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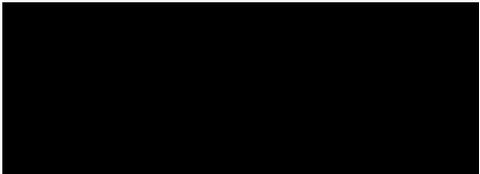
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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EAC-03-223-53523

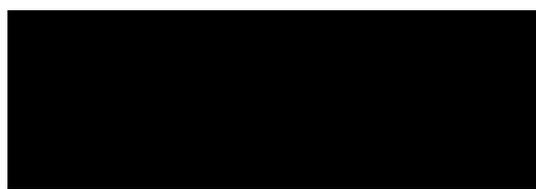
Office: VERMONT SERVICE CENTER

Date: JUL 26 2005

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

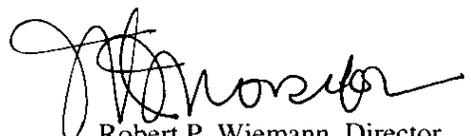
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Director
Administrative Appeals Office

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

The petitioner is a construction equipment and tools company. It seeks to employ the beneficiary permanently in the United States as a maintenance mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined 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 and denied the petition accordingly.

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 Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$20.22 per hour, which amounts to \$42,057.60 annually. On the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claimed to have worked for the petitioner beginning in June 1997 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on July 31, 2003. On the petition, the items for the date on which the petitioner was established, its current number of employees, its gross annual income and its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 16, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also specifically requested copies of the petitioner's federal income tax returns for 1998, 1999, 2000, 2001 and 2002.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on January 9, 2004.

In a decision dated February 20, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the petitioner is one of two affiliate companies and that a corporate restructuring occurred after the death of one of the principal owners. Counsel states that the revenues of the petitioner have continued to decline, but that the revenues of the affiliated company, Byrne Compressed Air Equipment Company, Inc., have continued to grow, and that both companies remain in existence. Counsel states that the revenues of both companies are available to pay the proffered wage.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, extensive documentation is submitted on appeal, but most of the documents are duplicate copies of ones previously submitted for the record. The documents newly submitted on appeal are a letter dated March 5, 2004 from a certified public accountant, and a copy of a New Jersey state income tax return for 2002 of the company which counsel asserts to be affiliated with the petitioner. None of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 12, 1998, the beneficiary claimed to have worked for the petitioner beginning in June 1997 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary for the years 1997 through 1998, from three different companies, including the petitioner. A Form W-2 of the beneficiary for 1997 shows compensation received from the petitioner in the amount of \$6,296.15 and a Form W-2 of the beneficiary for 1998 shows compensation received from the petitioner in the amount of \$3,978.00. The Form W-2 for 1997 is

not directly relevant to the instant petition, because the priority date is in 1998. Concerning the Form W-2 for 1998, the compensation paid to the beneficiary by the petitioner in 1998 is less than the proffered wage of \$42,057.60. Therefore the Form W-2 for 1998 fails to establish the petitioner's ability to pay the proffered wage in that year. No other Form W-2 in the record shows compensation paid by the petitioner to the beneficiary.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1999 and 2000. The record before the director closed on January 9, 2004 with the receipt by CIS of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 was not yet due. However the petitioner's federal tax return for 2002 should have been available, as well as its returns for each of the earlier years at issue. Nonetheless the record contains no copies of the petitioner's federal tax return for the years 1998, 2001 or 2002.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."

Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S, 2003*, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, *Instructions for Form 1120S, 2002*, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005).

In the instant petition, the petitioner's tax returns indicate income from activities other than from a trade or business. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax returns do not include portions of the petitioner's income. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K, for income. In the instant case, the petitioner's tax returns state amounts for income on Schedule K, line 23 as shown in the table below.

| Tax year | Net income | Wage increase needed to pay the proffered wage | Surplus or deficit |
|----------|---------------|--|--------------------|
| 1998 | not submitted | \$38,081.60* | no information |
| 1999 | \$19,287.00 | \$42,057.60** | -\$22,770.60 |
| 2000 | -\$62,584.00 | \$42,057.60** | -\$104,641.60 |
| 2001 | not submitted | \$42,057.60** | no information |
| 2002 | not submitted | \$42,057.60** | no information |

* Crediting the petitioner with the \$3,976.00 actually paid to the beneficiary in 1998.

** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above figures fail to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

| Tax year | Net Current Assets | | Wage increase needed to pay the proffered wage |
|----------|--------------------|---------------|--|
| | Beginning of year | End of year | |
| 1998 | not submitted | not submitted | \$38,081.60* |
| 1999 | \$8,181.00 | \$280.00 | \$42,057.60** |
| 2000 | \$280.00 | -\$46,601.00 | \$42,057.60** |
| 2001 | not submitted | not submitted | \$42,057.60** |
| 2002 | not submitted | not submitted | \$42,057.60** |

* Crediting the petitioner with the \$3,976.00 actually paid to the beneficiary in 1998.

