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U.S. Citizenship and Immigration Services

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[redacted]

MAY 06 2004

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

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:

[redacted]

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 sustained. The petition will be approved.

The petitioner is an income tax preparation firm. It seeks to employ the beneficiary permanently in the United States as a tax office manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 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.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition'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. The petition's priority date in this instance is January 14, 1998. The beneficiary's salary as stated on the labor certification is $2,638.00 per month or $31,656.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's experience. Concerning the petitioner's ability to pay the proffered wage, the evidence consisted of the following: copies of Form 1040 U.S. individual income tax joint returns for the petitioner's owner and his wife for the years 1997, 1998, 1999 and 2000; and a copy of Form 4868 application for automatic extension of time to file U.S. individual income tax return for the petitioner's owner and his wife for 2001.

Concerning the beneficiary's qualifications the evidence consisted of the following: an evaluation of educational credentials dated August 15, 2002 by International Educational Equivalency Evaluations Services; a copy of a diploma dated February 26, 1991, with certified English translation, from the Riga Civil Aviation Engineering Institute, Riga, Russia, awarding the beneficiary the degree of Master of Science in Engineering; a copy of a letter dated December 27, 1997 from the petitioner confirming the beneficiary's work experience with the petitioner from January 1992 through February 1994; a letter from a tax preparation company confirming the beneficiary's work experience with that company from February 1994 until April 1996; and copies of California documents evidencing the beneficiary's status as a registered tax preparer, with expiration dates in 1996, 1997, 1998, 1999 and 2002.

In a request for evidence (RFE) dated November 13, 2002, the director requested additional evidence on the petitioner's ability to pay the proffered wage and on the beneficiary's qualifications.

Counsel responded to the RFE with a letter dated February 3, 2003, accompanied by the following additional evidence: IRS computer printouts for the individual income tax joint form 1040 returns for the petitioner's owner

and his wife for the years 1998, 1999, and 2000; a copy of a Form 1120 U.S. income tax return for an S corporation Vizamora Enterprises, Inc. for the year 2001; a copy of a Form 1040 U.S. individual income tax joint return for the petitioner's owner and his wife for the year 2001; a letter dated January 24, 2003 from the accountant for the petitioner; copies of Form 1099-MISC showing payments received by the beneficiary from the petitioner for 1997 and 1998; a copy of an IRS printout of a Schedule C for the beneficiary for 1998; copies of Form W-2 Wage and Tax Statements for the beneficiary for 1999 and 2000 showing wages received from the petitioner; copies of Form W-2 Wage and Tax Statements for the beneficiary for 2001 and 2002 showing wages received from Vizamora Enterprises, Inc.; copies of federal and California state quarterly wage statements for Vizamora Enterprises, Inc. for the four quarters of the year 2002; copies of Form W-3 Transmittal of Wage and Tax Statements for the petitioner for 1998, 1999, and 2000; copies of Form W-3 Transmittal of Wage and Tax Statements for Vizamora Enterprises, Inc. for 2001 and 2002; and a letter dated December 12, 2002 from the owner of the petitioner confirming the work experience of the beneficiary with the petitioner from January 1992 through February 1994.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On the Form I-290B notice of appeal counsel checked the block indicating that a brief and/or evidence would be sent to the AAO within thirty days. Nonetheless, to date no additional documentation is in the file.

Counsel states on appeal that the director did not properly apply the regulation at 8 C.F.R. § 204.5(g)(2) and did not properly evaluate the evidence submitted by the petitioner in support of the petition.

The evidence in the record raises two principal issues, first, whether the petitioner has established its ability to pay the proffered wage as of the filing date and continuing until the beneficiary obtains permanent residence, and second, whether the S corporation Vizamora Enterprises, Inc. qualifies as a successor in interest to the petitioner, which at the time of filing was a sole proprietorship.

The AAO will first address the issue of the petitioner's ability to pay the proffered wage. In determining the ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage.

