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U.S. Citizenship
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Services

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FILE: WAC 02 032 56023 Office: CALIFORNIA SERVICE CENTER Date: **MAY 26 2004**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

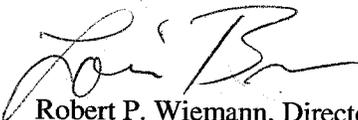
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a single and double knit manufacturer. It seeks to employ the beneficiary permanently in the United States as a knitting machine fixer. As required by statute, a Form ETA 750, Application for Alien Employment Certification filed on January 13, 1998, and approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it is a successor in interest to the original employer listed on the labor certification.

On appeal, counsel submits a brief and additional evidence.

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 petitioner filed the current petition with Citizenship and Immigration Services (then INS) on October 30, 2001. However, Carlos Knitting Mill, Inc. filed the accompanying Form ETA 750, Application for Alien Employment Certification, as certified by the Department of Labor for the beneficiary.

Seeking to clarify the petitioner's role as a potential successor in interest to Carlos Knitting Mill, Inc., the Service Center, on February 15, 2002, requested additional evidence in regard to this relationship and also requested evidence of the petitioner's ability to pay the proffered wage from the priority date of January 13, 1998 to the present.

In response, counsel submitted an uncertified Form ETA 750, still showing the former petitioner; copies of tax returns for fiscal years October 1, 1997 through September 30, 1998 and October 1, 1998 through September 30, 1999 for Carlos Knitting Mill, Inc.; copies of tax returns for fiscal years October 1, 1999 through September 30, 2000 and October 1, 2000 through September 2001 for the petitioner; a copy of Form DE-6, Quarterly Wage Report, for the quarter ending March 31, 2002 for the petitioner¹; a copy of Form DE-6, Quarterly Wage Report, for the quarter ending December 31, 2001 for the petitioner; copies of Form DE-6, Quarterly Wage Report, for the quarters ending September 30, 2001 and June 30, 2001² for the petitioner; a copy of the petitioner's Limited Liability Company Articles of Organization filed in the office of the Secretary of State of California on October 5, 1999; a copy of a Certificate of Dissolution for Carlos Knitting Mill, Inc. filed with the State of California on October 27, 2000; and a letter stating that the change in name from Carlos Knitting Mill, Inc. to the petitioner and reorganization was due to a change in partners from one company to another. The letter states: "Inc. was owned by Mr. Carlos Bilbao and UCC Corporation, which was owned by two individuals. LLC is owned by Mr. Carlos Bilbao and Mr. Rodolfo Sasso."

The director determined that the evidence did not establish that the petitioner was a successor in interest to Carlos Knitting Mill, Inc. and denied the petition on June 7, 2002.

¹ It is noted that the beneficiary is not listed on this report.

² Again, the beneficiary is not listed on these reports.

On appeal, counsel contends that the company changed its name and "form of incorporation," but that its business remained identical. Counsel states:

It [the LLC] gives a small business with a few shareholders the ability to manage their taxation in the manner of a partnership while protecting them from even more liability than the traditional corporation did before. . . . This change has no impact on the way the business is run or in the products or services that it provides. This is a paper change done to benefit the owners of the company when it comes to taxes and corporate liability.

Carlos Knitting Mill, Inc. was such a business. In 1999 Carlos Bilbao's fellow shareholder in the company resigned and a new partner came on board. This new partner preferred the LLC format over the Inc format and the name was changed. Nothing else changed at all. Carlos Knitting Mill, LLC is still at the same location as it was prior to the change. Its employees remained the same other than normal turnover. It still purchases the same equipment from the same suppliers and manufactures the exact same product.

Counsel provides additional evidence in the form of a letter from Carlos Bilbao explaining the change; Form DE-6, Quarterly Wage Report, for the quarter ending December 31, 1999 for both entities; a copy of an amendment to the petitioner's lease reflecting the name change dated October 28, 1999; copies of invoices from a supplier dated before and after the name change; and copies of the petitioner's letterhead before and after the change.

The petitioner's claim that the change from Carlos Knitting Mill, Inc. to Carlos Knitting Mill, LLC was merely a name change is not persuasive. The fact remains that Carlos Knitting Mill, Inc. was dissolved, and, therefore, no longer exists. As such it is incapable of petitioning for the beneficiary. Whether the petitioner is currently doing business in the same place, purchases from the same suppliers, and manufactures the same product is not at issue in this case. What must be considered is did the petitioner assume all of the rights, duties, obligations, and assets of Carlos Knitting Mill, Inc., and, thus, be considered a successor in interest.

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).

A 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. *See Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

The Certificate of Dissolution for Carlos Knitting Mill, Inc. states that the corporation's known debts and liabilities have been paid as far as its assets permitted and its known assets have been distributed to the persons entitled. The Limited Liability Company Articles of Organization for the petitioner merely state the company's name, the agent, and that more than one manager will manage the company. The petitioner has not provided any evidence that it assumed all of the rights, duties, obligations, and assets of Carlos Knitting Mill, Inc. or any agreements between the dissolved corporation and the petitioner assigning the rights, duties, obligations, and assets to the petitioner. Therefore, the petition may not be approved.

Beyond the decision of the director, the AAO notes that the petitioner has not established its ability to pay the proffered wage from the priority date and continuing to present.

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. *See* 8 C.F.R. § 204.5(d). 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. *See Matter of Dial Auto Repair Shop, Inc.*, supra. Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$17.94 per hour, or \$37,315.20 per year.

The tax return for Carlos Knitting Mill, Inc. for the fiscal year October 1, 1997 through September 30, 1998 reflects a taxable income before net operating loss deduction and special deductions of \$45,304 and net current assets (current assets minus current liabilities) of -\$258,167. The petitioner could pay the proffered wage of \$37,315.20 per year out of the taxable income.

The tax return for Carlos Knitting Mill, Inc. for the fiscal year October 1, 1998 through September 30, 1999 reflects a taxable income before net operating loss deduction and special deductions of -\$167,262 and net current assets of -\$475,578. The petitioner could not pay the proffered wage of \$37,315.20 per year out of either the taxable income or the net current assets.

The tax return for Carlos Knitting Mill, LLC for the fiscal year October 1, 1999 through September 30, 2000 reflects an ordinary income of -\$108,664 and net current assets of \$26,118. The petitioner could not pay the proffered wage of \$37,315.20 per year out of either the taxable income or the net current assets.

The tax return for Carlos Knitting Mill, LLC for the fiscal year October 1, 2000 through September 30, 2001 reflects an ordinary income of \$9,737 and net current assets of \$35,968. The petitioner could not pay the proffered wage of \$37,315.20 per year out of either the taxable income or the net current assets.

The only evidence of wages paid to the beneficiary reflect that Carlos Knitting Mill, Inc. paid the beneficiary \$812.50 in the fourth quarter of 1999 and the petitioner paid the beneficiary \$3,822 that same quarter. There is no evidence that the beneficiary worked for the petitioner after December, 2001. The wages, for October through December 1999, in addition to the petitioner's net current assets of \$26,118 for the fiscal year including that period, are less than the proffered wage. Thus, the evidence of the wages the petitioner and Carlos Knitting Mill, Inc. paid the beneficiary cannot establish either company's ability to pay the proffered wage after September, 1998. In addition, due to the absence of the beneficiary's name on the forms DE-6

provided for the quarters ending March 31, 2002, September 30, 2001, and June 30, 2001, it does not appear that the beneficiary worked enough to earn the proffered wage for 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.