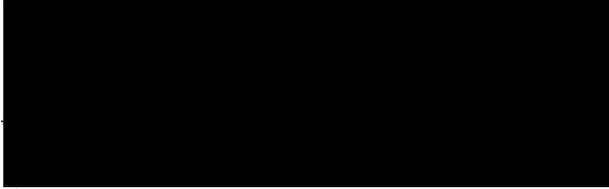


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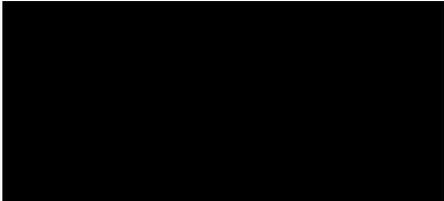


FILE: WAC 02 196 52817 Office: CALIFORNIA SERVICE CENTER Date: **APR 21 2004**

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.

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 cylinder repair firm. It seeks to employ the beneficiary permanently in the United States as a combination welder. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 hinges on the petitioner's ability to pay the wage offered from 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is December 22, 1997. The beneficiary's salary as stated on the labor certification is \$13.73 per hour or \$28,558.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated August 30, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted, for 1998-2001, the petitioner's completed and signed federal income tax return, with all schedules and tables, or audited financial statement, as well as 1998-2001 Wage and Tax Statements (Forms W-2), to reflect the petitioner's wage payments to the beneficiary.

The director noted that the petitioner's name and address on Form ETA 750 differed from that on the Immigrant Petition for Alien Worker (I-140), filed May 30, 2002. The director specified the evidence necessary to determine that the I-140 petitioner was a successor in interest to the predecessor employer, Cylinder Clinic, Inc. (CCI), named on Form ETA 750. The petitioner must establish, as the successor, that it was entitled to the priority date and, as next discussed, that the predecessor demonstrated the ability to pay the proffered wage from the priority date until the successor commenced business.

In respect to the ability to pay the proffered wage, the petitioner submitted 1998 and 1999 Forms 1040, U.S. Individual Income Tax Returns, of [REDACTED] (GG and LAG). They included Schedule C for Complete Welding and Cutting Supplies (CWCS), the petitioner. Forms 1040 reported adjusted gross income (AGI), for 1998, \$31,563, equal to, or greater than, the proffered wage, and, for 1999, \$24,725, less than the proffered wage. The petitioner incorporated in 2000 and included the 2000 Form 1120, U.S. Corporation Income Tax Return. It reflected taxable income before net operating loss deduction and special deductions of \$142,835, equal to, or greater than, the proffered wage

As already noted, the proceedings reflect that CCI obtained the priority date, and the amended Form ETA 750, as certified on October 24, 2001, refers only to CCI. The petitioner offered no tax return or financial statement of CCI, no tax return or financial document of any entity for 2001, and no reason for the omissions. Counsel stated, "We are proceeding with a substitute employer." The director concluded that counsel stipulated a substitute, rather than a successor in interest, and reasoned that the new employer required a new Form ETA 750. Due to the lack of a labor certification for the I-140, the director denied the petition in a decision issued November 30, 2002.

The AAO has no appellate authority over a decision based on the lack of a labor certification. *See* 8 C.F.R. § 103.1(f)(3)(iii)(B). Counsel insists, however, that the response to the RFE meant to specify the elements of the petitioner as a successor in interest, entitled to the use of the certified Form ETA 750 and its priority date. The RFE raised the point. The regulation accords an appeal on that issue.

Form ETA 750, as approved by the Department of Labor on October 24, 2001, still named the predecessor. Form ETA 750, in Part A, blocks 4-7, reflects that the predecessor is CCI and reflects an amendment involving a change of its address. This fact controls the credibility and effect of documents that the petitioner, CWCS, must offer in regard to its I-140. On appeal, counsel submits copies of the same tax returns, but they do not relate to CCI.

Counsel asserts on appeal that:

[The petitioner] responded on September 19, 2002 [to the RFE] stating that there was a substitute employer, Complete Welding Supply, and that Complete Welding was willing to assume all obligations and duties of the previous petitioner.