In the instant case the evidence established that the beneficiary was working for the petitioner as of the priority date, but at a wage level below the proffered wage and in a non-employee status. The Form 1099 issued to the beneficiary by the petitioner for 1998 shows non-employee compensation as $10,970, which is $20,686 less than the proffered wage. Beginning in 1999 the evidence shows that the beneficiary worked for the petitioner as an employee. The Form W-2s issued to the beneficiary by the petitioner show employee compensation as $11,000 for 1999, which is $20,656 less than the proffered wage, and as $12,000 for 2000, which is $19,656 less than the proffered wage. Later Form W-2s for the beneficiary were issued by Vizamora Enterprises, Inc. and show employee compensation as $30,025 for 2001, which is $1,631 less than the proffered wage, and as $31,937 for 2002, which is $281 greater than the proffered wage. Only in the year 2002 does the evidence establish that the beneficiary received compensation in an amount greater than the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figures as reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *K.C.P. Food Co., Inc., supra,* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp., supra,* at 1054.

Where a petitioner is a sole proprietorship CIS will evaluate the Form 1040 U.S. individual income tax returns of the petitioner's owner and will look to the adjusted gross income shown on line 33 as the figure for the petitioner's net income. In the instant case, the Form 1040 U.S. individual income tax joint returns of the petitioner's owner and his wife show the following amounts for adjusted gross income: $48,517 for 1998; $59,957 for 1999; and $76,359 for 2000. The differences between the actual compensation received by the beneficiary and the proffered wage in each of those years, as discussed above, are $20,686 for 1998; $20,656 for 1999; and $19,656 for 2000. Those figures are the amounts needed to raise the beneficiary's actual compensation to the proffered wage. Calculations based on those amounts yield the following amounts which would have remained to pay the reasonable household expenses of the owner after paying the proffered wage to the beneficiary: $27,831 for 1998; $39,301 for 1999; and $56,703 for 2000. Those amounts are considered to be sufficient to pay the reasonable household expenses of the owner, his wife and their two children. *See Ubeda v. Palmer, supra,* at 650.

The record also contains a copy of the Form 1040 for the owner and his wife for 2001, but that return is not directly material to the petitioner's ability to pay the proffered wage that year, since for the year 2001 the W-2 form for the beneficiary shows the beneficiary's compensation to have been made by Vizamora Enterprises, Inc. A Form 1120S for Vizamora Enterprises, Inc. for 2001 is also in the record and it shows ordinary income on line 21 as $48,009. As discussed above, the difference between the beneficiary's actual compensation in 2001 and the proffered wage was $1,631. The ordinary income of Vizamora Enterprises, Inc. of $48,009 in 2001 was significantly greater than the $1,631 needed that year to raise the beneficiary's actual compensation to the proffered wage.

In the director's decision, the director separated the analysis of the actual compensation received by the beneficiary from the analysis of the adjusted gross income of the petitioner's owner and his wife. Also, the director reversed the order of those two analyses, starting with the analysis of adjusted gross income and then analyzing the actual compensation received by the beneficiary. In doing so, the director failed to give proper credit for the actual compensation received by the beneficiary when the director evaluated whether the adjusted gross income figures were sufficient to pay the proffered wage and to pay the reasonable household expenses of the petitioner's owner. The director's analysis was therefore incorrect.

As shown above, the adjusted gross income figures for the petitioner's owner and his wife were sufficient in each of the years 1998, 1999 and 2000 to have paid the amounts needed to raise the beneficiary's actual compensation to the proffered wage and also to pay the reasonable household expenses of the petitioner's owner. For the year 2001, the ordinary income of Vizamora Enterprises, Inc. was sufficient to pay the amount needed to raise the beneficiary's actual compensation to the proffered wage. For the year 2002 no tax return of Vizamora Enterprises is in the record, but the Form W-2 issued to the beneficiary that year by

Vizamora Enterprises shows actual compensation received by the beneficiary to be higher than the proffered wage.

