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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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MAR 03 2011

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Perry Rhew
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 restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 8, 2009 denial, the issue in this case 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 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 either 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 the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

As a threshold issue, the Form I-140 lists the petitioner as [REDACTED] with an address of [REDACTED] and an IRS tax number of [REDACTED]. [REDACTED] records reflect that the corporate status of [REDACTED] with an address of [REDACTED] is dissolved.

On June 25, 2010, this office notified the petitioner and counsel that according to the records at the [REDACTED] Secretary of State official website, the petitioning business was dissolved. Counsel responded with a letter stating that the entity [REDACTED] is not the petitioning employer and that the employer is [REDACTED], which has been doing business as [REDACTED]. Counsel provided the fictitious business name statement of [REDACTED] showing that it is doing business as [REDACTED] its Articles of Incorporation showing that it was incorporated on August 30, 1994 and evidence that according to the [REDACTED] Secretary of State's official website, [REDACTED] is active and the address is listed as [REDACTED]. The IRS Forms [REDACTED] tax identification number as [REDACTED].

On November 23, 2010, the AAO requested that the petitioner explain the discrepancy in the tax identification numbers of the two entities and submit evidence that [REDACTED] and [REDACTED] are operating as the same company.

Counsel responded with a letter dated January 20, 2011 stating that the tax identification number provided on Form I-140, [REDACTED] was incorrect. Counsel stated that this tax identification number belonged to [REDACTED] a corporate entity that was dissolved and was not the entity that filed the application for labor certification in this case. Counsel claims that the correct tax identification number is [REDACTED] that the petitioning entity is [REDACTED] that has been doing business as [REDACTED], and that the state tax identification number [REDACTED] substantiates the claim that the entity listed on the Form ETA 750 Application for Alien Employment Certification, on the IRS Forms W-2 issued to the beneficiary, and the IRS Forms 1120S, U.S. Corporate Tax Returns is the same.²

¹ 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 of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The Form ETA 750 lists the petitioner as [REDACTED] with a State tax identification number of [REDACTED]. The beneficiary's Forms W-2 list [REDACTED], Inc. as the employer with the tax identification number [REDACTED] and state identification number as [REDACTED]. The Form 1120S, U.S. Income Tax Returns for an S Corporation lists the taxpayer as [REDACTED] and tax identification number [REDACTED].

The AAO finds that despite the petitioner's intention to file the Form I-140 petition as [REDACTED] Inc., with a tax identification number of [REDACTED], the Form I-140 was filed by [REDACTED] with a tax identification number of [REDACTED], a business that has been dissolved. The appeal thus is moot.³

Counsel also states that [REDACTED] is the corporate address and that the beneficiary will be employed at [REDACTED]. Counsel states that each [REDACTED] location is owned by a separate entity. [REDACTED] submitted a copy of a fictitious business name statement indicating that the registered owner of [REDACTED]. This evidence suggests that [REDACTED] Inc., the owner of the [REDACTED] that is doing business at [REDACTED], the location listed on Form ETA 750, would be the appropriate petitioner for the approved labor certification. Nevertheless, the petitioner filing the Form I-140 is dissolved, and the petition and its appeal are moot.

The director found that the petitioner did not establish its continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The AAO agrees. The petitioner, [REDACTED] did not provide any income tax returns or other financial documentation to establish its ability to pay the proffered wage from April 27, 2001 and onwards.⁴

³ Where there is no active business, no legitimate job offer exists, and the request that a foreign worker be allowed to fill the position listed in the petition has become moot. Additionally, even if the appeal could be otherwise sustained, the petition's approval would be subject to automatic revocation pursuant to 8 C.F.R. § 205.1(a)(iii)(D) which sets forth that an approval is subject to automatic revocation without notice upon termination of the employer's business in an employment-based preference case.

⁴ The petitioner submitted the tax returns of [REDACTED] who is not a party to this proceeding, to establish its ability to pay the proffered wage. There is no evidence of record, however, establishing a financial relationship between [REDACTED] with a tax identification number of [REDACTED] and [REDACTED] with a tax identification number of [REDACTED] or to show that [REDACTED] is the successor-in-interest to the C [REDACTED]. To establish a valid successor-in-interest relationship for purposes of the Immigration and Nationality Act, the petitioning successor must fully describe and document the transaction transferring ownership of the beneficiary's predecessor employer, demonstrate that the job opportunity is the same as the one originally offered on the labor certification, and prove by a preponderance of the evidence that the successor employer is eligible for the immigrant visa in all respects. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), clarified. Evidence of the transfer and assumption of ownership must show that the successor not only purchased assets from the predecessor, but also the essential rights and obligations necessary to carry on the business in the same manner as the predecessor. The successor employer must continue to operate the same type of

In the instant case, [REDACTED] has not been shown to be the petitioning employer. [REDACTED] formerly listed on the petition, is dissolved, and the appeal is moot.

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.

business as the predecessor and the essential business functions must remain substantially the same as before the transfer of ownership. To establish eligibility for the requested visa in all respects, the petitioning successor must support his or her successor-in-interest claim with all necessary evidence, including proof of the predecessor's ability to pay the proffered wage from the priority date until the date of transfer of ownership to the successor, and the successor's ability to pay the proffered wage from the date of transfer of ownership onwards. A petitioner is not precluded from demonstrating a successor-in-interest relationship simply because it acquired a division of the predecessor entity instead of purchasing the predecessor in its entirety. As [REDACTED] is not a successor-in-interest to the petitioner, its tax returns are not relevant to prove the petitioner's ability to pay.