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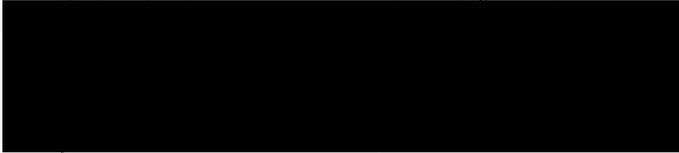
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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



FILE: EAC 00 028 50567 Service: VERMONT SERVICE CENTER

Date: JUL 22 2004

IN RE: Petitioner:  
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:



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.

  
for Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the petition will be remanded for further consideration and action.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on January 13, 1998, and approved by the Department of Labor (DOL), on September 29, 1999. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a brief statement in support of the appeal, and attaches copies of the petitioner's Form 1120 corporate tax returns for the 1998 and 1999 tax years. The petitioner indicates that no additional brief or evidence is being submitted. The petitioner's statement explains that it had been advised by its previous and current accountants not to submit its tax returns because of its status as a privately held company. The petitioner indicates that it is nonetheless submitting the tax returns, as it has been unable to obtain information as to what additional documents might alternatively establish ability to pay.

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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$10.93 per hour, which equals \$22,734.40 per year.

Additionally, in those cases where there has been a change in the business entity, it is necessary for a petitioner to demonstrate that the new business entity is a true successor-in-interest to the original business. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

The successor-in-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm.

1981).

A review of the record discloses that the petition was accompanied only by a letter dated January 7, 1998, from [REDACTED] a manager of [REDACTED] Brazil. The letter verifies the beneficiary's employment at the restaurant from April 1994, to March 1997 as a cook. The Vermont Service Center, on July 18, 2000, sent a Request for Additional Evidence (RFE) making two distinct requests of the petitioner. First, the Service Center noted that the ETA 750 identified the employer as [REDACTED] Restaurant and therefore, requested that the petitioner submit an original labor certification listing [REDACTED] as the employer. It advised the petitioner to submit an explanation of the relationship, if any, between the two entities. The second request was for additional evidence demonstrating that the petitioner had the ability to pay the wage/salary of \$10.93 per hour (\$22,734.40 per year) as of January 13, 1998. The Service Center instructed the petitioner to submit the 1997 and 1998 corporate tax returns if organized as a corporation.

The petitioner responded by sending a cover letter dated October 28, 2000, attaching another letter dated September 26, 2000.<sup>1</sup> This letter responded to the RFE by simply stating:

[REDACTED] has been incorporated in the State of Massachusetts since 1958 and has shown a profit every year. We now employ over ninety full time and part time employees and have shown a profit year to date for 2000.

The director issued a decision on December 20, 2000, noting that the petitioner had failed to submit the required financial information, and therefore, had failed to establish that it had the ability to pay the proffered wage. The director's decision did not make any reference to the successor-in-interest issue raised in the RFE.

On appeal, the petitioner submits the requested federal tax returns while noting that it had unsuccessfully sought to learn what alternative evidence would be acceptable. The tax returns reflect net income far above the proffered wage. The appeal does not address the issue of relationship, if any, between the petitioner and Corks Inc.

Given the director's failure to advise the petitioner in the RFE that annual reports and audited financial statements are acceptable alternatives to tax returns pursuant to 8 C.F.R. § 204.5(g)(2), the AAO will exercise discretion not to adjudicate the appeal on the basis of the record before the director, and instead, will remand the case to the director for additional consideration and the issuance of a new decision.

As stated above, the tax returns overcome the director's concerns. We remand the matter, however, for consideration of whether the petitioner has established that it is a successor-in-interest to the entity that filed the ETA-750 indicating that the beneficiary would work at a different address than the address of the petitioner, specified as the work address on the Form I-140.

**ORDER:** The petition is remanded for further consideration and action in accordance with the foregoing.

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<sup>1</sup> We note that the cover letter was submitted beyond the due date, although the attached letter was dated within the applicable period. Although no explanation was provided as to the late submission, the timeliness of the submission is irrelevant, as it did not include anything other than the petitioner's unsupported assertions regarding its ability to pay the proffered wage.