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FILE: [Redacted]  
WAC-04-125-52368

Office: CALIFORNIA SERVICE CENTER Date: SEP 19 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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be remanded to the director.

The petitioner is a custom cabinet and furniture manufacturing company. It seeks to employ the beneficiary permanently in the United States as a custom cabinet maker. 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 was a successor in interest to the employer for which the labor certification had been approved 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 November 12, 1999. The proffered wage as stated on the Form ETA 750 is \$18.63 per hour, which amounts to \$38,750.40 annually.

The ETA 750 was filed by an employer named [REDACTED] an employer of which the instant petitioner claims to be a successor in interest. On the Form ETA 750B, signed by the beneficiary on November 4, 1999, the beneficiary claimed to have worked for [REDACTED] beginning in January 1996 and continuing through the date of the ETA 750B.

An I-140 petition based on the certified ETA 750 (not the instant petition) was submitted by [REDACTED] on July 17, 2002. On the petition, [REDACTED] claimed to have been established in 1990, to have three current employees, to have gross annual income of "over 300,000," and to have net annual income of "over 25,000." (I-140 petition, WAC-02-235-51443, Part 5).

In a request for evidence (RFE) dated March 31, 2003 to [REDACTED] the director requested additional evidence. In response [REDACTED] submitted additional evidence, which was received by the director on May 30, 2003.

In a second RFE dated June 16, 2003 to [REDACTED] the director again requested additional evidence. In response, [REDACTED] submitted additional evidence, which was received by the director on September 16, 2003.

In a third RFE dated January 2, 2004 to [REDACTED] the director again requested additional evidence. The RFE included a request for evidence pertaining to a change in the name of the petitioner or concerning any change in ownership of the petitioner. In response [REDACTED] submitted additional evidence, which was received by the director on March 26, 2004.

The instant I-140 petition was submitted on March 26, 2004. On the petition, the petitioner stated that it currently had four employees. The petitioner left blank the items on the petition for the date on which it was established, its gross annual income and its net annual income. In a letter dated March 25, 2004, counsel stated that in response to the most recent RFE, the employer was being substituted and a new I-140 petition was being submitted, along with the requested documentation.

In a decision dated May 13, 2004, the director denied the I-140 petition submitted by [REDACTED]. The director found that the evidence did not establish that the new employer was a successor in interest to [REDACTED]. Therefore the director found that the submitted labor certification could not be reaffirmed and given further consideration. The director stated that the petition was therefore denied due to the lack of an appropriate labor certification.

In a decision dated June 10, 2004, the director denied the instant petition. The director made the same findings concerning lack of evidence to establish that the new employer was a successor in interest, and stated that the instant petition was denied due to a lack of an appropriate labor certification.

Counsel filed an appeal of the director's decision of May 13, 2004 denying the I-140 petition of [REDACTED]. That appeal was received by the director on June 18, 2004, a date three days after the appeal period expired. That appeal has been rejected as untimely by the AAO in a separate decision. (A94 345 786, WAC-02-235-51443).

After filing the appeal from the denial of the I-140 petition of [REDACTED] counsel later filed the instant appeal from the director's decision dated June 10, 2004 denying the petitioner's I-140 petition. The instant appeal is timely. Although the director's decision is dated June 10, 2004, CIS electronic records show that the decision was not mailed until June 15, 2005. The instant notice of appeal was received by the director on July 14, 2004, a date within the 33-day period after mailing, as specified by the regulations. See 8 C.F.R. §§103.3(a)(2)(i), 103.5a(b).

In support of the instant appeal counsel submits a brief and additional evidence.

Counsel states on appeal that the original petitioner, [REDACTED] was purchased by the instant petitioner, which has assumed all responsibilities of [REDACTED] including continuing with the labor certification process for the beneficiary. Counsel states that the job opportunity is being preserved in the same area of intended employment.

Counsel submits extensive evidentiary material on appeal, but all of the documents except one are duplicate copies of documents submitted previously for the record, either in the instant petition or in support of the earlier petition filed by [REDACTED]. The only evidentiary document newly submitted on appeal is a copy of a letter dated October 9, 1996 to counsel from the manager of the California Alien Labor Certification Office.

