

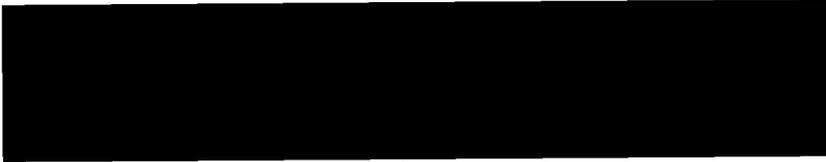
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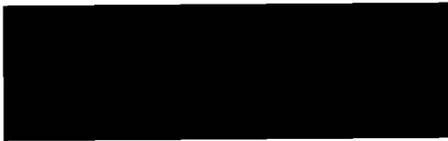
Petitioner:

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 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 convenience store and gas station. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 was the successor in interest to the employer named on the labor certification. She additionally found that the petitioner had not demonstrated its 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 that it is the successor in interest to the original employer identified on the labor certification and that it has had the 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.

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).

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 March 9, 2001 containing the name of the original employer, [REDACTED].” The proffered wage as stated on the Form ETA 750 is \$1,936 per month, which amounts to \$23,232 annually. On the Form ETA 750B, signed by the beneficiary on October 18, 2005, the beneficiary¹ does not claim to have worked for the petitioner.

¹ The beneficiary [REDACTED] appears to be a substituted beneficiary, although no request for substitution can be located in the record. There are two ETA 750Bs, however, with one being signed by [REDACTED] and the original

On Part 5 of the petition, filed on December 1, 2005, the petitioner claims that it was established on October 15, 1996, has a gross annual income of 1.05 million dollars and an annual net income of \$45,000 and currently employs three workers.

The petitioner, Al Royal, Inc. claims to be a successor in interest to the original employer, [REDACTED]. In support of this claim, the petitioner provided a copy of an assumed name certificate executed on February 22, 2005, stating that it would be conducting business as “[REDACTED]”

On September 21, 2005, the director requested additional evidence of the petitioner’s status as a successor in interest to [REDACTED] noting that the certificate does not establish a successor in interest relationship but merely that the petitioner is conducting business under an assumed name. The director specifically requested that the petitioner document its successor in interest relationship with [REDACTED]. She stated that the “evidence should document how the change in ownership occurred: buyout, merger, etc. and show how the petitioner will assume all rights duties, obligations, and assets of the original employer.”

The director also requested that the petitioner submit evidence showing that the beneficiary possesses the requisite work experience set forth on the labor certification as of the priority date of March 2001.

In response, the petitioner submitted an employment verification letter, and an affidavit, executed on November 14, 2005, from “[REDACTED]” the president of the petitioner. He stated that the petitioner “has acquired ownership of [REDACTED] and that it assumes all rights, duties, obligations, and assets of [REDACTED] and that it continues to operate the same type of business.

The director denied the petition on December 1, 2005, determining that the evidence failed to establish that a successorship in interest had occurred. She noted that the evidence provided in the form of an affidavit from Mr. [REDACTED] was not sufficient to establish that the petitioner became a successor in interest to the original

beneficiary, [REDACTED]” signing one on March 6, 2001. The signatures appear to be different and the work history is not the same. It is also noted that there is a similarity of the beneficiary’s name and some of the officers and shareholders of the two companies. For example, the name [REDACTED] is the beneficiary’s mother’s maiden name, the name appearing on one of the ETA 750’s, the name appearing on the employment verification letter (without designation of title), and the name of the 100% shareholder of the [REDACTED] corporation in 2004. Although possibly coincidental, it is noted that in future proceedings, if circumstances warrant, an advisory opinion from the DOL should be solicited before making a decision on a preference petition. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986). Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by “blood” or it may “be financial, by marriage, or through friendship.” *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

employer [REDACTED] The director noted that the petitioner had been requested to establish the change in ownership and show how that it assumed all rights, duties and obligations of the original employer. She observed that appropriate evidence should consist of a purchase agreement that outlines the details of the transaction and, that “at best, the affidavit would be used as supporting evidence of a purchase agreement.” The director also observed that the petitioner had not established that it had the ability to pay the proffered wage.

