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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 10 2005
WAC 03 110 54351

IN RE: Petitioner:
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:

[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, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The service center director denied the employment-based visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a furniture manufacturing company. It seeks to employ the beneficiary permanently in the United States as a furniture finisher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director examined the documents on the record following a non-response from the original petitioner, and 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.

On appeal, counsel states that recent amendments to the Immigration and Nationality Act (the Act) allow the beneficiary to change employers, and that the business that submitted a non-certified ETA 750 following the CIS Notice of Intent to Deny, has the right to serve as a substituting petitioner. Counsel submits no further documentation.

Section 203(b)(3)(A)(i) of 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 20, 2001. The proffered wage as stated on the Form ETA 750 is an hourly wage of $16.51, or an annual salary of $34,340. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since May 2000.

On the petition, the petitioner claimed to have been established in 1981, to have seven employees, and to have a gross annual income of $2,910,238.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 28, 2003, the director requested additional evidence pertinent to that ability. The director specifically 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 from the 2001 priority date to the present.

In response, the petitioner submitted IRS Form 1120S, the petitioner's corporate tax returns for the year 2000, as well as the state of California Form EDD, Quarterly Wage and Withholding Report for last quarter of 2002. This document indicated that the petitioner had paid the beneficiary $6,024 in the last quarter of 2002. In addition, the petitioner submitted IRS Form 7004, Application for Automatic Extension, for its federal income tax returns for 2001 and 2002. These two requests are dated March 30, 2003.

On August 20, 2003, the director issued a Notice of Intent to Deny (NOID). The director stated that the evidence of the beneficiary's wages in 2002 was not sufficient to establish that the petitioner had paid the beneficiary a salary equal to or more than the proffered salary. The director also stated that the petitioner had had sufficient time to prepare its 2002 federal income tax return. Finally the director stated that the petitioner had not established its ability to pay the proffered wage.

On September 17, 2003, a second petitioner, Sergio's Pallet Repair, Inc., submitted a response to the RFE in form of correspondence received by the initial petitioner from Mann & Kason Adjusters, Inc., Grand Terrace, California, and also copies of business cards of three deputy sheriffs from the San Bernardino County Sheriff's Department. [redacted]e owner of the second petitioner, submitted a non-certified ETA 750 and identified Sergio's Pallet Repairs, Inc. as a substituting petitione[redacted]stated that the original petitioner, Delta Pride, Inc., was unable to provide the necessary documents of income due to theft of all its records.[redacted]stated that the job he was offering the beneficiary was a similar position and since the beneficiary's application for adjustment of status had been pending for more than 180 days, the beneficiary was qualified to change employer[redacted]finally stated that the new petitioner would assume all rights, duties, and obligations of the original ETA 750. The non-certified ETA 750 submitted by[redacted] described the beneficiary's job as supervisor of pallet manufacturing and repair. [redacted]submitted IRS Form 1120S for 2001 and 2002, as well as state of California EDD Forms for the first two quarters of 2003.

In his denial of the petition, the director restated the comments outlined in the initial NOID. The director stated that Citizenship and Immigration Services (CIS) had received a response to the NOID, but that it was not clear that the original petitioner had responded. The director stated that the record was confused as the response to the NOID indicated that the petitioner was no longer pursuing the visa petition. Since the petitioner had not explicitly requested a withdrawal, and the record was not clear that the petitioner had abandoned the petition, the director stated that he had decided the merits of the petition based on the evidence in the record.

On appeal, counsel states that the substituting petitioner believes that the decision to deny the instant petition was made in error. Counsel cites to 8 C.F.R. § 204.5(e) and 22 C.F.R. § 656.30(b) and states that a statutory change now recognizes a situation in which the beneficiary may retain the benefit of the original labor certification even though the beneficiary may adjust his or her status based on a job with a new employer. Counsel refers to situations involving beneficiaries whose application for adjustment of status under INA 245 have been pending for at least 180 days who can then switch jobs in the same company or a different company without jeopardizing a labor certification for the corresponding visa petition. Counsel also states

that a provision enacted on October 17, 2000 preserves the validity of the petition and labor certification in such circumstances, if the new job is in an occupational classification that is the same or similar to the one under which the original labor certification was filed.

On appeal, counsel appears to assert that the portability provisions of the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, apply to the instant petition. AC21 amended the Act enabling qualified petitions to "remain valid with respect to a new job" if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. Those eligibility requirements under section 106(c) of AC21 are that (a) the I-485, Application for Adjustment of Status, must be pending (unadjudicated) for 180 days or more; and (b) the new job must be the same as, or similar to, the job described in the labor certification and I-140 petition. The AAO interprets the phrase "remain valid" to mean "approved."[1] Counsel's assertion that portability applies to the instant petition because any alien whose application for adjustment of status under INA 245 has been pending for at least 180 days is simply is a mistaken application of AC21 and the facts of this case. While the crux of a portability analysis is the length of adjudication of an I-485, the pendency timeframe of the beneficiary's I-485 filed on February 21, 2003 and denied on September 30, 2003 is irrelevant, since to utilize the portability provisions, a beneficiary needs an approved employment-based visa. In this case, there is no approved employment-based visa and thus the portability provisions do not apply.

