for net annual income were left blank on the petition. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated March 26, 2002, the director requested additional evidence to show that the petitioner is a successor in interest to the employer which filed the ETA 750 application for alien labor certification. The director also requested evidence pertaining to a change of address from that shown on the

ETA 750 to the address shown on the I-140 petition. The director also requested evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Finally, the director requested copies of Form W-2's and Form W-3's of the petitioner for all its employees for the years 1997, 1998, 1999, 2000 and 2001.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on June 19, 2002.

In a decision dated July 25, 2002, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief and additional evidence. The petitioner states on appeal that the petitioner was formerly known by the name which appears as the employer's name on the ETA 750, and that the petitioner has consistently paid wages to the beneficiary. The petitioner states that copies of tax returns requested by the director are in the possession of the petitioner's corporate attorney and that the petitioner has been unable to obtain complete copies of the tax returns requested by the director. The petitioner states that the beneficiary has been employed by the petitioner since 1988 and states that copies of the beneficiary's W-2 forms and copies of the beneficiary's personal income tax returns are sufficient to establish the petitioner's ability to pay the proffered wage.

CIS electronic records indicate that the record of proceeding was transmitted to the AAO on September 20, 2002.

The non-record side of the file contains a memorandum dated February 19, 2004 from the AAO to the California Service Center stating that the record of proceeding was then incomplete and that the Form I-140 could not be located in the file. The memorandum indicates that the record of proceeding was being returned to the California Service Center.

The director issued an RFE dated July 6, 2004 stating that in order to proceed with the petitioner's appeal a copy of the original I-140 petition was needed. In the RFE the director also stated that as of February 3, 2004, CIS records indicate that the beneficiary was deported. The director stated that if the petitioner wished to withdraw its appeal, it should submit a letter requesting a withdrawal.

In response to the RFE dated July 6, 2004 the petitioner submitted a photocopy of the I-140 petition. The petitioner also submitted a letter dated August 24, 2004 signed by its vice-president for operations and by an official with an immigration services firm. The letter states that the petitioner does not wish to withdraw its appeal. In the letter, the petitioner notes that it has previously submitted documentation requested by CIS. The petitioner states that the employer changed its name from that appearing on the ETA 750 to the name appearing on the I-140 petition, but that the company remains the same.

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).

An initial issue in the instant appeal concerns whether the petitioner is the same company which filed the ETA 750, and, if not, whether the petitioner is a successor in interest to that company.

The ETA 750 Application for Alien Employment Certification was filed by the employer "[redacted] Residential ([redacted])." The petitioner's name is "[redacted] Inc."

The record contains a copy of a letter dated September 17, 2001 from [redacted] the petitioner's vice president for operations, addressed to the U.S. Department of Labor, Employment and Training Administration. The record order indicates that that letter was submitted in evidence for the first time in response to the RFE dated July 6, 2004. The September 17, 2001 letter states in pertinent part as follows.

> I am writing on behalf of [the beneficiary's] Application for Alien Labor Certification.
>
> I am writing as we have undergone some changes within the business we had been employed with. We were previously employed with [redacted] Residential and Commercial Development Corporation when we started [the beneficiary's] application. It was unfortunate but South Shore had stopped doing business and ultimately closed.
>
> We reorganized and reopened as a new corporation under the new name [redacted] I am still [the beneficiary's] immediate supervisor and will continue to support his efforts to obtain his certification in any way that I can.

(Letter from [redacted] V.P. Operations, September 17, 2001, at 1).

The record also contains a copy of an undated letter from [redacted] which was submitted on June 19, 2002 in response to the earlier RFE dated March 26, 2002. That letter states in pertinent part as follows:

> I am writing on behalf of [the beneficiary] and his application for Alien Labor Certification.
>
> When I started this process as [the beneficiary's] sponsor several years ago we were doing business as [redacted] Residential and Commercial Development Corporation. We have since closed [redacted] and started an new [sic] corporation by the name of [redacted] I have enclosed a copy of the new contractors license to confirm the change.
>
> The purpose of this note is to reconfirm my dedication to sponsor [the beneficiary] through this process. As long as [the beneficiary] is permitted to remain in the United States he will always have a place to work for me.

(Letter from [redacted] June 17, 2002, at 1).

Later in the letter, in explanation of the petitioner's inability to provide certain tax documents which had been requested by the director, Mr. [redacted] states the following:

> The financial records are no longer in our possession for [redacted] and Commercial Development Corp. The [sic] are in the possession of it's [sic] Attorney. I am enclosing a copy of an extension of the tax return for the year 2000. I am afraid this is all that I can offer at this time.

(Letter from Terry June 17, 2002, at 1).

The record also contains a letter dated August 24, 2004, submitted in response to the RFE of July 6, 2004, jointly signed by [redacted] and by an official from an immigration services firm. That letter states in pertinent part as follows:

> The petitioning employer, [redacted]ffers a bonifide [sic] offer of full time employment to the beneficiary for the job position of landscape gardener since the pilot program in affect [sic] during 1997.
>
> Following the approval of said case matter by the US Department of Labor, on August 2, 2001, the employe[redacted] changed the name of the business only to [redacted]he company remains the same.