On appeal, counsel submits a document relating to the petitioner’s acquisition of the original employer’s business. It is titled an “Agreement and Bill of Sale.” The date is April 1, 2005. The agreement refers to ten dollars as consideration and refers to Exhibit A, which is not attached to the document. Counsel also submits copies of the petitioner’s unaudited financial statement for the nine months ending December 31, 2005, as well as a copy of the petitioner’s and A [REDACTED] quarterly employer’s tax return for the first quarter of 2005 and the last quarter of 2004 of [REDACTED]. The petitioner further provides copies of the petitioner’s bank statements for the period between April and December 2005. These bank statements are held in an account that the petitioner operates under the name of “ [REDACTED]”

Counsel asserts on appeal that the director’s concerns have been met that the documents taken together, establish that the petitioner is the successor in interest to [REDACTED] and that it has the continuing ability to pay the 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.² 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 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. If a successor-in-interest relationship is established, the successor 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).

In this matter, it is noted that the “Agreement and Bill of Sale” will not be considered on appeal. The director specifically advised the petitioner that she did not consider that the successorship in interest had been established. She specifically requested evidence to document the change in ownership and show *how it occurred*. (Emphasis added). The “Agreement and Bill of Sale,” which predated the director’s September 21st, 2005, request by more

² See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

than five months was not provided in response. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal related to this issue. As such, upon review of the evidence provided, we concur with the director's conclusion that the supporting documentation failed establish that a successorship in interest occurred in which the change of ownership under which the successor owner has assumed all the rights, duties, and obligations of the predecessor. Thus, it has not been demonstrated that the current petition is supported by a labor certification designating the petitioner as the sponsoring employer.

With regard to the petitioner's ability to pay the proffered wage, if the successorship in interest had been established, it is observed that 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.³ CIS will also review a petitioner's net current assets as a measure of liquidity and as a readily available cash or cash equivalent resource out of which the proffered wage could be paid. On a federal tax return, a corporate petitioner's current assets are shown on line(s) 1 through 6 of Schedule L and the current liabilities are shown on line (s) 16 through 18. The difference between these amounts represents net current assets.

CIS will additionally examine whether a petitioner may have employed and paid wages or compensation to a beneficiary during a given period. If a petitioner's corresponding net current assets or net income can cover any shortfall between the proffered wage and the actual wage paid to a beneficiary during a given period, then the petitioner's ability to pay is demonstrated for that specified period of time.

In this matter, if the successorship in interest had been established, and other issues clarified as referenced in footnote 1 herein, we observe that the federal tax returns for [REDACTED] that were submitted to the underlying record

³ 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.

for 2001, 2002, 2003, and 2004 show that it could pay the proffered wage through its net income. On appeal, counsel provides an unaudited financial statement presenting the nine months ending December 31, 2005 of [REDACTED]'s financial data, as well as copies of its corresponding bank statements. The bank statements reflect balances ranging from approximately \$6,000 to \$65,000. Counsel indicates that [REDACTED] has yet to file a federal tax return. That being so, it is noted that consistent with the regulation at 8 C.F.R. § 204.5(g)(2), an audited financial statement could have been elected, particularly in a case where a change in ownership and successorship of interest is alleged to have occurred in April 2005. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. The unaudited statements provided to the record are based on the representations of management and provide minimal probative value of the petitioner's financial position during this period.

With regard to the bank statements, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," bank statements generally show only a portion of a petitioner's financial status and do not reflect other liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage. In this matter, even if a successorship in interest had been demonstrated, based on the evidence provided, it may not be concluded that the petitioner has demonstrated a continuing financial ability beginning at 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.