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U.S. Citizenship  
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Services

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SEP 05 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:  
SRC 04 148 53044

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:

[REDACTED]

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*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the preference petition and certified her decision to the Administrative Appeals Office (AAO) for review. The director's decision will be affirmed.

The petitioner is a construction firm. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. A copy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because it was not supported by the original valid labor certification and did not represent a valid full-time job offer from a legitimate successor-in-interest to the employer originally listed on the labor certification. The director certified her decision to the AAO. The petitioner did not provide any submissions upon certification.

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.

On Part 5 of the preference petition, filed on April 29, 2004, the petitioner states that it was established in 2001, and currently employs four workers. In this matter, in conjunction with a decision to deny the case based on abandonment by the petitioner, and a subsequent reopening of the adjudication based on counsel's motion, the director issued two notices of intent to deny. The first one, dated January 11, 2005, requested the petitioner to provide evidence of the beneficiary's work experience, evidence of the petitioner's ability to pay the proffered wage and the submission of the original labor certification.

It is herein noted that with the exception of a cover letter stamped by the Department of Labor, the petitioner failed to provide the original labor certification. As noted by the director, the regulation at 8 C.F.R. § 103.2(b)(4) provides that forms that are issued to support applications and petitions such as labor certifications must be submitted in the original unless previously filed with the Citizenship and Immigration Services (CIS). There is no indication that this ETA 750B was previously filed with CIS. The petition is not be eligible for approval without it. If the requested original was not provided within 12 weeks, the application or petition shall be denied or revoked. See 8 C.F.R. § 103.2(b)(5).

The director issued a second notice of intent to deny the petition on April 29, 2005. The director noted that the counsel who had represented the original employer (and beneficiary) on the labor certification, [REDACTED] was found guilty of all charges lodged against him, including:

conspiracy to commit immigration fraud by making false representation in multiple visa petitions filed with [CIS], by knowingly accepting visas procured by fraud, and by harboring illegal aliens for profit. [REDACTED] was additionally charged with 11 substantive counts of making materially false, fictitious statements to [CIS] and 7 substantive counts of harboring an illegal alien for profit. The aliens worked in [REDACTED] law firm.

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Since [REDACTED] law firm was found guilty of committing immigration fraud, it may be concluded that this petition may contain fraudulent documents. As such, this petition cannot be considered approvable with the documents submitted.

The director detailed a list of documents and evidence required to overcome her notice of intent to deny the petition, including evidence of the current physical address of the petitioner and the address of the beneficiary's intended worksite, existence of family relationship between "an officer of the petitioning entity and beneficiary," details of the

proposed position to be filled, a certified and complete copy of the U.S. company's articles of incorporation, copies of the U.S. company's 2003 and 2004 tax returns, evidence that the U.S. company continues to conduct business, organizational chart, copies of wage and tax statements (W-2), sworn statements from previous employers attesting to the beneficiary's experience, exact dates of employment, duties, and evidence of wages paid by this employer, a copy of the phone directory page showing the listing for the petitioning entity.

The director further requested evidence of that the employer [REDACTED] as set forth on the copy of the approved labor certification is the same as [REDACTED] identified as the petitioner on the visa petition, and [REDACTED] which is on the job offer letterhead submitted to the record.

In response, the petitioner provided a copy of a "business asset sale & purchase agreement" dated January 9, 2004, between [REDACTED] as the seller and [REDACTED] as the purchaser. It was signed on January 13, 2004. As set forth in the agreement, for \$1,600, [REDACTED] bought the seller's assets and properties pertaining to the [REDACTED] located at the same street address as the employer listed on the ETA 750, but did not buy the seller's books and records, accounts receivable, cash, or: "xxxxxxx" The purchaser did not assume liability for any of the seller's accounts payable, liens, or liabilities.

An undated name amendment is also contained in the record stating that [REDACTED] will be known as [REDACTED]. It is unclear if the signature page signed by [REDACTED] the signatory for the "seller" in the January 13, 2004, agreement, is relevant to this amendment.

[REDACTED] subsequently executed an affidavit on March 2004, stating that he is the current president of [REDACTED] and that there is "absolutely no family/blood relationship between the petitioner, [REDACTED] and a member of this corporation." Which, as the director noted, is not pertinent to this petition as the beneficiary is [REDACTED] whose birth certificate identifies [REDACTED] as his mother. [REDACTED] is the beneficiary's father.

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. This status requires documentary evidence that the petitioner 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, 482 (Comm. 1986). 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. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 at 483.

