



U.S. Citizenship
and Immigration
Services

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FILE:

EAC 05 174 52116

Office: VERMONT SERVICE CENTER

Date:

MAR 18 2008

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:

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 Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a plumbing and heating company. It seeks to employ the beneficiary permanently in the United States as a plumber. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).¹ As set forth in the director's March 15, 2006 denial, the director determined that the petitioner had not established that it was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case and 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 questioned the validity of the sales agreement between the petitioner and the employer listed on the Form ETA 750, noting that it is not evident that the document is an official, legal and binding sales agreement, that it is not clear that the document was filed with a state governing agency, and that the sales agreement references Empire Construction Associates, a company different than that listed on the Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes 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.

The two issues in this case are: (1) whether or not the petitioner was a successor-in-interest to the employer listed on the Form ETA 750 submitted with the petition in the instant case; and (2) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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.

¹ The instant petition is for a substituted beneficiary. An employer initiates the substitution process by filing a Form I-140 petition on behalf of the alien to be substituted. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$39.16 per hour (\$81,452.80 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 On appeal, counsel submits a letter dated March 21, 2006. Relevant evidence in the record includes IRS Forms 1040, U.S. Individual Income Tax Returns, for [REDACTED] and [REDACTED] for 2001 and 2002; IRS Forms 1120, U.S. Corporation Income Tax Returns, for Fixanything Construction & Plumbing Inc. dba First Choice Plumbing for 2003 and 2004; financial statements for First Choice Plumbing for the years ending December 31, 2001 and December 31, 2002; financial statements for Fixanything Construction & Plumbing, Inc. for the year ending December 31, 2004; and an Agreement dated December 2, 2003 between Empire Construction Associates and First Choice Plumbing indicating that Empire Construction Associates agreed to transfer title to its assets and liabilities to First Choice Plumbing on December 31, 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

In response to the director's request for evidence dated November 2, 2005, the petitioner claimed to have been established in 2003, to have a gross annual income of \$600,859.00, to have a net annual income of \$199,937.00 and to currently employ six workers.

On appeal, counsel asserts that the petitioner, First Choice Plumbing, took over all of the assets and liabilities of a predecessor company, Empiretech Construction, in 2003, that the petitioner operated as a sole proprietorship in 2001, and that Fixanything Construction & Plumbing uses the assumed name of First Choice Plumbing & Heating.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

² 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).

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, 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).

In this case, the labor certification was issued to Empiretech Construction Associates Inc. The I-140 petition was filed by First Choice Plumbing & Heating. According to the New York State Department of State Division of Corporations website, Empiretech Construction Associates Inc. was incorporated on January 6, 1998 and is currently an active corporation in the State of New York. See http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2260879&p_corpid=2214697&p_entity_name=%65%6D%70%69%72%65%74%65%63%68&p_name_type=%25&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0 (accessed February 21, 2008). Further, according to the New York State Department of State Division of Corporations website, Fixanything Construction & Plumbing, Inc. was incorporated on January 23, 2003 and is currently an active corporation in the State of New York. See http://appsext8.dos.state.ny.us/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=2874910&p_corpid=2860693&p_entity_name=%66%69%78%61%6E%79%74%68%69%6E%67&p_name_type=%25&p_search_type=%42%45%47%49%4E%53&p_srch_results_page=0 (accessed February 21, 2008). However, the petitioner has submitted no evidence to establish that Fixanything Construction & Plumbing, Inc. operates under the assumed name of First Choice Plumbing & Heating, the company listed on the I-140 petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Therefore, financial documents relating to Fixanything Construction & Plumbing, Inc. will not be considered in the determination of the petitioner's ability to pay the proffered wage.³

³ Counsel submitted financial statements for First Choice Plumbing for the years ending December 31, 2001 and December 31, 2002 and financial statements for Fixanything Construction & Plumbing, Inc. for the year ending December 31, 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are

The DOL does not certify a Form ETA 750 labor certification on behalf of a potential employee/beneficiary, but rather to an employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the employer is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer. In addition, in order to maintain the original priority date, the petitioner, First Choice Plumbing & Heating, must demonstrate that the predecessor entity, Empiretech Construction Associates Inc., had the ability to pay the proffered wage from the priority date in April 2001 until the date of the purported change in ownership in December 2003. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). As noted by the director in her decision, the petitioner has failed to provide evidence that it is the same company or the successor-in-interest to the original employer. In response to the director's request for evidence, the petitioner submitted an Agreement dated December 2, 2003 between Empire Construction Associates and First Choice Plumbing indicating that Empire Construction Associates agreed to transfer title to its assets and liabilities to First Choice Plumbing on December 31, 2003. As noted by the director in her decision, Empire Construction Associates is not the employer listed on the Form ETA 750. Therefore, the Agreement does not establish that the petitioner purchased all of the assets and liabilities of the employer listed on the Form ETA 750. The petitioner submitted no new evidence on appeal. Instead, counsel submitted a letter dated March 20, 2006 stating that the petitioner took over all of the assets and liabilities of the former company in 2003. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. The director issued a request for evidence to the petitioner on November 2, 2005. The director requested that the petitioner submit, among other items, evidence to show the relationship between First Choice Plumbing & Heating and Empiretech Construction Associates Inc., evidence to show that First Choice Plumbing & Heating acquired substantially all of the assets and liabilities of Empiretech Construction Associates Inc., and certified transcripts of the petitioner's tax returns from the Internal Revenue Service for 2001 to 2004. Although specifically and clearly requested by the director, the petitioner declined to provide evidence to show the relationship between First Choice Plumbing & Heating and Empiretech Construction Associates Inc., evidence to show that First Choice Plumbing & Heating acquired substantially all of the assets and liabilities of Empiretech Construction Associates Inc., and certified transcripts of the petitioner's tax returns from the IRS for the relevant years. The petitioner's failure to submit these documents cannot be excused. 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).

Even assuming that the petitioner has established that it is the successor-in-interest to Empiretech Construction Associates Inc., the petitioner has not established that the predecessor entity had the ability to

the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

pay the proffered wage from the priority date in 2001 until the date of the purported change in ownership in December 2003, or that the petitioner had the ability to pay the proffered wage from the date of the change in ownership. The record before the director closed on January 26, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2004 is the most recent return available. The petitioner submitted no regulatory-prescribed financial documentation to establish the ability of Empiretech Construction Associates Inc. to pay the proffered wage from the priority date in April 2001 to the date of the alleged change in ownership in December 2003. Further, the petitioner submitted no regulatory-prescribed financial documentation to establish its ability to pay the proffered wage from the date of the alleged change in ownership in December 2003. As previously noted, financial documents relating to Fixanything Construction & Plumbing, Inc. will not be considered in the determination of the petitioner's ability to pay the proffered wage, as the petitioner has not demonstrated that Fixanything Construction & Plumbing, Inc. utilizes the assumed name of First Choice Plumbing & Heating, the company listed on the I-140 petition.

Therefore, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer. Even assuming that the petitioner had established that it is the successor-in-interest to Empiretech Construction Associates Inc., the petitioner has not established that it or its predecessor had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.