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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, DC 20536

File:

Office: CALIFORNIA SERVICE CENTER Date:

JAN 21 2004

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 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 construction firm. It seeks to employ the beneficiary permanently in the United States as a tile setter. 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.

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 July 14, 1998. The beneficiary's salary as stated on the labor certification is \$13.00 per hour or \$27,040.00 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 20, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage. The RFE requested signed copies of the petitioner's federal income tax returns. The RFE requested a recent employment offer letter from the petitioner to the beneficiary. The RFE also requested copies of the tax returns and W-2 forms of the beneficiary up to June 1998. Finally, the RFE requested copies of the four most recent pay stubs of the beneficiary.

In response to the RFE, counsel submitted signed copies of the petitioner's 1998, 1999 and 2000 Form 1040 U.S. Income Tax Returns. Counsel also submitted an offer of employment letter dated



January 2, 2003 from the petitioner to the beneficiary. Counsel also submitted copies of pay stubs for the beneficiary for the pay periods ending 12/13/2002 through 1/20/2003. Counsel also submitted copies of the beneficiary's Form 1040 tax returns for the years 1992, 1993, 1994, 1999, 2000 and 2001, and copies of the beneficiary's W-2 forms for 1999 and 2000.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

In his decision the director found the following. For 1998 the petitioner's gross income was \$454.00; for 1999 the gross income was -\$1,325.00; for 2000 the gross income was \$24,359.00 and for 2001 the gross income was \$19,459.00. The director stated that the beneficiary's proffered wage is \$24,960.00 per year and found that the gross income for each of these years was insufficient to pay the proffered wage.

On appeal, counsel submits no additional evidence and submits no brief. In his Notice of Appeal Form I-290B counsel states that the petitioner had demonstrated its ability to pay the proffered wage from the priority date to the present. Counsel also states that the beneficiary was on the payroll of the petitioner from the priority date until the present.

A review of the federal tax returns of the petitioner shows that the director's figures for "gross income" in his decision actually state the figures for the adjusted gross income each year. The director also made an error in his statement of the beneficiary's proffered wage. The director stated that the beneficiary's proffered wage is \$24,960.00 per year. However, the proffered wage as stated on the Form ETA-750 is actually \$13.00 per hour, which is equivalent to \$27,040.00 per year. This amount was higher than the petitioner's adjusted gross income each year from 1998 through 2000. Despite the errors noted above, the director's finding that the tax returns of the petitioner failed to establish the ability of the petitioner to pay the proffered wage was correct.

The copies of the petitioner's tax returns submitted for the record do not include any schedules showing petitioner's assets and liabilities. Therefore the record lacks any evidence of net current assets which might be available to the petitioner to pay the proffered wage. However, the record does contain evidence relating to the employment of the beneficiary by the petitioner.

For the year 2002, pay stub information shows that as of December 22, 2002 the petitioner had paid the beneficiary compensation in that year in the amount of \$48,432.50. This amount is significantly in excess of the proffered wage of \$27,040.00. For the year 2001 the joint tax return of the beneficiary and his wife showed total wages, salaries and tips in the amount of \$52,300. However, no W-2 form or forms were submitted for the year 2001, therefore it cannot be ascertained from the beneficiary's tax records how much of the wages, salaries and tips for 2001 were received by the beneficiary from the petitioner.

For the year 2000 the beneficiary's W-2 form shows wages, tips and other compensation in the amount of \$35,160.00 received from the petitioner. This amount was significantly in excess of the proffered wage of \$27,040.00. For the year 1999 the beneficiary's W-2 form shows wages, tips and other compensation in the amount of \$12,210.00 received from HK General Contractors, Inc. No tax return or W-2 form for the beneficiary was submitted for 1998, which was year of the petitioner's priority date.

A letter in the file dated June 10, 2002 from Mr. [REDACTED] the sole proprietor of the petitioner, states that the labor certification was initially filed in the name of his company HK Construction. The letter further states that Mr. [REDACTED] did business as HK Construction from 1997 to 1999. The letter also requests an amendment of the name of the petitioning company to that of [REDACTED] Construction.

The letter from Mr. [REDACTED] raises the issue of whether [REDACTED] is the successor in interest of [REDACTED]. No evidence on this issue is found in the record other than the letter from Mr. [REDACTED]. The status of successor in interest requires documentary evidence that the successor has assumed all of the rights, duties, and obligations of the predecessor company. It should be noted that the name of the company which appears on the beneficiary's 1999 W-2 form is [REDACTED] Inc. This name is different from the name which originally appeared on the Form ETA-750, which was [REDACTED]. 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 have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Even assuming that [REDACTED] was the trade name of [REDACTED] the evidence fails to establish that [REDACTED] had the ability to pay the proffered wage. No tax returns for [REDACTED] were submitted in evidence. The only W-2 form showing payments by that company to the beneficiary was the W-2 form for 1999 discussed above, which showed payments in the amount of \$12,210.00. That amount was significantly less than the proffered annual wage of \$27,040.00.

In summary, the pay stub and tax information for the beneficiary establishes that the petitioner had the ability to pay the proffered wages in the years 2000 and 2002. Nonetheless, the evidence fails to establish that the petitioner or its purported predecessor enterprise had the ability to pay the proffered wage in the years 1998, 1999 and 2001.

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.