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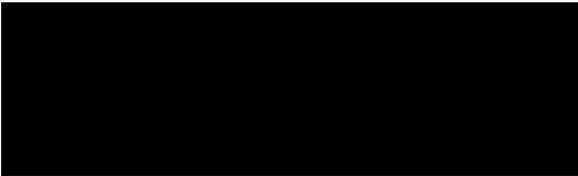


FILE: WAC 02 072 52914 Office: CALIFORNIA SERVICE CENTER Date: AUG 10 2005

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

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.

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 Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has established its continuing ability to pay the certified wage.

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 the continuing ability to pay the proffered wage 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 22, 1995 containing the name of the original beneficiary. The current beneficiary was subsequently submitted as a substitution when the current petition was originally filed in December 2001. The proffered wage as stated on the Form ETA 750 is \$1,400 per month, which amounts to \$16,800 annually. On the Form ETA 750B, signed by the beneficiary on November 19 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to employ from twenty to twenty-five workers. With the petition, the petitioner submitted copies of business licenses and tax certificates from 1999, 2000 and 2001 showing the petitioner's name as the [REDACTED] with the owner as the [REDACTED]." The petitioner also provided copies of a payroll register from October 2001 and a copy of the alien worker petition filed on behalf of the original beneficiary. The beneficiary's name does not appear to be among the employees listed on the payroll register. The federal tax identification number given for the petitioner on the original immigrant petition dated January 1996 is not the same as that given for the petitioner in the current case.

The record indicates that the director requested additional evidence on three different occasions. The first request, dated March 13, 2002, reflects that the director specifically requested that the petitioner provide complete copies of its federal tax returns for 1995 through 2000 in order to demonstrate the petitioner's continuing ability to pay the proffered salary beginning on the visa priority date of February 22, 1995. The director also advised the petitioner to complete certain omitted items on the immigrant petition.

In response, the petitioner, through counsel, withdrew the 1996 petition (Wac 9607652193) filed on behalf of the original beneficiary¹ and provided documentation relating to the petitioner's ability to pay the certified wage. The petitioner also provided information related to omissions on Part 5 of the petition. One of the completed areas indicates that the petitioner was originally established in 1979, but acquired a new owner in 1999. Accompanying documents of sale and a letter from "██████████" the President of the ██████████ Corporation dba ██████████ ██████████ indicate that the petitioner was purchased in October 1999 from ██████████ ██████████ also states that, because of the sale, he does not have the earlier income tax returns from 1995 to September 1999.

The petitioner provided a copy of its 1999 Form 1120, U.S. Corporation Income Tax Return, which covers the period from August 10, 1999 until June 30, 2000. It also supplied an Internal Revenue Service (IRS) form indicating that an extension of time had been requested to file the income tax return for the fiscal year running from July 1, 2000 until June 30, 2001. The 1999 return reflects that the petitioner declared -\$206,760 in taxable income before the net operating loss (NOL) and special deductions. Schedule L of the tax return shows that the company had \$132,734 in current assets and \$272,122 in current liabilities, resulting in -\$139,388 in net current assets. Besides net taxable income, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² A petitioner's year-end current assets and current liabilities may be found on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of a corporate tax return. If a petitioner's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner additionally submitted copies of the petitioner's Form 941, Employer's Federal Quarterly Tax Returns for the last quarter in 2000 and each quarter in 2001. They indicate that the petitioner declared total wages each quarter ranging from approximately \$97,000 to \$115,000.

On June 21, 2002, the director requested the petitioner to provide additional evidence of its continuing ability to pay the proffered wage. The director advised the petitioner that the evidence must be in the form of copies of annual reports, federal tax returns, or audited financial statements. The director requested the petitioner to provide this evidence for fiscal years 2000 and 2001.

¹ Citizenship and Immigration Services (CIS) electronic records show that this petition was subsequently revoked by the director on December 26, 2002.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In response, the petitioner provided a copy of its 2000 tax return covering the period from July 1, 2000 to June 30, 2001. Counsel's transmittal letter, dated September 12, 2002, states that the 2001 return covering the period to June 2002 had not yet been filed. The petitioner's 2000 corporate return reflects that it reported \$80,184 in taxable income before the NOL deduction. Schedule L reflects that it had \$290,926 in current assets and \$176,358 in current liabilities, resulting in \$114,568 in net current assets.

