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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass. 3/F
425 I Street N.W.
Washington, D.C. 20536

[redacted]

File [redacted] Office: California Service Center Date: MAR 09 2004

IN RE: Petitioner: [redacted]
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 [redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

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 restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it is a successor in interest to the San Diego Korea House Restaurant, Inc., the original filer of the ETA 750.

On appeal, counsel argues that the use of a successor in interest analysis is inapplicable in this case because petitioner has the same owner and is, in fact, the same restaurant but in a different location.

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. A labor certificate from DOL must accompany every petition under this classification. 8 C.F.R § 204.5(l)(3).

The regulation at 20 C.F.R. § 656.30(c)(2) states:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

Eligibility in this matter hinges on whether the petitioner is a successor in interest to the San Diego Korea House Restaurant, Inc., the original filer of the ETA 750. The petitioner's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, is September 11, 2000. The beneficiary's salary as stated on the labor certification is $2192 per month or $26,304 per year.

With the petition, counsel submitted copies of the petitioner's 1999, 2000 and 2001 Form 1120, U.S. Corporation Income Tax Return,

and an ETA 750 with a different employer than that shown on the Form I-140, Immigrant Petition for Alien worker.

In a request for evidence (RFE) dated March 10, 2003, the director required additional evidence to establish the petitioner as successor in interest to the original employer and of the beneficiary's experience for the position. In response, counsel submitted a certificate of employment establishing that the beneficiary had the necessary experience for the position, and a letter from the president of the petitioner stating he had sold the San Diego Korea House Restaurant.

The director determined that the evidence presented did not establish petitioner as successor in interest to the original filer of the ETA 750 and denied the petition.

On appeal, counsel states that petitioner's owners had two corporations, each consisting of one restaurant. He states an ETA was filed with DOL in September 2000 "through" the San Diego Korea House Restaurant, Inc. The application was approved in November of 2002, the same year in which the owners sold the San Diego Korea House Restaurant, while maintaining the San Diego Korea House Restaurant corporation.

With the appeal, counsel submitted a brief and the 2001 Form 1120S, U.S. Income Tax Return for an S Corporation, for San Diego Korea Restaurant, Inc. The tax return showed ordinary income of negative $22,145. Counsel states the petitioner had the same owner and the same management as the original filer of the ETA 750. He argues that the successor in interest analysis is inappropriate as there has been no change in ownership.

Although it may share the same management and ownership, the San Diego Korea House Restaurant is incorporated as a separate and distinct legal entity from the petitioner. Different locations, different federal employer tax identification numbers, different California corporate identification numbers, and separate tax returns attest to this. Thus the San Diego Korea House Restaurant is not the "same restaurant" as the petitioner. Further, as separate legal entities, each corporation has its own assets and liabilities, and CIS will not attempt to "pierce the corporate veil" to make them one entity because of common owners.

In order to use the labor certification issued to the San Diego Korea House Restaurant, Inc., the petitioner must show it is a successor in interest to the company, and that it has assumed all rights, duties, obligations and assets of the original company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N 481 (Comm. 1986).

Counsel argues that the San Diego Korea House Restaurant, Inc. sold the restaurant[1], and has resolved to transfer the remaining assets to the National City corporation.[2] However, counsel submits no documentary evidence that this has occurred. Furthermore, since the restaurant in which the beneficiary was to have been employed was not transferred to the petitioner, the petitioner cannot be a successor in interest to the proffered job opportunity.

Although not an issue on appeal, it is noted that the petitioner has not shown that the original filer of the ETA 750 had the ability to pay the proffered wage at the time the priority date was established and continuing until the date the restaurant was sold. 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 original employer's tax return for calendar year 2001, the only one submitted, shows a net loss for the year. The proffered wage could not have been paid from ordinary income. Assets of shareholders or of other enterprises and corporations cannot be considered in determining the corporation's ability to pay. *See Matter of M,* 8 I&N Dec. 24 (BIA 1958); *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel,* 17 I&N Dec 631 (Act. Assoc. Comm. 1980).

The petitioner must show that the predecessor prospective employer had the ability to pay the proffered wage at the time the priority date was established. *See Matter of Dial Auto Repair Shop, Inc., supra.* The evidence submitted does not demonstrate that the predecessor employer was able to pay the proffered wage beginning on the priority date and continuing to the date of sale.

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[1] No evidence of the sale has been submitted.

[2] The "transfer" of the ETA 750, which counsel describes as an asset of the original company, in no way binds CIS or DOL, as the job offer must still meet statutory and regulatory guidelines for the ETA 750 to remain valid.

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.