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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: WAC-02-146-52944 Office: CALIFORNIA SERVICE CENTER Date: **APR 26 2004**

IN RE: Petitioner: [Redacted]
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]

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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.

[Signature]
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 supermarket. It seeks to employ the beneficiary permanently in the United States as a meat cutter. 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.

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 \$14.26 per hour or \$29,660.80 per year.

Counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. The only evidence submitted was a letter dated March 14, 2002 from a former employer of the beneficiary, but that letter failed to specify the hours or tasks performed by the beneficiary. In a request for evidence (RFE) dated May 10, 2002, the director required additional evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750 Application for Alien Employment Certification. The RFE also requested a complete G-28 and a corrected copy of the I-140 indicating whether the beneficiary would apply for a visa abroad or apply for adjustment of status.

In response to the RFE the petitioner submitted a letter dated June 7, 2002 from a former employer of the beneficiary stating the beneficiary's experience as a meat cutter with that employer from 1988 to 1994. The petitioner also submitted an additional G-28 dated June 24, 2002 and a corrected copy of the I-140 petition indicating that upon the approval of the petition the alien intends to apply for adjustment of status.

In a second RFE dated August 20, 2003 the director required additional evidence to establish the petitioner's ability to pay the proffered wage from the priority date to the present.

In response to the second RFE counsel submitted copies of Form 1040 U.S. individual income tax joint returns for the petitioner's former owner and his wife for the years 1998 and 1999; copies of Form 1040 U.S. individual income tax returns for the petitioner's current owner for the years 1999, 2000 and 2001; California quarterly wage and withholding reports for the petitioner for the first three quarters of 2002; copies of Form 1040 U.S. individual income tax joint returns for the beneficiary and his spouse for the years 1988 through 2001; copies of California Form 540A individual income tax joint returns for the beneficiary and his spouse for the years 1992 through 1998; copies of California Form 540 2EZ individual income tax joint returns for the beneficiary and his spouse for the years 1999, 2000 and 2001; a letter dated December 9, 1999 from an applicant for the offered position; a

letter dated December 20, 1999 from an apparent employee or agent of the petitioner responding to the job applicant's letter; and a resume from a second apparent applicant for the offered position.

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 present, and denied the petition.

On the Form I-290B notice of appeal counsel checked the box indicating that a brief and/or additional evidence would be submitted to the AAO within thirty days. Counsel also stated on the notice of appeal that the employer would submit additional evidence to establish its ability to pay the prevailing wage. Nonetheless, to date no additional documentation is in the file.

In his decision the director analyzed the tax returns in evidence for the years 1998 through 2001 and the W-2 forms for the beneficiary for those same years. The director found that even after crediting the payments received by the beneficiary from the petitioner, the petitioner's adjusted gross income was insufficient to pay the petitioner's personal household expenses and to pay the proffered wage to the beneficiary.

The director treated all the tax returns in evidence as having been submitted by a single person or entity, referred to by the director as "the petitioner." The director failed to note that the petitioner is a sole proprietorship, and that the tax returns and W-2 forms in evidence show that the petitioner was owned by one individual from 1998 until 1999, and then was owned by another individual from 1999 through 2001. The tax returns in evidence were joint returns for 1998 and 1999 by the former owner and his wife and individual returns for 1999, 2000 and 2001 by the current owner.

The tax returns of the former owner and his wife show the following amounts for adjusted gross income: \$14,730 for 1998 and \$223,279 for 1999. The figure for 1999 includes a capital gain of \$200,541, apparently realized from the sale of the petitioning business to the current owner. The tax returns of the current owner show the following amounts for adjusted gross income: \$5,881 for 1999, \$14,009 for 2000, and \$18,478 for 2001. In the director's summary of the tax return information the director cited the figures from the return of the former owner and his wife for 1998 and the figures from the current owner's returns for 1999, 2000 and 2001. The director ignored the return of the former owner and his wife for 1999.

The W-2 forms in the record for the beneficiary show that the beneficiary received compensation from the former owner of \$14,180 in 1998 and \$7,720 in 1999, and from the current owner of \$7,800 in 1999, \$16,120 in 2000, and \$16,120 in 2001. The nearly equal amounts received by the beneficiary in 1999 from the former owner and from the current owner indicate that the sale of the business to the current owner occurred about the middle of the year in 1999.

In none of the years from 1998 through 2001 do the tax returns of the owners and the W-2 forms of the beneficiary establish the petitioner's ability to pay the proffered wage. Only the tax return for 1999 of the former owner and his wife shows a sufficient adjusted gross income sufficient to pay the proffered wage with sufficient funds remaining for reasonable household expenses of the former owner and his wife. *See Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). But the relatively high adjusted gross income that year of the former owner and his wife was apparently due mainly to the sale of the petitioning business to the current owner. Upon the sale of the business, of course, the former owner was no longer responsible for paying the proffered wage to the beneficiary.

With regard to the director's decision, in failing to note that ownership of the petitioning business had changed in 1999 and in ignoring the tax returns of the former owner and his wife for 1999, the director's analysis was incorrect. Nonetheless, the director's conclusion that the tax returns and the W-2 forms in evidence fail to establish the ability of the petitioner to pay the proffered wage as of the priority date until the present was correct.

In failing to note the change in ownership of the petitioner the director also failed to consider the issue of successors in interest. The Form ETA 750 was filed by the former owner, while the Form I-140 petition was filed by the current owner. The record contains no evidence that the current owner qualifies as a successor-in-interest to the former owner. This status requires documentary evidence that the current owner has assumed all of the rights, duties, and obligations of the former owner. The fact that the petitioning business remains at the same location as it did under the former owner does not establish that the current owner 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, as shown in the analysis above, the petitioner has not established the financial ability of the former owner to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

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.