In addition, counsel's reference to 8 C.F.R. § 204.5(e) in the context of a beneficiary's ability to change employers and still maintain the benefits of an approved visa petition is misplaced. As stated previously, there is no approved I-140 visa petition for the beneficiary. Furthermore, counsel's references to Sergio's Pallet Repair, Inc., as a substituting employer are inexplicable. The record is devoid of any evidence that Sergio's Pallet Repair, Inc. is a successor in interest to the original petitioner. With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. According to a Citizenship and Immigration Services (CIS) memo issued in December 1993, if the petitioner has been bought out, merged, or had a significant change in its ownership, the successor in interest must file a new I-140 petition.[2] In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate 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). Without the establishment of Sergio's Pallet Repair, Inc., as a successor in interest, the director correctly examined the instant petition solely based on the evidence provided by the petitioner, namely, Delta Pride, Inc. In addition, if Sergio's Pallet Repair, Inc. were not attempting to establish that it is a successor in interest, as a new petitioner for the beneficiary, it would still have to submit its own I-140 petition.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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

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[1] *See* Memorandum from William R. Yates, Acting CIS Associate Director for Operations, *Continuing Validity of Form I-140 Petition in accordance with Section 106(C) of the American Competitiveness in the Twenty-First Century Act of 2000(AC21) (ADO03-16)*. HQBCIS 70/6.2.8-P. (August 4, 2003).

[2] Memorandum from James A. Puleo, Acting Executive Associate Commissioner, INS Office of Operations, *Amendment of Labor Certifications in I-140 Petitions*, HQ 204.24-P. (December 10, 1993).

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. Although the initial petitioner submitted a quarterly employee record that established it employed the beneficiary during the last quarter of 2002, this evidence is not sufficient to establish that it employed and paid the beneficiary the full proffered wage as of March 20, 2001, and onward. In addition, the beneficiary's W-2 Forms for 2001 and 2002, and IRS Form 1040 for 2001 and 2002, submitted with the beneficiary's Form I-485, indicate that the beneficiary was paid $16,407.10 in 2001 and $14,151 in 2002, wages considerably less than the proffered wage of $34,340. The beneficiary's three pay stubs submitted for 2003 also indicate that in 2003, the beneficiary was paid $12 an hour, as opposed to $16.51 hourly salary noted on the Form ETA 750. Thus, the petitioner did not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage as of the priority date and to the present.

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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Delta Pride, Inc., the initial petitioner, provided its federal income tax returns for 2000, and documentation that it had requested an extension until December 2003 to file its 2001 and 2002 federal income tax. Since the petitioner has to establish its ability to pay the proffered wage as of the priority date, namely, March 2001, the petitioner's 2000 federal income tax returns are not dispositive in these proceedings. Nevertheless, since no other evidence remains on the record, the petitioner's 2000 partial return can be given some evidentiary weight to provide further clarification of the issues.

The evidence indicates that the initial petitioner is structured as a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deductions, and special deductions, of the IRS Form 1120. The petitioner's tax return for 2000 shows the following amount of net income: $18,398. While the beneficiary's Form 1040A for 2000 indicates that he earned $11,891, this documentation is problematic. First, the beneficiary's Form 1040 does not identify his employer, therefore, the evidence is inconclusive that the petitioner paid the beneficiary the $11,891 salary in 2000. Second, as stated previously, the priority date is March 20, 2001, and the beneficiary's salary in 2000 is not dispositive. Finally, even if the beneficiary's 2000 personal income tax documentation were dispositive, the combination of the beneficiary's salary and the petitioner's net income would be insufficient to cover the full proffered wage of $34,340. Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net income. As previously stated, the petitioner did not submit its federal income tax returns for 2001 and 2002, so no further analysis can be made based on the petitioner's net income. Therefore, the petitioner has not established that its net income from 2001 to the present was sufficient to cover the remainder of the beneficiary's salary needed to pay him the full proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that 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 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.[3] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year 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. In the instant petition, the petitioner did not submit a complete income tax return for tax years 2001and 2002, or any other relevant documentation, such as annual reports or audited financial statements. Therefore no analysis of the petitioner's net current assets for the period in question can be made.

The initial petitioner, Delta Pride, Inc., has not demonstrated that it paid the full proffered wage to the beneficiary. The petitioner also has not established that it could pay the proffered wage on the basis of its net income or net current assets. The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001 and continuing to the present date. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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.

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[3] 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.