The second issue which the AAO must address in this case concerns a possible successor in interest. As noted above, beginning in 2001 the beneficiary was employed by Vizamora Enterprises, Inc. That fact raises the issue of whether Vizamora Enterprises, Inc. is a successor in interest to the petitioner. To establish that an entity is a successor in interest the successor must establish that it 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).

In the instant case, the Form 1040 U.S. individual tax returns for the owner and his wife in the record for 1998 through 2000 are joint returns, and they show the income from the petitioning business on Schedule C for each year, as a sole proprietorship. The Form 1040 tax return for 2001 is also a joint tax return for the owner and his wife. The income of the owner and his wife from Vizamora Enterprises, Inc. appears on the Schedule E, part II, attached to the Form 1040 for 2001, showing income from partnerships and S corporations.

A separate tax return for Vizamora Enterprises, Inc. is also in the record, a Form 1120S U.S. income tax return for an S corporation. The Form 1120S for Vizamora Enterprises, Inc. for 2001 shows the corporation name and address on the attached Schedule K-1's as Vizamora Enterprises, Inc., with the name of the petitioner as the second line in the address block, followed by the petitioner's street address. This format indicates that Vizamora Enterprises, Inc. retains the name of the petitioner as part of its mailing address. The Schedule K-1's show the share ownerships of Vizamora Enterprises, Inc. to be 50% for the petitioner's owner and 50% for his wife. Since the entire income from an S corporation is passed through to the corporation's owners for tax purposes, no substantial change in tax liability of the owner and his wife resulted from changing the form of the business from a sole proprietorship to an S corporation.

The Schedule L for Vizamora Enterprises, Inc. for 2001 shows assets and liabilities at the beginning of the year as zero, and assets at the end of the year consisting of cash in the amount of $37,387, with no liabilities. Retained earnings are stated as $37,387, balancing the cash assets. The information on the Schedule L for 2001 indicates that Vizamora Enterprises, Inc. began doing business in the year 2001.

The record contains a letter dated January 24, 2003 from the petitioner's accountant. The accountant does not indicate that he is a certified public accountant, nor that the information in the letter is the result of an audit. For those reasons the information in the letter was not considered as evidence in the above analysis with regard to the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2). Nonetheless, the letter does contain information relevant to the issue of a possible successor in interest.

The letter from the accountant states that Vizamora Enterprises, Inc. is doing business under the name of the petitioner, that is, under the same name that appears as the petitioner's name on the I-140 petition. The letter from the accountant describes the petitioning business as an ongoing enterprise from 1998 through 2001, and the letter indicates no significant change in operations resulting from the change from a sole proprietorship to an S corporation in 2001.

The evidence summarized above in the Form 1040's of the petitioner's owner and his wife, the Form 1120S of Vizamora Enterprises, Inc. for 2001, the Form 1099 and Form W-2's of the beneficiary, and the letter from the accountant indicates that the change of the petitioner from a sole proprietorship to an S corporation was a change in the form of business organization which did not interrupt the continuity of business operations. No particular type of evidence is required by *Matter of Dial Auto Repair Shop, Inc., supra,* to establish the relationship of a successor in interest. In the instant case, the evidence summarized above is sufficient to establish that Vizamora Enterprises, Inc., doing business in the same name as the petitioner, is a successor in interest to the petitioner, a sole proprietorship.

The petitioner has made no formal request to amend the caption on the I-140 petition to reflect the name Vizamora Enterprises, Inc. Nonetheless, the evidence summarized above, including the letter from the petitioner's accountant, sufficiently establishes the petitioner's intention that Vizamora Enterprises, Inc. be considered as the petitioning entity. Accordingly, the caption in the instant I-140 petition is hereby amended to identify the petitioner as Vizamora Enterprises, Inc., doing business under the name of the petitioner.

In summary, the evidence in the record establishes the ability of the petitioner to pay the proffered wage as of the filing date and continuing until the beneficiary obtains permanent residence, and establishes that Vizamora Enterprises, Inc., an S corporation, is the successor in interest of the petitioner, a sole proprietorship.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.