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FILE: EAC 03 078 50890 Office: VERMONT SERVICE CENTER Date: **SEP 30 2005**

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

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The director determined that the petitioner had not established its ability to pay the \$39,270.40 in proffered wage as of the priority date of October 25, 1995.

On April 20, 2004, the director denied the petition for failure to establish the petitioner's ability to pay the proffered wage.

On appeal, counsel asserts error in the denial based upon the petitioner's failure, as of the priority date, to establish ability to pay the proffered wage. Counsel maintains that ability to pay criteria should instead reflect the petitioner's "present time" economic condition.

Counsel's assertion conflicts with federal regulation, however. For a petition to be approvable, the petitioner must establish its ability to pay as of the priority date. Thus, the regulation 8 C.F.R. §204.5(g)(2) expressly provides:

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 [Emphasis added]. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

This appeal hinges upon whether the petitioner has established its ability to pay as of the priority date. The petitioner is a firm that sells reconditioned appliances. It seeks to employ the beneficiary permanently in the United States as a gas appliance service technician. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date assigned to the instant petition is October 25, 1995. The proffered wage as stated on the Form ETA 750 is \$18.88 per hour, which amounts to \$39,270 annually. On the Form ETA 750B, signed by the beneficiary on October 2, 1995, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on January 8, 2003. On the petition, the petitioner claimed to have been established on 1996, to currently have six employees, to have a gross annual income of \$1,500 [sic], and to have a net annual income of \$27,300.

In support of the petition, the petitioner submitted an original certified ETA 750, among other documents.

In a request for evidence (RFE) dated October 22, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage¹ beginning on the priority date. The director also specifically requested the petitioner's federal income tax return for 1995 or in the alternative its annual reports accompanied by audited or reviewed financial statements. The RFE also asked for copies of any Form W-2 Wage and Tax Statement for 1995 issued to the beneficiary.

In response to a request for evidence (RFE) seeking financial documents for 1995, the petitioner submitted a 1995 Form W-2 Wage and Tax Statement for 1995 showing wages paid to the beneficiary of \$13,258. In an undated RFE response [REDACTED] stated his company, Appliance Wholesalers Inc., is a successor in interest to the petitioner although possessed none of the petitioner's income tax returns, including that for 1995. He stated his company has been paying the beneficiary \$525 a week currently and submitted W-2s showing the petitioner had employed the beneficiary since 1994.

In a decision dated April 20, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and accordingly denied the petition. The director stated that the submitted 1995 W-2 established the petitioner paid the beneficiary a wage of \$13,258, which does not establish its ability to pay the proffered wage of \$39,270.

On appeal, counsel submits no brief or additional evidence but states that the criteria for determining the petitioner's ability to pay the proffered wage should be "the present time and not the date of filing the petition."

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, the beneficiary did not claim to have worked for the petitioner, even though

¹ The RFE lists the proffered wage as \$525, which is the weekly wage listed on the petitioner. By comparison, the ETA 750 specifies the minimum proffered wage must be \$18.88 per hour, which converts to \$3,272.53 per month, \$39,270 per year, or \$755.20 per week.

the submitted W-2s appear to demonstrate that he did work for the petitioner from and after the priority date. The record contains copies of Form W-2 Wage and Tax statements of the beneficiary as shown in the table below.

Year	Proffered wage	Beneficiary's actual compensation	Wage increase Needed to pay The Proffered Wage
1995	\$39,270	\$13,258	\$26,012
1996	\$39,270	\$16,682	\$22,588
1997	\$39,270	\$17,532	\$21,738
1998	\$39,270	\$21,725	\$17,545
1999	\$39,270	\$30,270	\$9,000
2000	\$39,270	\$30,782.24	\$8,488
2001	\$39,270	\$25,635	\$13,635
2002	\$39,270	\$27,150	\$12,120

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, then the petitioner must make up the difference from another source of funds.

Accordingly, CIS would next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses *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. Tex. 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). However, with no income tax returns in the record, neither the petitioner's net income or its net current assets are available to establish ability to pay the proffered wage. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year.

After a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the record discloses that Appliance Wholesalers Inc. is asserted to be a successor in interest and accordingly the record should also include proof of the change in ownership and of how the change in ownership occurred; and whether the new company assumed all of the rights, duties, obligations, and assets of the original employer and whether it continues to operate the same type of business as the original employer.² 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*

²An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Dial Repair Shop 19 I&N Dec. 481 (Comm. 1981). None of these documents appears in the record, however, and is a further reason for affirming the director's denial of the petition.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.