



U.S. Citizenship
and Immigration
Services

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

BE

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 03 175 54423

Date: DEC 19 2005

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:

[REDACTED]

INSTRUCTIONS:

This is the decision 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 Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

On appeal, counsel appears to be representing the interests of the beneficiary or of a substituted petitioner,¹ rather than those of the original petitioner, TBC Conexion PHX Incorporated (TBC) of Tucson, Arizona, as shall appear below. Only an affected party is permitted to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). The beneficiary of a visa petition is not a recognized party in a proceeding. 8 C.F.R. § 103.2(a)(3). The beneficiary of this petition is not, therefore, permitted to file an appeal in this matter. Because the record contains a Form G-28 Notice of Entry of Appearance signed by the original petitioner's owner recognizing counsel as its attorney in this matter, however, this office recognizes counsel and will treat the petition in this matter as having been filed by the petitioner.

The original petitioner in this matter, TBC, is a transportation company. It sought to employ the beneficiary permanently in the United States as a regional manager. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor, issued to the original petitioner, accompanied the petition. In response to a Request for Evidence issued in this matter, however, the original petitioner stated that it no longer employed the beneficiary.

The director determined that the evidence does not show that the beneficiary's present employer, the substituted petitioner, is the original petitioner's true successor and able to utilize the approved labor petition in this matter. Further, the director found that the petitioner had failed to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification. Further still, the director found that the substituted petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The director denied the petition accordingly.

On appeal, counsel submits a brief.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

¹ The record contains no G-28 from the substituted petitioner recognizing counsel.

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 Department of Labor. 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 December 3, 2001. The proffered wage as stated on the Form ETA 750 is \$60,000 per year. The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of related experience with a transportation company.

On the petition, the petitioner stated that it was established on August 1, 2000 and that it employs 25 workers. Both the petition and the Form ETA 750 indicate that the petitioner would employ the beneficiary in Tucson, Arizona.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner, TBC of Tucson, Arizona. The sole claim of employment on that form was for employment as the manager of Transportes Baldomero Corral, SA de CV,² of Sonora, Mexico, from September 1994 until at least November 3, 2001, the date the beneficiary signed that form.

With the petition, counsel submitted the 2002 Form 1120 U.S. Corporation Income Tax Return of the petitioner, TBC. That return shows that the petitioner is a corporation and that it reports taxes pursuant to the calendar year. During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$113,866. At the end of that year the petitioner had current assets of \$171,562 and current liabilities of \$72,561, which yields net current assets of \$99,001.

Counsel submitted no verification of the beneficiary's claim of qualifying employment with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the

² The similarity between the name of the petitioner, TBC, and that of the petitioner's former employer, Transportes Baldomero Corral, SA de CV, implies that the two companies are related. The names also demonstrate conclusively, however, that they are different companies, as TBC is incorporated in the United States and Transportes Baldomero Corral is a Sociedad Anonima, or stock company, in Mexico.

requisite two years work experience, the California Service Center, on December 11, 2003, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested copies of annual reports, federal tax returns, or audited financial statements showing the ability to pay the proffered wage during 2001, 2002, and 2003.

Consistent with the requirements of 8 C.F.R. 204.5 § (1)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, phone number, and title of the trainer or employer, and the beneficiary's title, duties, dates of employment, and number of hours worked per week.

The Service Center also asked whether the petitioner, TBC, currently employed the beneficiary and specifically requested that the petitioner submit Form W-2 Wage and Tax Statements showing any wages paid to the beneficiary.

In response, counsel submitted a letter, dated March 2, 2004. In that letter counsel noted that the beneficiary left his employment for TBC after his visa petition had been pending for more than 180 days, and now works for Azteca de Oro, another transportation company. In support of that assertion counsel submitted a letter, dated January 15, 2004, from a payroll officer of Transportes Azteca de Oro, stating that the beneficiary began working for them on December 8, 2003. Counsel argues that the American Competitiveness in the Twenty First Century Act (AC21) permits approval of the visa petition under these circumstances.

With the letter counsel submits a copy of the 2002 Form 1120 U.S. Corporation Income Tax Return of Transportes Azteca de Oro, Incorporated. That return shows that it is the company's initial return, that it covers the period from August 15, 2002 to the end of the year, and that the company is a corporation. During that period Transportes Azteca de Oro declared a loss of \$684,998 as its taxable income before net operating loss deduction and special deductions. At the end of that year Transportes Azteca de Oro had current assets of \$346,804 and current liabilities of \$130,900, which yields net current assets of \$214,904.

Counsel also provided various documents from Transportes Baldomero de Corral SA de CV in Spanish. Those documents appear to include payroll data and the beneficiary's name appears on them. Counsel apparently submitted them to support the proposition that Transportes Baldomero de Corral employed the beneficiary as a regional manager or in a related occupation during some period.

The majority of those documents, however, were submitted without English translations. Any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English. 8 C.F.R. 103.2(b)(3). The contents of the documents from Transportes Baldomero submitted without the required translations shall not be considered.

The director determined that, under the circumstances described by counsel, the new employer is obliged to demonstrate that it is the true successor of the original petitioner, within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981) in order to be permitted to rely on the labor

certification issued to the original petitioner.³ Because counsel had neither demonstrated nor alleged that the substituted petitioner is the true successor of the original petitioner, the director denied the petition. The director further determined that the petitioner had not demonstrated its continuing ability to pay the proffered wage beginning on the priority date, and that the petitioner had not demonstrated that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification.

