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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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File: WAC-03-216-51586 Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as cook. As set forth in the director's April 29, 2005, denial, the case was denied based on the petitioner's failure to demonstrate that it was the successor-in-interest to the petitioner listed on the labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

The record shows that the appeal is timely filed. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker. 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 must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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).

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.

Statutory authority requires that the I-140 Petition for a skilled worker be filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). In the case at

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

hand, however, the petitioner filed the I-140 on July 21, 2003, without an approved labor certification. Instead, the petitioner submitted an uncertified copy of ETA 750A with the petitioner listed as [REDACTED] 256 Carousel Mall, San Bernardino, CA 92401.

On May 3, 2004, the Service Center issued a Request for Additional Evidence (“RFE”) for the petitioner to submit a certified labor certification, or to explain how the certified ETA 750 was lost; to submit evidence to show that the beneficiary was qualified for the position offered; to submit information and photos related to the petitioner’s business; and to submit evidence regarding the petitioner’s ability to pay including tax returns, and Forms DE-6, Quarterly Wage Reports filed with the state Employment Development Department.

In response, the petitioner submitted an October 27, 2000 letter from the Department of Labor written to a prior attorney regarding the beneficiary’s certified ETA 750 with an employer, New China Express. The letter provided: “this letter, in lieu of the actual certification, may be taken or mailed to the INS (the predecessor to U.S. Citizenship and Immigration Services) along with the appropriate forms and fee. The petitioner additionally submitted a letter to document the beneficiary’s experience with a prior employer; an unaudited financial statement dated May 31, 2004, Federal Tax Return Forms 1040 for the years 2001, 2002, and 2003; and information related to the business, including a lease copy, utility bills, and a copy of the petitioner’s menu.

Based on the DOL letter provided, the Service Center requested from the DOL a duplicate copy of the certified ETA 750 Form filed by New China Express on behalf of the beneficiary. The DOL issued a duplicate to the Service Center on October 26, 2004. The duplicate ETA 750 showed the following information: petitioner: New China Express; address: 1211 Waterman, San Bernadino, CA 92404; position: cook, specialty foreign (Chinese food); date filed: June 28, 1996; date approved: April 10, 1998.

As the certified labor certification provided listed a different petitioner and address than was listed on the Form I-140, on January 26, 2005, the Service Center issued a second RFE. The second RFE specifically requested that the petitioner, [REDACTED], submit evidence that it was the successor-in-interest to the petitioner listed on the ETA 750,<sup>2</sup> New China Express, including Forms ETA 750, Parts A and B, uncertified to reflect information regarding the successor; documentation to show how the change of ownership occurred, and documentation to show that the petitioner will assume all the rights, duties, obligations, and assets of the original employer.

In response to the second RFE, the petitioner’s owner submitted a letter, which provided that: “[REDACTED] restaurant, would like to sponsor [REDACTED] to be an employee at my restaurant. I plan to hire her for the executive chef position at my restaurant. I have completed and filed the ETA 750 form to the US Department of Labor on April 9, 2003 and have not yet received the labor certification.” The letter further, and pertinently provides: “New China Express . . . was [REDACTED] previous sponsor. However, there was a change in ownership. The new employer chose not to be a Successor in Interest, so withdrew the Immigration Petition for Alien Work. Having no relations with the employer at New China Express and being aware of [REDACTED] situation, I decided to sponsor her. Therefore, I am unable to submit the following documentation: 1) Documentation to show how the change of ownership occurred . . . 2) documentation to show the petitioner will assume all the rights, duties, obligations, and assets of the original employer.”

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<sup>2</sup> To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

On April 29, 2005, the director denied the petition as the I-140 petitioner was not able to establish that it was the successor-in-interest to the petitioner on the certified ETA 750. The petitioner appealed and indicated solely: "need more time for labor certificated." We believe that the petitioner refers to the labor certification that [REDACTED] has filed on behalf of the beneficiary. Upon certification of the labor certification that [REDACTED] has filed on behalf of the present beneficiary, the petitioner would then be able to validly file a new I-140 petition, with qualifying evidence, for the beneficiary. The petitioner may not present the certified ETA 750 at the appeal stage, but is instead a prerequisite to filing the I-140 Petition itself.

The petitioner did not submit any further documentation and cannot establish that it is the successor-in-interest to New China Express. Accordingly, the petition was properly denied.

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.