(Letter from [redacted] and [redacted] August 24, 2004, at 1).

The September 17, 2001 letter states that the Residential and Commercial Development Corporation stopped doing business and was closed, and that the petitioner is a new corporation.

Similarly, the undated letter submitted on June 19, 2002 states that the corporation which filed the ETA 750 was closed and that the petitioner is a new corporation. Moreover, the statement in that letter that tax documents of [redacted]e Residential and Commercial Development Corp. were unavailable to the petitioner's vice president of operations is further evidence that the petitioner is a separate corporation from [redacted] Residential and Commercial Development Corp.

The foregoing information is inconsistent with the statement in the August 24, 2004 letter that the employer changed only its name, and that the company remains the same. Moreover, in the August 24, 2004 letter the prior name is stated as "[redacted]," rather than [redacted] Residential and Commercial Development Corporation." (Letter from [redacted] and [redacted] August 24, 2004, at 1).

The record contains partial copies of Form 1120 U.S. Corporation Income Tax Returns of [redacted] Residential and Commercial Development Corp. for 1996, 1997 and 1998. The employer identification number on those tax returns is a number ending in the final three digits "788." The record also contains copies of Form W-2 Wage and Tax Statements of the beneficiary showing compensation received from that corporation for the years 1988 through 1999. On each of those documents the employer identification number is that same number ending in "788." The record also contains a copy of a Form W-2 of the beneficiary for 2000. The name of the employer on the copy of that Form W-2 is partially obscured, with only [redacted] 1999" visible, and the federal employer identification number is almost completely obscured, except for an apparent final digit of "8." On the Form W-2 for 2000, the employer's California state I.D. number ends with the three digits "07-5" and is the same state I.D. number as that which appears on the Form W-2's for 1988 through 1999.

The record also contains a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2001, showing compensation received from the petitioner. The federal employer identification number on that Form W-2 is a number with the final three digits of "790." The employer's California state I.D. number is a number with the final three digits of "82-3."

The differences in federal and state employer identification numbers between the Form W-2's for 1988 to 2000 on one hand and the Form W-2 for 2001 on the other are further evidence that the petitioner is a separate corporation from the employer which filed the ETA 750.

Most of the above evidence indicates that the employer on the ETA 750 and the petitioner are two separate corporations. Only in the letter dated August 24, 2004 does the petitioner assert that the employer on the ETA 750 merely changed its name and that the company remains the same.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above. No copies of articles of incorporation were submitted for [redacted] Residential and Commercial Development Corp. or for the petitioner. Nor were any copies of articles of amendment submitted which might show a legal name change from [redacted] Residential and Commercial Development Corp. to the petitioner's name.

For the foregoing reasons, the evidence fails to establish tha[redacted] Residential and Commercial Development Corp. is the same corporation as the petitioner.

The record also fails to establish that the petitioner is a successor in interest to [redacted] Residential and Commercial Development Corp. That status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The address of the petitioner as shown on the beneficiary's Form W-2 Wage and Tax Statement for 2001 is the same address as is shown on the prior Form W-2's issued [redacted] Residential and Commercial Development Corp., and the same address which appears for that corporation on the ETA 750. Nonetheless, the fact that the petitioner is doing business at the same location as the purported predecessor does not establish that the petitioner is a successor-in-interest. The record lacks any evidence that the petitioner has assumed any of the rights, duties or obligations of [redacted] s Residential and Commercial Development Corp.

For the foregoing reasons, the Form ETA 750 submitted by the employer "[redacted] Residential (Commercial Development Corp.)" and approved by the Department of Labor for that corporation is not a Form ETA 750 which was submitted by the petitioner or which was approved by the Department of Labor for the petitioner.

The regulations at 8 C.F.R. §§ 204.5(a)(2) and 204.5(l)(3)(i) require that any I-140 petition filed under the preference category of INA § 203(b)(3) be accompanied by a labor certification. The record in the instant petition lacks a labor certification issued to the petitioner or to an employer of which the petitioner is a successor in interest. The petition therefore must be denied.

In the RFE dated March 26, 2002, the director requested additional evidence to show that the petitioner is a successor in interest to the employer which filed the ETA 750 application for alien labor certification. The director also requested evidence pertaining to an apparent change of address from that shown on the ETA 750. The evidence submitted by the petitioner in response to that RFE apparently satisfied the director, since the director did not again discuss those issues in his decision, but rather treated the evidence pertaining to

[redacted] Residential and Commercial Development Corp. as evidence pertaining to the petitioner. The director then found that the evidence failed to establish the petitioner's ability to pay the proffered wage during the years at issue in the instant petition. Nonetheless, for the reasons discussed above, the director's implicit finding tha[redacted]Residential and Commercial Development Corp. is the same corporation as the petitioner is not supported by the evidence in the record.

Although the analysis of the director was incorrect, the director's decision to deny the petition was correct, for the reasons stated above. The assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

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.