On appeal, counsel stated, "At no time did our office ever claim that [the substituted petitioner] was a successor in interest of [the original petitioner]." Counsel argues, though, that pursuant to the portability rules of AC21 the petition in this matter should be approved even though the beneficiary has changed employers during its pendency. In support of this assertion, counsel cites a copy of a letter, dated April 24, 2002, from the Director, Business and Trade Services, of Citizenship and Immigration Services (CIS). That letter states that

[An approved] employment-based petition and the supporting labor certification shall remain valid with respect to a new job offer if the individual changes jobs or employers as long as the adjustment application has been filed and remains adjudicated for 180 days or more. This interpretation would appear to apply even if approval of the initial Form I-140 had been revoked, providing the I-140 was revoked after the 180 days had passed.

In the appeal brief, counsel did not address the director's findings pertinent to ability to pay the proffered wage and the beneficiary's qualifications.

Counsel asserts on appeal that the petition is still "approvable" due to the terms of AC21. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*⁴ to be approved, under some circumstances, despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days

³ Although the basis of the decision was not so succinctly stated, that is its basis.

⁴ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment.

and (2) the new job offer the new employer must be for a "same or similar" job. A plain reading of the phrase "will remain valid," suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 be approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an employment-based application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

The employer named on the approved Form ETA 750 in this case is TBC. The petitioner named on the Form I-140 petition is also TBC. Counsel's admission that the substituted petitioner is the original petitioner's competitor, and not its true successor, indicates that the petition is not supported by a valid labor certification. The petition was correctly denied on that basis.

We turn now to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

Because the petitioner in this matter is TBC, only financial data pertinent to TBC is relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Evidence pertinent to the finances of Azteca de Oro is not salient to the ability of the petitioner, TBC, to pay the proffered wage. In his March 2, 2004 letter, counsel stated that the beneficiary no longer works for the petitioner. The record, however, contains no evidence that the beneficiary ever worked for the petitioner or that it ever paid him wages. The petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$60,000 per year. The priority date is December 3, 2001.

Although the California Service Center requested, on December 11, 2003, evidence of the petitioner's ability to pay the proffered wage during 2001, 2002, and 2003, neither counsel nor the petitioner has submitted copies of annual reports, federal tax returns, or audited financial statements for 2001. The petitioner has not, therefore, demonstrated its ability to pay the proffered wage during 2001.

During 2002 the petitioner declared taxable income before net operating loss deduction and special deductions of \$113,866. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated its ability to pay the proffered wage during 2002.

As was noted above, the California Service Center requested evidence of its ability to pay the proffered wage during 2003. That request was issued, however, on December 11, 2003. On that date, the petitioner's 2003 tax return was clearly unavailable. Counsel's response is dated March 2, 2004. On that date, the petitioner's 2003 tax return may still have been unavailable. The petitioner's failure to provide financial information pertinent to 2003 is therefore excused and plays no part in today's decision.

The evidence submitted does not establish that the petitioner was able to pay the proffered wage during 2001. Therefore the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this ground.

This office turns now to the issue of whether the beneficiary's qualifications have been sufficiently demonstrated.

On the Form ETA 750, Part B, the beneficiary stated that he worked, not for the petitioner, TBC, but as the manager of Transportes Baldomero Corral, SA de CV, of Sonora, Mexico, from September 1994 until at least November 3, 2001. The various documents submitted in support of that asserted qualifying

employment are in Spanish without the requisite translation and will be disregarded pursuant to 8 C.F.R. 103.2(b)(3), as was noted above. The petitioner has not sufficiently proven the claim of qualifying employment for Transportes Baldomero Corral.⁵

The remaining claim of employment is for [REDACTED] beginning on December 8, 2003. The priority date in this matter, however, is December 3, 2001. Even if the beneficiary's employment for [REDACTED] were sufficiently proven, it cannot be used to show that the beneficiary was qualified for the proffered position on the priority date. Further, the Service Center requested, consistent with 8 C.F.R. 204.5 § (1)(3)(ii), that evidence of the beneficiary's experience be in the form of letters from trainers or employers giving the name, address, phone number, and title of the trainer or employer, and the beneficiary's title, duties, dates of employment, and number of hours worked per week. None of the evidence submitted conforms to that request or the requirements of the regulations.

The evidence submitted does not demonstrate credibly that the beneficiary has the requisite two years of experience. Therefore, the petition was correctly denied on this additional ground.

The evidence submitted does not demonstrate that [REDACTED] whom counsel has attempted to substitute for the original petitioner in this case, is that original petitioner's true successor. Therefore, [REDACTED] may not prevail as petitioner in this matter.

The evidence submitted does not demonstrate that TBC, the actual petitioner in this matter, had the continuing ability to pay the proffered wage beginning on the priority date or that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor petition. For both of those reasons, TBC may not prevail.⁶

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.

⁵ Even if the requisite translations had been submitted, those documents were unlikely to demonstrate that the beneficiary worked as a regional manager or in a related occupation, as the approved labor certification specifies.

⁶ Counsel's attempt to substitute [REDACTED] as the petitioner in this matter appears to imply that the original petitioner, TBC, is no longer pursuing the petition. Nothing in the record demonstrates, however, that TBC has withdrawn the petition or otherwise abandoned it. In the absence of any such abandonment this office is obliged to decide whether the petition may be approved with TBC as the petitioner.