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FILE: WAC 01 052 52174 Office: CALIFORNIA SERVICE CENTER Date **MAY 12 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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a fabric wholesaler, import, and converter business. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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 status of the petitioner either as an employer substituted for, or a successor in interest to, Pacific Breeze Homes (PBH), named in the Form ETA 750, as approved by DOL. The prospective employer must demonstrate the 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is May 8, 1995. The beneficiary's salary as stated on the labor certification is \$11.45 per hour or \$23,816 per year.

Initially, the director's request for evidence (RFE), dated January 26, 2001, exacted evidence to document the change of ownership from PBH to the petitioner and to demonstrate the petitioner's assumption of all of the rights, duties obligations, and assets of PBH. The petitioner stipulated, in response, that it was not a successor in interest, but qualifies for a "substitution of employers."

The director determined that the petitioner could not reaffirm Form ETA 750, with the priority date, unless it was the successor in interest and denied the petition in a decision issued March 28, 2001. The petitioner appealed. The AAO determined that Form ETA 750 was valid only for the particular job opportunity. The AAO concluded that, since the petitioner was not the employer who made the job offer, the petitioner must secure certification of a new Form ETA 750.

The AAO dismissed the appeal in a decision issued June 18, 2002, and counsel filed the instant Motion to Reconsider Based on a Precedent Decision (MTR). The MTR contends, primarily, that:

The Petitioner is eligible for a substitution of employers pursuant to a strict and literal reading of [20 C.F.R. § 656.30(c)(2)].

Provisions of 20 C.F.R. § 656.30(c) state:

- (2) A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the [Form ETA 750].

Counsel concedes that, as a general rule, a change of employer requires a new Form ETA 750. Counsel proposes an exception for this case, based on a perceived error of Citizenship and Immigration Services (CIS), formerly the Service or INS, in a matter of definition:

Additionally, a change in employers requires a new application for certification by the new employer unless the same job opportunity and the same area of intended employment are preserved. [20 C.F.R. § 656.30(c)(2)]. [CIS] interprets “particular job opportunity” as *Employer*; whereas, the rule of strict interpretation suggests that an equally plausible definition for a “particular job opportunity” is that the *job title* and *job duties* must remain the same.

Thus, counsel’s motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because it asserts that the director and the AAO made an erroneous decision through misapplication of law or policy. Counsel favors expansive interpretation in the reliance on 20 C.F.R. § 656.30(c)(2), relating to the validity and invalidation of labor certifications, a status pertinent to an approved Form ETA 750. Strictly speaking, however, the general rule, pertinent to the new application for labor certification, just as counsel concedes, presumes a new Form ETA 750.

Terms of 20 C.F.R. §§ 656.2 control the new application for Form ETA 750:

- (b) The regulations under this part set forth the procedures whereby such immigrant labor certifications may be applied for, and given or denied.
- (c) Correspondence and questions concerning the regulations in this part should be addressed to: Division of Foreign Labor Certifications, United States Employment Service, Department of Labor. . . .

Likewise, for application purposes, 20 C.F.R. § 656.3 provides the definition for an employer:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an “authorized representative” means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters.

CIS must necessarily follow this definition as it describes the role of an employer or its authorized representative for named parties in labor certification matters. It conspicuously lacks any reference to job title and job duties. An employer intending and desiring to file an Immigrant Petition for Alien Worker (I-140) must include with it the required individual labor certification. *See* 8 C.F.R. § 204.5(c) and 8 C.F.R. §204.5(a)(2). Thus, these regulations establish the acknowledged, general rule, that a new employer requires a new Form ETA 750

Counsel advances canons of statutory and regulatory construction to limit the general rule and contends that:

Although there is no specific provision in the CFR or in the [Act] for a substitution of the petitioning employer, there is also no specific provision disallowing a substitution of the petitioning employer. In fact, 20 C.F.R. § 656.30(c)(2) specifically applies to issues involving changes in employers and transfers of interest. Section 656.30(c)(2) provides that a certification

petition is valid only if the “particular job opportunity, the alien for whom certification was granted, and the area of intended employment stated on the [Form ETA 750] remain the same. There is no provision requiring the employer to remain the same. [See *International Contractors, Inc., and Technical Programming Services, Inc.* 89-INA-278 (June 13, 1990)].