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<sup>1</sup> 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 Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). If circumstances warrant, in some cases, an advisory opinion from the DOL should be solicited before making a decision. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

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. Conversely, if a successorship-in-interest has occurred, 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. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In this case, we do not find that a transfer of all of the seller's rights, duties and obligations has occurred, given the provisions in the "business asset sale and purchase agreement" that are explicitly reserved. Although neither the petitioner nor counsel directly addressed the director's question as to whether the employer name [REDACTED] which appears on the ETA 750, is the same employer that [REDACTED] identified as the petitioner on the visa petition, and [REDACTED] Corp.," which is on the job offer letterhead submitted to the record, it is noted that the seller in the 1/13/2004 agreement, indicates the same location and ownership of [REDACTED] as the ETA 750 employer. Based on the provisions of the agreement, and without other information such as the articles of incorporation and organizational chart that were requested by the director, it may only be concluded that a successorship-in-interest has not taken place, but rather a partial dissolution based on non-transfer of all of the seller's rights and obligations. In such a case, these entities would not be considered the same and the validity of the labor certification may be concluded to be expired.

As also stated by the director, the petition must also fail because the petitioner failed to establish either the beneficiary's qualifying credentials or the petitioner's ability to pay the proffered wage even if the labor certification were not deemed to be expired. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The petitioner must also demonstrate that it has the continuing ability to pay the proffered salary as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(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 for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements of Pilot Program

occupation designation. The minimum requirements for this classification are at least two years of training or experience.

It is noted that item 14 of the ETA 750A sets forth the requirements of education, training and experience that the beneficiary must have obtained as of the priority date. With regard to work experience, the beneficiary must have accrued two years in the job offered of "concrete finisher." The beneficiary set forth his credentials on Form ETA-750B, which he signed on April 25, 2001. On Part 15, eliciting information about his work experience, the beneficiary states that he worked in two capacities as a concrete finisher: 1) self-employed in the Miami area from March 1998 until the present and 2) for "██████████" in "██████████", from March 1995 until May 1997.

In support of the beneficiary's qualifying work experience, the petitioner submitted a letter in Spanish, which indicated that he worked for a "██████████" from 1993 to 1995 in administration. The letter did not establish the beneficiary's qualifying experience as a concrete finisher and did not comply with the terms of 8 C.F.R. § 103.2(b)(3)<sup>2</sup> as it was not accompanied by a certified English translation.

The director also determined that the petitioner was incapable of paying the proffered wage of \$14.50 per hour or \$30,160 per year, beginning on the priority date and continuing. 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, there was no evidence that established that the petitioner employed the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 1305 (9th Cir. 1984)); 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).

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<sup>2</sup> *Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation that the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

As noted above, the priority date is April 30, 2001. The 2001 and 2002 federal tax returns were submitted to the record, although the director also requested returns for 2003 and 2004. They belong to the corporation which filed the I-140. In 2001, it declared -\$12,934 in taxable income before taking the net operating loss (NOL) deduction. In 2002, it reported \$1,746 in taxable income before the NOL deduction. In 2001, \$1,361 in net current assets were reported and in 2002, \$970 in net current assets were reported. In neither year was either the net income or the net current assets sufficient to pay the certified wage of \$30,160 per year.

It is also noted that if a successorship-in-interest to [REDACTED] had been demonstrated, as noted by the director, the language of the job offer letter signed by [REDACTED] as president, does not appear to offer a full-time job. He writes that "it has taken forever for [REDACTED] to get his job authorization and our offer still stands at \$14.50 per hour minimum up to 17.00 hours depending on the quality of work and reliability." As required by law, unless a petition for a position is clearly intended for a full-time worker, it must fail. The regulation at 20 C.F.R. § 656.3<sup>4</sup> states:

*Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

*Employment* means permanent full-time work by an employee for an employer other than oneself. For purposes of the definition, and investor is not an employee.

Finally, it is noted that, as referenced by the director, the petitioner did not submit several requested documents such as a certified and complete copy of the U.S. company's articles of incorporation, copies of the U.S. company's 2003 and 2004 tax returns, evidence that the U.S. company continues to conduct business, organizational chart, copies of wage and tax statements (W-2), sworn statements from previous employers attesting to the beneficiary's

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<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>4</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

experience, exact dates of employment, duties, and evidence of wages paid by this employer, or a copy of the phone directory page showing the listing for the petitioning entity.

The petitioner failed to submit such evidence and failed to provide a reasonable explanation as to why it did not. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO on that basis even where the director failed to identify such basis for denial in his 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)(which notes that the AAO reviews decisions on a *de novo* basis).

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 director's decision that the petition should be denied is affirmed.