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**U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

Date:

NOV 22 2005

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IN RE: Petitioner:

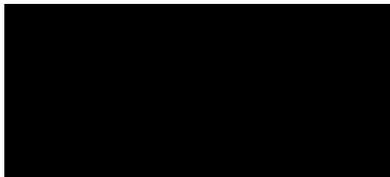


Beneficiary:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. The petitioner began operations on November 15, 2000. According to its support and information letter in the record of proceeding, it is located in Columbia, South Carolina. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director on January 28, 2004, 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, that the evidence submitted did not show that the petitioner had the intent to employ the beneficiary. The director denied the petition accordingly.¹

On appeal, the counsel submits a brief.

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 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$14.50 per hour (\$30,160.00 per year). The Form ETA 750 states that the position requires two years experience.

With the I-140 petition filed concurrently with an I-485 adjustment application, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor; petitioner's 2001 U.S. federal tax return; an accountant's letter; an

¹ There is also a collateral issue concerning whether another business is the successor-in-interest to the petitioner who is the applicant/employer on the certified Alien Employment Certification.

employer's support letter for the beneficiary; and, documentation concerning the petitioner's business; and documents concerning beneficiary's qualifications as well as other documents.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on September 13, 2003, requested evidence pertinent to that and other issues.

The director reciting the regulation at 8 C.F.R. § 204.5(g)(2) above mentioned requested additional evidence such as copies of annual reports, federal tax returns and audited financial statements for years 2002 and 2003. The director also requested W-2 Wage and Tax Statements or employee pay stubs if the petitioner employed the beneficiary.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel did not provide any evidence.

Counsel instead submitted information that the beneficiary wished to work for another restaurant in the same community, and, that the beneficiary was taking advantage of "portability"² provisions. Counsel said that the petitioner relocated its restaurant business to another area. Counsel submitted documentation concerning this second employer including a job offer letter to the beneficiary stating the proffered wage and that the occupation was chef in a Thai cuisine restaurant in the same community.

The director then issued a notice of intent to deny dated December 19, 2003 to the petitioner that recounted the above chain of events. The director stated in pertinent part:

Immigration laws ... [do] not provide for a new petitioner to take over an existing employer's immigrant alien worker petition, except in cases where a buyout, a merger, or a financial takeover has occurred between two or more companies. The new owner or controlling company in such cases may pursue "successor in interest" of the existing employer's immigrant alien worker petition. In all other cases, a second employer, unrelated to the first employer, must file a separate instant I-140³ for the beneficiary.

The tax return submitted by the petitioner demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000.00 per year from the priority date:

- In 2001, the Form 1120S a stated taxable income loss ⁴ of <\$10,950.00>⁵.

The petitioner had no ability to pay the proffered wage from taxable income for the year examined. 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 1305, (9th Cir. 1984)); *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).

²Counsel's response will be explained below.

³Accompanied by another certified Alien Employment Application.

⁴Form 1120S, Line 21.

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. According to Schedule "L" of petitioner's 2001 tax return its net current assets were \$985.00. It had insufficient net current assets to pay the proffered wage. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. No evidence was submitted that the petitioner employed the beneficiary. Although an accountant's letter submitted dated December 3, 2002, stated that current income projections indicated that the petitioner would have the ability to pay the proffered wage in the future, this is insufficient and not probative evidence to demonstrate the ability to pay the proffered wage. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Based upon the evidence submitted, the petitioner could not pay the proffered wage from the priority date, and, as is mentioned below, ceased doing business in Columbia, South Carolina.

The director denied the petition on January 28, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the evidence submitted did not demonstrate that the new employer, "Thailand Restaurant and Bar" was the successor in interest to the prior business owner who was the applicant on the Alien Employment Certification and the petitioner on the I-140. The director found, according to the facts as presented by the petitioner, that Thai Spicy Company Inc. had no intent to employ the beneficiary according to the regulation at 8 C.F.R. § 204.5(c).⁶

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (CIS) "... erroneously interpreted § 106(c)" of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) with regard to portability. Counsel asserts that the petitioner filed concurrently. That is, petitioner's filing included the I-140 petition⁷ and the application for adjustment of status (I-485 Form) since the beneficiary is present in the United States. Counsel is requesting that the petition be processed pursuant to AC21. AC21 rendered certain immigrant employment-based visas "portable." That is, under some circumstances, a holder of one of those visas may substitute an employer.

Counsel recounts the chain of events mentioned above leading to CIS requesting additional evidence to review the petition on September 13, 2003 that precipitated counsel's response on December 11, 2003. According to counsel, the beneficiary under AC21 was choosing to work for another similar employer in his community in the same occupation since his first I-140 petition and adjustment application were not adjudicated

⁶ 8 C.F.R. § 204.5(c). Filing petition. Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act. An alien, or any person in the alien's behalf, may file a petition for classification under section 203(b)(1)(A) or 203(b)(4) of the Act (as it relates to special immigrants under section 101(a)(27)(C) of the Act).

⁷ The I-140 petition was filed on December 16, 2002.

in 180 days. Counsel, now representing the second employer, Thailand Restaurant and Bar, submitted to CIS a new I-140 petition for that new employer naming the subject beneficiary. It is dated January 13, 2004.

The petitioner, Thai Spicy Company Inc., never responded to the request for evidence, and, although it never withdrew its petition, according to counsel's statements in the record of proceeding the petitioner chose to relocate its restaurant business from Columbia, South Carolina. There was no evidence submitted that the beneficiary ever worked for the petitioner. There was no evidence present in the record of proceeding that the petitioner sold, assigned⁸ or transferred the business or the corporation to another entity. The record contains no evidence that the second employer qualifies as a successor-in-interest to the petitioner. By the statements of petitioner's counsel in the record of proceeding, the petitioner Thai Spicy Company Inc., ceased business in Columbia, South Carolina and relocated.⁹

Counsel contends that:

The clear terms of this statutory provision [AC21 § 106(c)] clearly indicate that either an approved labor certification or an approved I-140 immigrant petition will allow the beneficiary to port [i.e. work or offer to work for another employer] after 180 days. The ... [CIS] decision was in error and poses undue and impermissible burden on the beneficiary for the service's own failure to adjudicate such cases in a timely fashion.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status* to be approved despite the fact that the initial job offer is no longer valid.¹⁰ The language

⁸ The director requested evidence that the Thailand Restaurant and Bar in the Columbia, South Carolina area qualified as a successor-in-interest to petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. 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. The petitioner must establish 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).

⁹ Counsel's letter of January 15, 2004.

¹⁰ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the bona fides of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment that in this case, is the center director.

of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

We find that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, that the evidence submitted did not demonstrate that petitioner was the successor in interest to the prior business owner who was the applicant on the Alien Employment Certification. We find that the petitioner had no intent to employ the beneficiary according to the criteria of the regulation at 8 C.F.R. § 204.5(c), and, that therefore, the I-140 petition was invalidated when the job offer was invalidated by the close of the petitioner's Columbia, South Carolina business.

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.