Pursuant to the rules of statutory and regulatory construction, the regulatory provision at 20 C.F.R. § 656.30(c)(2) must be construed by the narrowest of several possible meanings of the words used, and in a manner most favorable to the alien.

The law and regulations make no provision for a substitution of the petitioning employer, because, even counsel concedes, the general rule requires a new Form ETA 750 and a new I-140 for a new petitioner. The AAO reached the same conclusion in its decision. Provisions of 20 C.F.R. § 656.30(c)(2) do not mention changes in employers and transfers of interest, as speculated. They speak of the continuing validity of labor certifications already approved. In immigrant visa proceedings, there is no such thing as the substitution of petitioning employers.

Contrary to the assertion of counsel, a strict and literal interpretation of the labor certification process narrowly focuses rules in 20 C.F.R. § 656.30(c)(2) on the continuing validity of approved labor certifications. Other rules, as noted, apply to new employers and petitioners. Therefore, the speculation that the narrowest of several possible meanings will most favor the alien does not apply to this case and does not overcome the director’s decision. No authority supports the stated rationalization, viz., that the narrowest of meanings must inevitably aid the alien. The AAO correctly concluded that the petitioner must support its I-140 with a new Form ETA 750.

Counsel counters with two (2) authorities, but they are unpersuasive and removed from the factual context of the petitioner’s case. The first, *International Contractors*, is not, as averred in the MTR, a precedent decision. The decision in *International Contractors* does not consider an I-140, an action of CIS, or a matter within the jurisdiction of the AAO. See 8 C.F.R. § 103.1(f)(3)(i). Moreover, counsel highlights an *obiter dictum*, stating that a change of employers ordinarily necessitates a new Form ETA 750. It supports the decision of the AAO. The AAO distinguishes *International Contractors* factually, because the employer remained the same, and the employee was working at the same salary and in the same position, duties, and area of intended employment. Only a change of placement agencies occurred. The proceedings on the instant motion do not identify a common entity of, or relationship between, PBH and the petitioner.

In any event, counsel does not provide the published citation of *International Contractors*. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel invokes a second authority, a memorandum of [REDACTED] director of business and trade services of CIS, dated June 7, 2001 (trade services memorandum). It considers the status of a successor in interest in non-immigrant H1B petitions, arising as a result of a merger. Counsel has stipulated, in the instant MTR, that the petitioner makes no claim as a successor in interest. As a matter of controlling principle, letters and correspondence issued by offices of CIS are not binding on the AAO. The trade services memorandum in the record does not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although letters and memoranda may be useful as an aid to interpret the law, they are not binding on any CIS officer, as they merely indicate the writer’s analysis of an issue. See

Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letter Drafted by the Office of Adjudications* (December 7, 2000).

The trade services memorandum applies to non-immigrant proceedings and is not persuasive as to the instant motion in regard to this I-140. The petitioner is not a successor in interest to PBH, the employer on the ETA 750, by merger, or otherwise. This status requires documentary evidence that petitioner, as the successor, has assumed all of the rights, duties, and obligations of the predecessor company. These proceedings reflect the petitioner's interest only the ETA 750 of PBH. The fact that the petitioner is 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. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Counsel stipulates that the predecessor could not proceed:

Unfortunately, [PBH] was unable to proceed with the case.

Beyond the decision of the director and the scope of the RFE, the proceedings failed to document, before 1999, the ability of any entity to pay the proffered wage. The priority date, however, is May 8, 1995. Whether the petitioner represents itself, acts as a substitute, or demonstrates contractual status as a successor in interest, the petitioner must show that the appropriate entity 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).

No entity demonstrated the ability to pay the proffered wage from 1995-1998. The I-140 reflects the establishment of the petitioner in 1995, its 1999 Form I120S, and the filing of its I-140 on December 4, 2000. Though not a part of the basis of this decision, these circumstances do not suffice for proof of the ability to pay as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

After a review of decisions of the director and AAO, the federal tax return, and counsel's briefs and points and authorities, it is concluded that the petitioner has not established that it was eligible as a successor in interest to assume the labor certification and priority date of PBH.

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 motion to reconsider is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.