On January 24, 2003, the director issued a third request for evidence of the petitioner's ability to pay the proffered salary. The director again advised of the required evidence in the form of annual reports, audited financial statements or federal tax returns. He specifically instructed the petitioner to submit copies of federal income tax returns for 1995 – 1998, 2001 and 2002.

In response, the petitioner provided a copy of its 2001 corporate tax return covering the period of July 1, 2001 to June 30, 2002. It shows that the petitioner reported \$193,788 in taxable income before the NOL deduction. Schedule L indicates that it had \$494,485 in current assets and \$115,131 in current liabilities, producing \$379,354 in net current assets. Counsel's transmittal letter, dated April 15, 2003, advises that the petitioner's 2002 tax return was not due yet as the fiscal year did not end until June 31, 2003. He further states that the previous owner's 1995-1998 returns were not available to the petitioner's current owner.

On March 24, 2004, director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage date and denied the petition.

On appeal, counsel asserts that the director had no need to look at the petitioner's ability to pay the proffered wage since the 1996 preference petition for the original beneficiary had been approved on February 10, 2000. Counsel maintains that the petitioner provided its own tax returns for the years that were available to it and could not provide any documentation prior to its acquisition in 1999. In support of the petitioner's ability to pay the proffered wage, counsel further offers a letter, dated April 13, 2004, from [REDACTED] a certified public accountant. Mr. [REDACTED] states that the first year of operation after the purchase of the restaurant was difficult but the petitioner's corporate tax returns show that the petitioner's income increased sufficiently to cover the beneficiary's proffered wage.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by CIS, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.³ If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group*, the original

³ See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired.

In this case, the record indicates that the petitioner's purchase from the previous corporate owner of [REDACTED] was sufficiently documented to establish that the current petitioner owned by [REDACTED] Corporation is the successor-in-interest to the original petitioner. As such, 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.*, 19 I&N Dec. 481 (Comm. 1986).

Counsel's assertion that because the original petitioner's immigrant petition for the first alien had been initially approved in February 2000, although subsequently withdrawn and revoked as previously noted, it obviates the need to look at the ability to pay prior to that date in this matter. Counsel's assertion in this regard is not persuasive. It is worth emphasizing that each petition filing is a separate proceeding with a separate record. See 8 C.F.R. § 103.9(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Moreover, CIS is empowered to make a de novo determination of whether the alien beneficiary is entitled to third preference status based on a review of the petitioner's ability to offer a permanent full-time position, including examining the petitioner's ability to pay the offered wage. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984).

Although the documentation submitted with the original petition filed under Wac 9607652193 was not discussed by the director, it remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is noted that counsel in this case represented the original petitioner in 1996. Counsel in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481, also maintained that the petitioner did not have access to the financial records of the previous petitioner. In dismissing the appeal, the Commissioner found that the petitioner's inability or refusal to establish that the previous enterprise could have met the wage offer at the time when the application for a labor certification was accepted for processing by the DOL, precluded a finding that the petition could be approved.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner provide annual reports, federal tax returns or audited financial statements to demonstrate its ability to pay a proffered wage. Relevant to federal tax returns, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As noted above, CIS will also review a petitioner's net current assets as an alternative method of determining its ability to pay a certified salary during a given period. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d at 1305); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this matter, although the petitioner's 2000 and 2001 tax returns indicate that either the petitioner's net taxable income or its net current assets could have covered the proffered wage of \$16,800 during the periods covered by the tax returns, neither the -\$206,760 in net income or the -\$139,388 in net current assets, reported on the 1999 tax return reflect a similar ability. Additionally, as noted above, the omission of any evidence in the record relating to the predecessor company's ability to pay the certified wage from 1995 through 1998, cannot support the approval of this petition with the specified February 22, 1995, priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires a *continuing* ability to pay the proffered wage beginning at the priority date. Based upon a review of the evidence and argument submitted to the underlying record and on appeal, the AAO concludes that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.