

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



BC

FILE: [Redacted]
SRC 06 160 53245

Office: TEXAS SERVICE CENTER Date: **APR 15 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 for
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 nature of the petitioner's business is a supermarket. It seeks to employ the beneficiary permanently in the United States as a meat cutter. 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, inter alia, that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

As set forth in the director's denial dated September 12, 2006, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of 2005 and continuing until the beneficiary obtains lawful permanent residence. Further because of evidence submitted in the record of proceeding, the director found that the petitioner may not be in business at the location given, or that the petitioner's business was purchased by another entity that is now in that location.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. 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.

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 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. See 8 C.F.R. § 204.5(d). 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 was accepted on October 31, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$15.30 per hour (\$31,824.00 per year).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003 and 2004; a statement from [REDACTED] manager of [REDACTED] c. dated April 16, 2006; cover letters from counsel dated April 7, 2006 and August 24, 2006; W-2 Wage and Tax Statements for 2001 and 2002 issued by the petitioner to [REDACTED]; a W-2 Wage and Tax Statement for 2004 issued by the petitioner to the beneficiary³ in the amount of \$18,074.26; a W-2 Wage and Tax Statement for 2005 issued by [REDACTED] to the beneficiary in the amount of \$14,198.00 a W-2 Wage and Tax Statement for 2005 issued by the petitioner to the beneficiary in the amount of \$10,168.22; the beneficiary's U.S. Internal Revenue Service Form 1040 tax returns for 2001 and 2002 that were submitted without W-2 or 1099-MISC statements; the beneficiary's Form 1040 tax return for 2003 that stated business income (and no wages) derived from a cleaning business; the beneficiary's U.S. Internal Revenue Service Form 1040 tax returns for 2004 and for 2005; approximately 28 checks to the beneficiary in equal amounts of \$350.00 from [REDACTED], [REDACTED] Washington DC in 2006; and copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1982 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were \$12,397.00 and \$772,671.00 respectively. On the Form ETA 750, signed by the beneficiary on, the beneficiary did claim to have worked for the petitioner since March 2001.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage based upon the evidence submitted.

¹ It has been approximately six years since the Application for Alien Employment Certification has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

³ According to the record of proceeding the beneficiary has two social security numbers.

Further counsel states that [REDACTED] is the successor in interest to the petitioner based upon the evidence submitted upon appeal.

Accompanying the appeal, counsel submits a legal brief and additional evidence that includes an undated but signed "Agreement of Sale" between the owner of the petitioner and [REDACTED] and/or [REDACTED]. The agreement refers to June 1, 2005 as the operative date for pre-settlement possession and excludes certain assets from the sale using the same date.

Further evidence submitted on appeal includes the following: two checks from [REDACTED] to the beneficiary in 2006; a compiled financial statement as of September 30, 2006 for [REDACTED] and a commercial lease executed on June 15, 2005, by [REDACTED] and [REDACTED] for the business premises at [REDACTED], Washington DC.

As a preface to the following discussion, for [REDACTED] to qualify as a successor-in-interest to the petitioner, documentary evidence must be presented that [REDACTED] has assumed all of the rights, duties, and obligations of the petitioner, [REDACTED]. The fact that [REDACTED] is doing business at the same location as the petitioner does not establish that [REDACTED] is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate it has the ability to pay the proffered wage. Moreover, the successor-in-interest 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 petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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.

Counsel submitted W-2 Wage and Tax Statements for 2004 and 2005 issued by the petitioner to the beneficiary in the amount of \$18,074.26 and \$10,168.22, respectively. Since the proffered wage is \$31,824.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which is \$13,749.74 in 2004 and \$1,714.00 in 2005. As can be seen from an enumeration of the evidence presented in this case relating to wages paid to the beneficiary by the petitioner, only two W-2s were submitted although the labor certification information indicated that the beneficiary has been employed at the business location since March 2001. While the beneficiary's personal

tax returns were submitted, no wage or compensation source information was submitted for years 2001 or 2002 although it was requested by the director.⁴

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The record before the director closed on August 29, 2006, with the receipt by the director of the petitioner's response to the request for evidence. At that time, the petitioner's 2005 federal tax return was the most recent tax return available. However, despite the director's request, the petitioner failed to provide its 2005 federal tax return. The tax return would have demonstrated the amount of taxable income the petitioner reported to the U.S. Internal Revenue Service from January 1, 2005 to June 1, 2005. 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). The petitioner has failed to demonstrate that it could pay the difference between the wages paid to the beneficiary and the proffered wage in 2005.

The petitioner's Form 1120 tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income (Line 28) of \$12,397.00.
- In 2002, the Form 1120 stated net income of \$14,057.00.
- In 2003, the Form 1120 stated net income of <\$6,974.00>.
- In 2004, the Form 1120 stated net income of <\$1,006.00>.

Since the proffered wage is \$31,824.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003 and 2004.

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's

⁴ The director mistakenly used W-2 statements from 2002 issued for another employee in assessing the petitioner's ability to pay the proffered wage.

total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001 were \$66,274.00, during 2002 were \$76,152.00, during 2003 were \$66,973.00, and during 2004 were \$35,900.00.⁶

Therefore, for the years for which original tax returns were submitted, the petitioner did have sufficient net current assets to pay he proffered wage in 2001, 2002, 2003 and 2004. However, the petitioner did not have sufficient net income or net current assets to pay the difference between wages paid to the beneficiary and the proffered wage in 2005 prior to the sale of the business to [REDACTED]

Counsel asserts in his brief accompanying the appeal that [REDACTED] does qualify as a successor-in-interest to the petitioner by the documentary evidence presented and that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company, [REDACTED] c., the petitioner.

The purchase agreement and the commercial lease submitted are credible evidence that a sale of the business occurred and that [REDACTED].⁷ does qualify as a successor-in-interest to the petitioner. The 2005 net income and net current asset figures for [REDACTED] were <\$6,810.00> and \$56,458.00.⁸ However, if the sale of the business occurred on June 1, 2005, the petitioner stated on the Form I-140 should have been [REDACTED] as the Form I-140 petition was filed on April 24, 2006, after the sale alleged by counsel's cover letter occurred. That cover letter submitted with the Form 1-140 does not mention a transfer or sale of the petitioner's business. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date through the date of the alleged sale of the business on June 1, 2005.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

⁶ The director calculated this amount as \$34,900.00.

⁷ The compiled financial statement dated as of September 30, 2006 for [REDACTED] indicates that the business of the petitioner is being continued at the same location. There is an indicator from the statements that the business remains profitable and viable.

⁸ A W-2 statement was submitted evidencing a wage payment to the beneficiary by [REDACTED] in 2005 of \$14,198.00.

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.