* * *

Enclosed as Exhibit A please find a true and correct copy of the pertinent sections of the Agreement of Sale dated December 3, 2001. As described in paragraph C of the enclosed Agreement of Sale [redacted] purchased the real property and all the assets of [Carolyn Roquet's] business, Affordable Welding Supplies. The business was then renamed Complete Welding Supply. Subsequent to the purchase on December 3, 2001, [the beneficiary] began working solely for [redacted] at Complete Welding Supply and [CCI] went out of business.

The response to the RFE did not contain any document stating that the petitioner "was willing to assume all obligations and duties of the previous petitioner," except counsel's transmittal.

The assertions of counsel 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).

On appeal, counsel presented only pages 1, 4, and 16 of Exhibit A (fragment A), dated December 3, 2001. Fragment A is titled as a sale of business assets and real property and concerns two individuals, CR and GG. As now constituted, it states no general assumption of rights, duties, liabilities, and obligations and does not name CWCS or CCI.

Fragment A, therefore, is unpersuasive as proof that CWCS is a successor in interest to CCI. This status requires documentary evidence that CWCS has assumed all of the rights, duties, and obligations of the predecessor company. Even if the petitioner was doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, 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.

In this case, the petitioner has not established the financial ability of the predecessor enterprise to pay the certified wage at the priority date and continuing until the successor commences business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Fragment A and counsel's narration, *supra*, at best, project that there was a transfer to a successor on or about December 3, 2001. Hence, the predecessor must tender proof of ability to pay the proffered wage for 1998-2001, pursuant to 8 C.F.R. § 204.5(g)(2) and the RFE. Forms 1040 for 1998 and 1999 and Form 1120 for 2000 do not pertain at all to the predecessor, CCI, as required by *Matter of Dial Auto Repair Shop, Inc.* No evidence at all pertains to 2001. This record does not establish either the predecessor's ability to pay the proffered wage or the validity of the ETA 750 for the petitioner as a successor in interest.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

The RFE exacted proof of both the petitioner's and the predecessor's ability to pay the proffered wage from 1998-2001 and of Forms W-2, if any, for wages paid to the beneficiary. Regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. Within the 12 weeks allowed, the petitioner may submit all the requested initial or additional evidence, submit some or none of the additional evidence and ask for a decision based on the record, or withdraw the petition. *See* 8 C.F.R. §§ 103.2(b)(8)(i)-(iii).

The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and offers no explanation on appeal. The appeal will be adjudicated based on the record of proceeding before the director. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Even if the AAO could evaluate new evidence on appeal that was requested by the director, the petitioner's appellate evidence is insufficient. Fragment A is inconclusive. Additionally, counsel submits the Declaration of [REDACTED] dated January 22, 2003 (Exhibit B), on appeal. Neither Exhibit B nor Forms W-2 establishes the amount, date, and payer of wages to the beneficiary. The RFE requested these specific facts, and the petitioner has not presented them.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Exhibit B recites, as of January 22, 2003, that:

3. [The petitioner] hereby agrees to fulfill all obligations of [Form ETA 750] and assume all rights and liabilities associated with its terms and conditions.

Matter of Dial Auto Repair Shop, Inc. requires that the successor in interest assume all of the obligations of the predecessor. This adoption of the selected ETA 750 obligation is unconvincing. No contract defines the petitioner's assumption of all the rights and obligations of the predecessor.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Exhibit B projects that the assumption of rights and obligations might have occurred on January 23, 2003. If so, it contradicts Fragment A.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

Form ETA 750 establishes that CCI was the predecessor employer at the time the labor certification was filed and certified. No credible documentation establishes when or if CWCS commenced business as the successor in interest of CCI. Tax returns from 1998-2000 justify the ability to pay of CWCS, not CCI. No evidence pertains to 2001, and the AAO cannot ascertain if any entity established the ability to pay the proffered wage in that year.

The AAO has reviewed federal tax returns for 1998 and 1999 of GG and LAG and for 2000 of CWCS, Form ETA 750, as certified, and Exhibits A and B of the appeal. The AAO has weighed the lack of any federal tax return or financial statement for CCI and the absence of one for 2001, for any party. The AAO concludes that the petitioner has not established that the predecessor and petitioner had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.