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). 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, however, the document submitted for the first time on appeal was not specifically requested by the director. Therefore no grounds would exist to preclude that document from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The initial issue in this case is whether the petitioner is a successor in interest to [REDACTED] the employer which filed the ETA 750 and the employer for which the labor certification was approved by the Department of Labor. As noted above, counsel states that [REDACTED] was purchased by the petitioner and states that the petitioner has assumed all responsibilities of that company. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of [REDACTED]*, 7 I&N Dec. 503, 506 (BIA 1980). Any claim of a successor in interest relationship must be supported by evidence in the record. The record will be considered to include all documents submitted in support of the instant petition as well as all documents submitted in support of the petition by [REDACTED]. The beneficiary's A-file contains the evidence submitted in support of both petitions.

The record contains copies of Form 1040 U.S. Individual Income Tax Returns of [REDACTED] for the years 2000, 2001, and 2002. Schedule C's attached to those returns show a furniture repair business with the business name [REDACTED] indicating a sole proprietorship. The gross receipts or sales of the business in each of those years is stated as \$277,341.00 in 2000, \$182,297.00 in 2001 and \$85,083.00 in 2002. The business address on the Schedule C's is stated as [REDACTED] which is the same address as the home address of the owners [REDACTED] shown on the Form 1040 tax return.

The record also contains a copy of a Form 1040 U.S. Individual Income Tax Return of [REDACTED] for 2002. A Schedule C attached to that return shows a furniture manufacturing business under the business name [REDACTED] indicating a sole proprietorship business. The gross receipts or sales of the business are stated as \$110,260.00. The business address on the Schedule C attached to that return is stated as [REDACTED] which is the same address as the home address for the owner, [REDACTED] on the Form 1040 tax return.

The record also contains a copy of a Form 1040 U.S. Individual Income Tax Return of the beneficiary for 2002. The return shows wages tips and salaries in the amount of \$300.00 and business income in the amount of \$5,930.00, for total income of \$6,230.00. The schedule C for the beneficiary's business states the service provided as "carpentering services," and the business name as "Master Carpentering." (Beneficiary's Form 1040, 2002, Schedule C). The business address states only Los Angeles, California, with no street address listed.

The record contains a copy of a Form DE 6 California quarterly wage report for [REDACTED] for the second quarter of 2002. That report shows three employees of that company. The beneficiary is not one of the three employees shown on that report.

The record also contains a handwritten note, unsigned and undated, which states, "Petitioner changed it's name to [REDACTED] same add. & same phone number." The record order of the file indicates that the note was submitted on May 3, 2003, as part of the response of [REDACTED] to the director's RFE dated March 1, 2003.

The record also contains copies of Form DE 6 California quarterly wage reports for the petitioner [REDACTED] for the four quarters of 2003, showing two employees in the first quarter, three employees in the second quarter report, three employees in the third quarter, and four employees in the fourth quarter. [REDACTED] is one of the employees of the petitioner on each of those four quarterly reports for 2003. The total subject wages paid to [REDACTED] by the petitioner are \$2,400.00 in the first quarter of 2003; \$3,900.00 in the second quarter of 2003; \$2,700.00 in the third quarter of 2003; and \$1,200.00 in the fourth quarter of 2003. The beneficiary is shown as one of the employees of the petitioner on the report for the fourth quarter of 2003, with total subject wages of \$3,960.00. The address of the petitioner is stated on the DE 6 reports as [REDACTED]

The record contains a copy of the petitioner's articles of incorporation, signed by [REDACTED] s incorporator, and dated October 24, 2002. The articles of incorporation bear a date stamp showing filing in the office of the California Secretary of State on November 12, 2002. The address for service of process is shown as [REDACTED]

The record contains a copy of a Form 1120 U.S. Corporation Income Tax Return of the petitioner for 2003, marked as an initial return. That return shows gross receipts or sales of \$271,103. The address of the corporation is shown as [REDACTED]

The record also contains a copy of a letter on the petitioner's letterhead dated May 21, 2003 signed by [REDACTED] as "Owner," and stating that the beneficiary is employed by the petitioner as a custom cabinet maker, working a minimum of 40 hours per week.

