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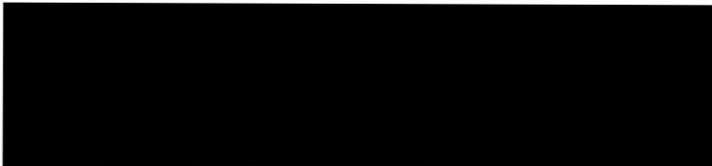
FILE: LIN-04-186-50228 Office: NEBRASKA SERVICE CENTER Date: **JUN 27 2006**

IN RE: Petitioner:
Beneficiary:



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:



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 "Michael Valdez".

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 private school and education firm. It seeks to employ the beneficiary permanently in the United States as a mathematics tutor.¹ 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 and 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.

The record shows that the appeal is properly filed, timely 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's October 22, 2004 denial, two issues exist in this case. The first issue is whether or not the petitioner is a successor-in-interest to the original entity named in the labor certification. If evidence shows that the petitioner is a successor-in-interest, then the second issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the

¹ According to the I-140 petition, the job title of the proposed employment is "Tutor, Mechanics." However, according to the Form ETA 750, the job title is "Teacher, Mathematics," and the job description on the I-140 petition includes "[t]each[ing] regular and specialized mathematic courses." Thus, the evidence in the record indicates that the petitioner is seeking to employ the beneficiary permanently in the United States as a mathematics tutor.

employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$12,160.00 per year.

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.² Relevant evidence submitted on appeal includes a letter from a certified public accountant dated November 15, 2004, a letter from the petitioner dated March 7, 2003, a Purchase Agreement dated September 9, 2002, the petitioner's Articles of Organization filed on August 27, 2002, an appraisal of the original entity's property, the petitioner's financial statements for 2004, bank account information of the original entity for 2001, copies of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 2001, 2002, and 2003, copies of the beneficiary's Form 1099-MISC Miscellaneous Income from the petitioner for 2002 and 2003, and copies of the beneficiary's Form 1099-MISC Miscellaneous Income from the original entity for 2001 and 2002. Other relevant evidence in the record includes a letter from a certified public accountant dated March 25, 2004, a letter from the petitioner dated September 2, 2004, the petitioner's statement of operations for 2003, copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2002 and 2003, copies of the original entity's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001 and 2002, the petitioner's profit and loss statement for 2004, and a copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter in 2004. The record does not contain any other evidence relevant to the petitioner's status as a successor-in-interest and the petitioner's ability to pay the proffered wage.

Counsel states on appeal that documentation shows that the petitioner is a successor-in-interest to the original entity and documentation shows the petitioner's ability to pay the proffered wage. Counsel also states that the director's decision should be consistent with prior decisions.

The first issue in this case is whether or not the petitioner is a successor-in-interest to the original entity named in the labor certification. The status of successor-in-interest requires documentary evidence that the petitioner has assumed all the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. 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 as of the priority date and continuing until the petitioner succeeded the original employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The record contains a Purchase Agreement date September 9, 2002. Section four of the Purchase Agreement on page three states:

Buyer's Assumption of Liabilities. Buyer is not assuming any liabilities or obligations of the Seller, except the assignment of existing leases and to the Polish language radio station contract currently in existence. Buyer and Seller agree that Buyer does not assume or have any responsibilities for any liability, obligation or commitment of any nature, whether now or hereafter arising, absolute, contingent or otherwise, relating to Seller's business, except for future obligations incurred under the leases. Notwithstanding the provisions herein, Buyer shall honor all obligations relating to prepaid tuition.

² 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).

The plain language of the Purchase Agreement specifically states that aside from obligations relating to existing leases, the existing Polish language radio station contract, and the prepaid tuition, the petitioner is not assuming any obligations of the original entity. Thus, the Purchase Agreement is clear evidence that the petitioner has not assumed all the obligations of the original entity as required for the status of successor-in-interest.

The record contains the petitioner's Articles of Organization filed on August 27, 2002. The document indicates that the petitioner is to be offering education services, which appears to be the same type of business as the original employer. However, it is silent on whether the petitioner has assumed all the rights, duties, obligations, and assets of the original employer.

The record contains a letter from a certified public accountant dated November 15, 2004 stating that "[t]he terms of the Purchase Agreement clearly state that the [p]etitioner is a successor in interest to [the original entity.]" As stated above, the Purchase Agreement explicitly states that the petitioner is not assuming all the obligations of the original entity as required for the status of successor-in-interest.

The record contains a letter from another certified public accountant dated March 25, 2004 stating that the petitioner is continuing the work of the original entity and "assumed part of [the] agreement [of the original entity.]" It is unclear whether "part of [the] agreement" means that the petitioner is only assuming parts of the Purchase Agreement or that the petitioner is only assuming parts of the obligations and duties of the original entity, and the latter meaning appears consistent with the language of the Purchase Agreement. Regardless of what the certified public accountant meant by "assumed part of [the] agreement," the letter is not evidence of the petitioner's status as successor-in-interest because the petitioner is only assuming parts, and not all, of the rights, duties, obligations, and assets of the original owner. Additionally, counsel states on appeal that this letter, along with one of the letters from the petitioner mentioned below, "include[s] [a] clear statement that the petitioning company . . . is a successor in business." The assertions of the certified public accountant or the petitioner do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The record contains two letters from the petitioner dated March 7, 2003 and September 2, 2004. Both letters from the petitioner state that the petitioner is a successor in business to the original entity and that "[t]he ownership changed on October 1, 2002." The letters also state that the petitioner has retained the same location and same phone number as the original entity. The fact that the petitioner is doing business at the same location and is using the same phone number as its predecessor does not establish that the petitioner is a successor-in-interest. Moreover, as stated above, evidence in the record does not show that the petitioner has assumed all the obligations of the original entity and thus the petitioner has not meet the criteria necessary to be a successor-in-interest.

Counsel states that "[t]he petitioner requests the consistency with the prior Service's decisions be applied in adjudicating of underlying petition. Based upon the same documentation [the director approved two other cases.]" CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Counsel also neglects to mention two other cases, in addition to the two approved cases, filed by the petitioner. One was approved and one was denied due to abandonment.

After a review of the evidence, it is concluded that the petitioner is not a successor-in-interest to the original entity named in the labor certification. Since the petitioner is not a successor-in-interest, the AAO will not examine the petitioner's ability to pay the proffered wage. The director's finding that the petitioner did not

establish the right to use the original entity's labor certification is correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel 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.