

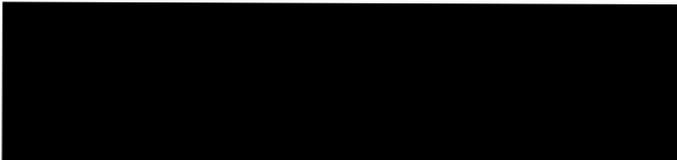
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6



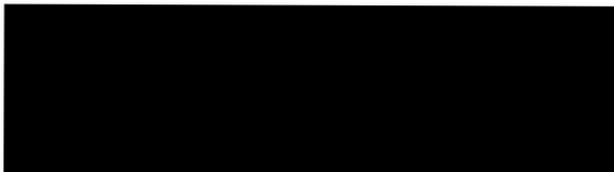
FILE: LIN 05 149 50197 Office: NEBRASKA SERVICE CENTER Date: MAY 10 2007

IN RE: Petitioner:
Beneficiary:



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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an insulation business. It seeks to employ the beneficiary permanently in the United States as a supervisor of mechanical insulation. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. As set forth in the director's June 21, 2005 decision denying the petition, the director determined that the petitioner had not established that it qualifies as a successor-in-interest to the original employer listed on the ETA 750, and denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and is incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

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 regulation at 8 C.F.R. § 204.5(g)(2) states:

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 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)].

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 DOL. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 28, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$23.58 per hour, which amounts to \$49,046.40 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a brief.

On appeal, counsel states, in part:

¹ It is noted that the petitioner was not incorporated until October 7, 2002.

Clearly, the law and the regulations favor allowing a successor employer to step in for a petitioner who no longer wishes, or is no longer able, to pursue the process. This is clear under the case law and the regulation. It should be noted that the regulation at 20 CFR 656.30(c)(2) indicates that the labor certification involves a specific job offer for a “particular job opportunity”, for the “alien for whom certification is granted” and for the area of “intended employment stated on the application”. There is no mention in the regulation that labor certification involves only a “specific employer”. Hence, the interpretation that successor employer’s [sic] may apply. The substitute employer is offering the exact same job and in the exact same wage and in a very close proximity to the area covered by the first employer.

The record contains the following documentation:

- ETA 750, certified by the DOL on September 3, 2003, listing the following employer and correspondent address: [REDACTED]
- Letter, dated April 6, 2004, from the petitioner’s president stating that his company, [REDACTED] “would like to step in and sponsor [the beneficiary] in his labor certification process,” as “[the beneficiary] was laid [sic] off by [REDACTED]
- 2004 federal income tax return for [REDACTED]; and
- Bank statements for [REDACTED] for the period from December 23, 2004 through March 23, 2005.

Counsel’s assertion that “the law and the regulations favor allowing a successor employer to step in for a petitioner who no longer wishes, or is no longer able, to pursue the process,” is noted. The assertions of counsel, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains no evidence that the petitioner, [REDACTED], qualifies as a successor-in-interest to [REDACTED]. 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 offering the same job and wage, and is located in close proximity to the original employer listed on the ETA 750, 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.

Moreover, 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). The record in the instant petition contains no financial information for [REDACTED]

Based on the foregoing analysis, the evidence in the record fails to establish that the petitioner qualifies as a successor-in-interest to the original employer listed on the ETA 750. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

² The 2004 federal income tax return for [REDACTED] does not establish ability to pay based on net income or net current assets.

Beyond the decision of the director, the evidence fails to establish that the beneficiary has met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.³ On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as two years of experience in a related occupation "application of mechanical installation materials and jacketing etc." The record as it is presently constituted does not contain any evidence, such as an employment letter, that the beneficiary meets these qualifications.⁴ It is also noted that the record does not contain a Form ETA 750B, Statement of Qualifications of Alien, for the beneficiary.⁵ To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Further, there may be an additional ground of eligibility. 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). The AAO notes that the petitioner's president's last name and the beneficiary's last name are the same. In any future proceedings, the relationship between the petitioner's president and the beneficiary should be addressed. For these additional reasons, the petition may not be approved.

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.

³ An 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*, 299 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).

⁴ *See* 8 C.F.R. § 204.5(l)(3)(ii).

⁵ The regulations at 8 C.F.R. § 204.5(a)(2) and § 204.5(l)(3)(i) require that any Form I-140 petition filed under the preference category of Section 203(b)(3) of the Act be accompanied by a labor certification.