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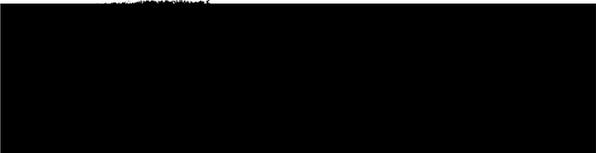
FILE: WAC 03 163 53479 Office: CALIFORNIA SERVICE CENTER Date: JUL 28 2006

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition<sup>1</sup> 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<sup>2</sup> is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a "cook wok I". As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the submitted documentation does not show that the petitioner is a successor in interest to the original employer<sup>3</sup> listed on the original labor certification.<sup>4</sup> The petition also lacks an appropriate labor certification filed with the petition. The director denied the petition accordingly.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements

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<sup>1</sup> According to counsel in his letter dated April 24, 2003, "... this case had been filed previously with your Service Center and had the file number [REDACTED] was denied on November 30, 2002 ...."

<sup>2</sup> The undated petition Form I-140 filed May 5, 2003, states that the organization filing the petition is Pick Up Stix, Inc. located at [REDACTED]

<sup>3</sup> The employer that is stated on the Application for Alien Employment Certification [REDACTED] located at [REDACTED] According to a letter dated October 12, 1995, from the company president found in the record of proceeding, the employer is California International Foods Inc. doing business as Pick Up Stix Inc. with corporate offices in San Clemente, California.

<sup>4</sup> The submitted labor certification cannot be reaffirmed and cannot be given further consideration. The Alien Employment Application was brought by Stix Restaurant with the petition in the name of Pick Up Stix Inc. Once certified after the labor certification cannot be amended.

for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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<sup>5</sup> was accepted on July 17, 1995. July 17, 1995 is the priority date discussed below. The Application For Alien Employment Certification was certified by the U.S. Department of Labor on June 23, 2000. The proffered wage as stated on the Form ETA 750 is \$8.00 per hour (\$16,640.00 per year). The Form ETA 750 states that the position requires two years experience.

On appeal, counsel submits a legal brief and additional evidence.

With the petition filed May 5, 2003, counsel submitted copies of the following documents: a copy of the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; Forms W-3; U.S. Internal Revenue Service Forms 941; California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports; a certification of a chief financial officer; a letter from the company president; Articles of Incorporation; Statement by Domestic Stock Corporation; Agreement of Merger; a request for substitution of the beneficiary ETA 750 Part B; and, as well as other documentation.

The director requested on March 12, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns. The director also requested annual reports with audited financial statements and a statement from a financial officer that established the petitioner's ability to pay.

The director requested Form W-2 Wage and Tax Statements for the beneficiary for the years 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002 and 2003, and, the beneficiary's pay statements for December 2003, January and February 2004.

The director noted that the names on the copy of the labor certification (Stix Restaurant) and the I-140 petition (Pick Up Stix, Inc.) are different. Therefore the petitioner was requested to show that it is a successor in interest. A document requested was a copy of the notice of approval of the initial form I-140; documentation to show "how the change of ownership occurred; buyout, merger, etc.;" and, "documentation to show that the petitioner will assume all rights, duties, obligations, and assets of the original employer."

Counsel then submitted a letter dated April 17, 2003 entitled "Substitution Request." Along with the letter counsel submitted copies of the following documents: an ETA Part B; an offer of employment on letterhead of Pick Up Stix; a letter from a prior employer; a letter from the president and Chief Financial Officer on the letterhead of Pick Up Stix dated April 17, 2003; a letter from the president on the letterhead of Pick Up Stix dated April 2, 2003, stating that Pick up Stix Inc, Pick Up Stix and Stix Restaurant are the same corporation; Statement [REDACTED] Agreement of Merger of two California corporations; Form I-797C;

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<sup>5</sup> The certified Form ETA 750 is also called herein the Alien Employment Certification, or labor certification.

Form I-140; the first page of Pick Up Stix Inc.'s U.S. federal tax return for 1999; a listing of the employees by name [REDACTED] dated March 31, 2002; [REDACTED] (formerly known [REDACTED] U.S. federal tax return for 2001; three statements evidencing that the outstanding stock of [REDACTED] formerly known as [REDACTED] as held by others was sold [REDACTED] or about December 31, 2001.

There is also submitted a statement that does not bear a corporate seal, nor was it made as an affidavit, that indicates that [REDACTED] changed its name "in a transaction that qualifies as a reorganization" but with the following statement that "the name change is a mere change in the name of the corporation."