** The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above figures fail to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains a letter dated March 5, 2004 from a certified public accountant and copies of federal tax returns of Byrne Compressed Air Equipment Company, Inc., for 1997, 1998, 1999, 2000, and 2001; of [REDACTED] 2001; and of Custom Utility Vehicles Inc., for 2002. The letter from the certified public accountant is newly submitted on appeal.

In his letter, the certified public accountant states that in 1998 at the time of the original filing, the petitioner was one of two affiliate companies, along with [REDACTED]. The accountant states that both companies were in the same industry, shared the same premises, and had common ownership. The accountant states that one of the principal owners died in "late 1998/1999," and that a corporate restructuring occurred. The accountant states that although the petitioner continued in existence, "most of the organization's operations and business were transferred to [REDACTED]" (Letter from CPA, March 5, 2004, at 1). It should be noted that the accountant sometimes omits the word "Equipment" from the name [REDACTED] and that counsel sometimes makes the same omission in his brief. Nonetheless, the context of the statements by the accountant and by counsel, as well as the tax documents in the record, indicate that the references to [REDACTED] and to [REDACTED] refer to the same company, not to two different companies.

Concerning the financial responsibility of other companies for the liabilities of the petitioner, the accountant states the following:

All member companies of this group (which now includes a third company - Custom Utility [REDACTED] as well as the individual owners are required by their banks and as a result of SBA Loans, to cross guarantee each others' activities/financial obligations. Therefore, each affiliate company as well as each owner is required by the banks to guarantee the financial obligations of the others. What all this means in the simplest terms possible is that in the event that [the petitioner] was unable to meet any financial obligation including salaries to be paid to employees, the [REDACTED] or even Custom Utility Vehicle Inc. or any of the owners would be held liable in meeting that obligation. In addition, an infusion of capital can be made at any time to [the petitioner] in order to solidify and guarantee its ability to pay the proffered wages.

(Letter from CPA, March 5, 2004, at 2).

Although the accountant refers to the petitioner and two other corporations as "affiliate" companies, the record contains no evidence explaining the legal relationship among those companies. Nor does the record contain copies of any of the guaranty agreements referred to in the accountant's letter. Moreover, the record contains evidence which appears to be inconsistent with the assertions of the accountant that the petitioner, [REDACTED] and Custom Utility Vehicle, Inc. are the only corporations which comprise the affiliated group of corporations.

Attached to the Form 1120 U.S. Corporation Income Tax Returns of [REDACTED] Company, Inc. for 1997, 1998, 1999 and 2000 are Consent to Apportionment forms pertaining to a surtax exemption under section 1561 of the Internal Revenue Code. Those forms state that [REDACTED] is a member of a controlled group of corporations, along [REDACTED] and [REDACTED]. Neither of the latter two corporations are mentioned in the accountant's letter of March 5, 2004. Moreover, neither the petitioner nor Custom Utility Vehicle, Inc. are mentioned in the Consent to Apportionment forms attached to the above federal tax returns of [REDACTED] Inc.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

For the above reasons, the evidence fails to establish that any other corporation or individual is liable for the salary obligations and other financial obligations of the petitioner. Moreover, the evidence fails to establish that any other company is a successor in interest to the petitioner. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company.

Counsel asserts in his brief that on February 21, 2001 his office informed the New York Department of Labor case worker assigned to review the labor certification application that Byrne Compressed Air Equipment Company, Inc., was in fact the appropriate employer. Counsel states that notwithstanding that notice, the ETA 750 was never amended or corrected, and that processing continued and that certification was granted without any changes to the ETA 750.

The assertions of counsel 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 in the instant case lacks any evidence to support the assertions of counsel concerning any notice to the New York Department of Labor case worker concerning a change in the employer from the petitioner to Byrne Compressed Air Equipment Company, Inc. Moreover, CIS does not have authority to change terms of a labor certification. See INA § 212(a)(5); 8 C.F.R. § 204.5(a). See also 20 C.F.R. § 656.20 (2004 ed.). New Department of Labor regulations concerning labor certifications went into effect in March 2005, but the instant petition is governed by the prior regulations. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

In his decision, the director correctly analyzed the petitioner's federal tax returns for 1999 and 2000. The director also correctly determined that the tax returns of other corporations could not be relied upon to establish the petitioner's ability to pay the proffered wage. The decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the record fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The Form ETA 750 states that, *inter alia*, the position of maintenance mechanic requires six years of high school education.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

On the ETA 750B, the beneficiary states his education as elementary school studies in Lima, Peru, from April 1982 to December 1987; high school studies in Lima, Peru, from April 1988 until December 1992; and diesel engine studies at the National University of Callao, Lima, Peru, from April 1993 to December 1996. The record contains no evidence corroborating the beneficiary's education. The record also lacks any explanation for the education requirement of six years of high school education and any explanation of how the beneficiary's studies satisfy that requirement. It appears from the dates of study listed on the ETA 750B that the beneficiary claims to have four and one-half years of high school education and three and one-half years of education at a university.

For the foregoing reasons, the evidence fails to establish that the beneficiary has six years of high school education as required on the ETA 750.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director denied the petition on that ground. Beyond the decision of the director, the evidence fails to establish that the beneficiary had the education required by the ETA 750 as of 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.