The record also contains copies of Form 540 California Resident Income Tax Returns of [REDACTED] for 2000 and 2002 and of [REDACTED] for 2002. Those returns show information consistent with the corresponding federal tax returns for those individuals, which are mentioned above.

As noted above, the record also contains a copy of a letter dated October 9, 1996 to counsel from the manager of the California Alien Labor Certification Office, submitted for the first time on appeal. That letter confirms receipt of a labor certification application from the [REDACTED] on behalf of the beneficiary with a priority date of September 30, 1996. The beneficiary is named in the letter. The September 30, 1996 priority date is more than two years earlier than the priority date of the ETA 750 labor certification which was submitted with the I-140 petition of [REDACTED]. Therefore the letter appears to relate to an earlier labor certification application by that same employer. The letter dated October 9, 1996 therefore appears to have no direct relevance to the instant petition.

The status of a successor in interest to a previous employer 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 (Comm. 1986).

In the instant petition, the record lacks any evidence directly explaining the transfer of the sole proprietorship business [REDACTED] to the petitioner, a California corporation. Nonetheless, the relevant

evidentiary documents in the record taken together, are sufficient to establish that the petitioner is a successor in interest to [REDACTED]

The evidence shows that [REDACTED] was the sole proprietor of a carpentry business in the years 2000, 2001 and 2002. The evidence also shows the incorporation of the petitioner in November 2002, at the same business address. The evidence shows that [REDACTED] began working for the petitioner during the first quarter of 2003. A handwritten note, apparently written by [REDACTED] in May of 2003, states that the petitioner on the first I-140 petition, referring to [REDACTED] had changed its name to [REDACTED] which is the petitioner's name. The Form 1120S corporate income tax return of the petitioner for 2003 is marked as an initial return. That return shows gross receipts or sales at a level which is approximately equal to the combined gross receipts or sales in the previous year of 2002 of the two sole proprietorship businesses mentioned above, one owned by [REDACTED] and the other owned [REDACTED]

The letter on the petitioner's letterhead dated May 21, 2003 signed by [REDACTED] as owner states that the beneficiary was then working for the petitioner.

The beneficiary claimed on the ETA 750 to have worked for [REDACTED] beginning in January 1996 and continuing through the date on which he signed the ETA 750B, which was November 4, 1999. However, the record lacks any documentation indicating that the beneficiary was an employee for tax purposes of [REDACTED]. The Form 1040 U.S. Individual Income Tax Return of the beneficiary for 2000 shows that the source of nearly all of his income that year was the beneficiary's sole proprietorship business providing carpentry services. The beneficiary's tax return does not show the source of the beneficiary's business income from carpentry services, but that line of work is consistent with the beneficiary's claim on the ETA 750 to have worked for [REDACTED]

The only documentary evidence of the beneficiary's status as an employee is the copy of the petitioner's Form DE 6 California quarterly wage report for the fourth quarter of 2003, which shows the beneficiary as one of the petitioner's four employees during that quarter. That report is further evidence that the petitioner took over the obligations [REDACTED]

In summary, taken as a whole, the evidence is sufficient to establish that the petitioner has assumed the rights, duties and obligations of [REDACTED] and is therefore is a successor in interest to that company.

In addition to establishing that it is a successor in interest to the employer which filed the ETA 750, 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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. That is, the petitioner 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).

In his decision, the director found that the evidence failed to establish that the petitioner is a successor in interest to ██████████. However, as discussed above, a consideration of all the evidence in the record relevant to that issue shows that the evidence is sufficient to establish that the petitioner is a successor in interest to ██████████. The assertions of counsel on appeal and the evidence submitted on appeal therefore are sufficient to overcome the decision of the director with regard to that issue.

The director did not address the issue of the ability of the petitioner and its predecessor to pay the proffered wage, apparently because the director found that the insufficient of evidence to establish a successor in interest relationship was a sufficient ground to deny the petition.

Since the director made no finding on the issue of the ability of the petitioner and its predecessor to pay the proffered wage, the petition will be remanded to the director for consideration of that issue and of any other issue which may now be relevant in the light of the decision of the AAO in the instant appeal.

**ORDER:** The appeal is sustained. The petition is remanded to the director for further action consistent with this decision.