In response to the request for evidence counsel also submitted copies of the following documents: the U.S. Internal Revenue Service (IRS) Form 1120S tax return for 2001 [REDACTED] the U.S. Internal Revenue Service (IRS) Form 1120S tax returns for tax years 1997, 1998, 1999, 2000 for Pick [REDACTED] U.S. Internal Revenue Service (IRS) Form 1120S tax returns for tax years 1996 [REDACTED] formerly [REDACTED] statement on the letterhead by the president and chief operating officer of [REDACTED] 2 statements from [REDACTED] the beneficiary for 1994 and 1995; a W-2 statements [REDACTED] to the beneficiary for 1996; W-2 statements from Pick Up Stix Inc. to the beneficiary for 1997 and 1998; W-2 statements [REDACTED] California to the beneficiary for 1999, 2000 and 2001; W-2 statements from [REDACTED] to the beneficiary for 2002 and 2003; pay statements dated 12/02/2003 to 4/6/2004 to the beneficiary from Carlson Restaurants Worldwide of Dallas, Texas.; a Stock Purchase Agreement for the Purchase of Stock<sup>6</sup> [REDACTED] TGI Friday's Inc. dated June 4, 2001; and, a letter from the company president.

The director denied the petition on November 19, 2004, finding that the submitted documentation does not show that the petitioner is a successor in interest to the original employer listed on the original labor certification; the submitted labor certification cannot be reaffirmed and cannot be given further consideration; and, that the petition also lacks an appropriate labor certification filed with the petition.

On appeal, counsel asserts [REDACTED] was the same corporation as Petitioner which was also referred to as [REDACTED] Stix Restaurant ...." Also, counsel contends the Petitioner is the successor in interest to the original Petitioner who is the same entity. Counsel states that the director erred in requiring a "new ETA 750 Part B."

Counsel has submitted the following copies of documents to accompany the appeal statement: a legal brief; a Form I-797C; the subject Notice of Decision; a letter from the president [REDACTED] a statement on the letterhead by the president and chief operating officer [REDACTED] Restaurants; an Articles of Incorporation of [REDACTED] Statement by Domestic Stock Corporation; Agreement of Merger of two California corporations, [REDACTED] and [REDACTED] management Inc. into the surviving corporation [REDACTED] December 31, 1996; and, five statements evidencing [REDACTED] formerly known as [REDACTED] outstanding stock as held by others was sold [REDACTED] or about December 31, 2001. There is also a statement that is not sealed, or made as an affidavit, that indicates that Pick [REDACTED] changed its name "in a transaction that qualifies as a reorganization" but with the following statement that "the name change is a mere change in the name of the corporation;" and, a Stock Purchase Agreement for the Purchase of Stock [REDACTED] by TGI Friday's Inc. dated June 4, 2001 signed by the president and chief executive officer of TGI Friday's Inc.

<sup>6</sup> The closing date is stated as June 28, 2001. TGI Friday's Inc signed the document.

On appeal, counsel contends the "Petitioner is the successor in interest to the original Petitioner who is the same entity." Counsel's statement is internally inconsistent, suggesting at the same time that the petitioner is a successor in interest and that the petitioner remains the same entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The AAO will look to the record of proceeding to see what evidence supports or is contrary to counsel contentions.

In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer.

An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). According to the above-mentioned five statements, Pick Up Stix Inc., changed [REDACTED] with a sale of outstanding stock to its president in a reorganization. There is no comment or explanation in the record of proceeding by petitioner whether or not TGI Friday's Inc. is the successor in interest to [REDACTED]. Counsel has submitted a Stock Purchase Agreement for the Purchase of Stock [REDACTED] by TGI Friday's Inc. ("Agreement") dated June 4, 2001 signed by the president and chief executive officer of TGI Friday's Inc. However, other than the Agreement, there is no other indicia such as Board of Director minutes authorizing the sale, or, the dissolution [REDACTED] and, for example, a merger into the surviving entity TGI Friday's Inc. by [REDACTED] Inc.

The submitted documentation does not show that the petitioner is a successor in interest to the original employer listed on the original labor certification. The submitted labor certification cannot be reaffirmed and cannot be given further consideration. The petition also lacks an appropriate original labor certification filed with the petition.

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.

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<sup>7</sup> There is a further inconsistency found in the record of proceeding. According to counsel the petitioner is California International Foods Inc. doing business [REDACTED]