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FILE: SRC 02 196 53567 Office: TEXAS SERVICE CENTER Date:

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:

SELF-REPRESENTED

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 service center director issued two Notices of Intent to Deny (NOID), and subsequently denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a master chef. 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 a successor in interest relationship had not been established, and thus, the petitioner could not establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date. The director denied the petition accordingly.

On appeal, the petitioner states that it closed its operations in July 2002, and that all of the petitioner's business and transactions, including the petition for the beneficiary, is now undertaken by Mantis Family Restaurant. The petitioner submits further documentation.

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.

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.¹ 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).

On the petition, the petitioner is identified as [REDACTED]. The petitioner claimed to have been established in 1997, to have three employees, and to have a net

¹ Memorandum from [REDACTED] Acting Executive Associate Commissioner, INS Office of Operations, *Amendment of Labor Certifications in I-140 Petitions*, HQ 204.24-P. (December 10, 1993).

annual income of \$58,000. The petitioner must demonstrate that it has a 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 April 25, 2001. The proffered wage as stated on the Form ETA 750 is a weekly salary of \$620, or an annual salary of \$32,240. On the Form ETA 750B, signed by the beneficiary, the beneficiary does not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted documentation with regard to the beneficiary's qualifications for the position.

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 December 12, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide evidence to demonstrate its continuing ability to pay the proffered wage as of April 2001. The director requested the petitioner's 2001 corporate income tax return, copies of Form 941, Quarterly Tax Report, for each quarter in 2002; a copy of the petitioner's bank statements from April 2001 to the present, and any additional documents to establish the petitioner's ability to pay the proffered wage.

On June 10, 2003, the petitioner via its congressman submitted additional documentation which included the [REDACTED] for the years 1999 and 2001.² The congressional office also submitted a letter from the petitioner that stated it had relocated its business to [REDACTED] to the closing of hotels and a downturn in business. The petitioner further stated in his letter that the I-140 petition for the beneficiary was still standing and the petitioner still wanted the beneficiary to work for it.

On June 23, 2003, the director issued a notice of intent to deny (NOID). The director noted that the employer identification number on the tax forms differed from that of the petitioner. The director requested evidence that the [REDACTED] had the ability to pay the proffered wage or evidence that Felos, Inc., and [REDACTED] were one and the same restaurant. In addition, the director stated that the tax returns submitted did not clearly establish the petitioner's ability to pay. The director again requested copies of the petitioner's bank statements from April 2001 to the present, and copies of Form 941 for the first two quarters in 2003.

On July 11, 2003, the petitioner via its congressman transmitted further documentation for the petitioner that consisted of a menu for [REDACTED] and a letter signed by the petitioner and [REDACTED]. This letter stated that the petitioner moved his business from [REDACTED] and joined the [REDACTED]. This submission also included a letter dated June 29, 2002 addressed to INS that stated the petitioner was moving his business to [REDACTED] and to direct any correspondence regarding the I-140 petition to the [REDACTED]. The petitioner submitted two 941 forms for quarters ending in

² The petitioner's congressional liaison indicated that the petitioner had never received the request for further evidence in correspondence that accompanied this evidence.

March and June of 2003 [REDACTED] as well as bank statements for Felos, Inc., from October 2001 to May 2003.

On July 24, 2003, the director issued a second NOID, and stated that the petitioner's letter was insufficient evidence to establish a successor in interest. The director stated that the Headquarters policy memo HQ 204.24-P indicated that a successor in interest must assume all of the rights, duties, obligations and assets of the original employer and continue to operate the same type of business as the original employer. Furthermore, the director indicated that the successor in interest had the burden of proof to submit documentation showing the change of ownership and assumption of rights, duties, obligations, and assets of the original petitioner. The director states that such evidence was usually in the form of a contract or agreement. The director stated that the letter submitted in response to the first NOID, was insufficient to establish that a successor in interest relationship exists. The director also stated that the new employer must demonstrate the ability to pay the beneficiary the proffered wage as of April 25, 2001, the priority date.

In response, the petitioner, through its congressional office, submitted a letter that stated the petitioner had merged with the [REDACTED] as of July 2002, and stated that the beneficiary was needed for advancing the food business.

On September 22, 2003, the director stated that the petitioner had not established that a successor in interest relationship exists, and that the petitioner had not submitted evidence that demonstrated [REDACTED] had assumed the rights, duties, obligations, and assets of the [REDACTED]. The director also noted that there is no provision on the ETA-750 to substitute petitioners. The director further noted that the financial documentation for Felos, Inc. Mantis Family Restaurant could not be used to establish the petitioner's ability to pay, as there was no successor in interest relationship.

On appeal, the petitioner submits an unsigned, undated letter that reiterates that the [REDACTED] closed its operations at [REDACTED] as of July 2002 and joined the [REDACTED]. The letter further states that all of the previous business for Hollywood Grill has come to the [REDACTED] restaurant, and all transactions of the [REDACTED] are undertaken by [REDACTED] restaurant including the employment of the beneficiary who will introduce a new line of continental foods.

The petitioner also submits a letter from [REDACTED] Certified Public Accountant [REDACTED] states that the [REDACTED] has been acquired by Felos, Inc. D/B/A [REDACTED] and that Felos, Inc. has assumed all rights, duties obligations and assets [REDACTED] including but not limited to the operation of the restaurant, hiring of staff, and administration of all payroll expenses and liabilities. The accountant further states that at the time of the merger, no written contract was prepared as the customs of the interested parties hold that a verbal contract, i.e., a man's word, is binding. The petitioner also submits an affidavit of merger agreement. This document states that Felos, Inc. D/B/A The [REDACTED] has merged with the [REDACTED] effective July 2002. The document also states that the successor company [REDACTED] will operate the [REDACTED] as a successor, assuming all assets, rights, obligations, and duties of the [REDACTED] President, and [REDACTED] Food and Beverage Director, sign the document. The document is dated October 16, 2003.

The director's decision with regard to the successor in interest issue is well founded. In the instant petition, the petitioner is identified as [REDACTED] and this same petitioner submits the Form ETA Form 750 to the Department of Labor. CIS received the instant petition on June 11, 2002. The following month, according to the petitioner, it closed its operations and merged with another restaurant [REDACTED] in Charlotte, North Carolina. Although the petitioner has stated several times in its responses to the director's request for further evidence or NOIDS, that it merged with the [REDACTED] these statements are not sufficient evidence to establish a successor of interest relationship. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The joint affidavit submitted on appeal signed by both the petitioner and the owner of [REDACTED] is also not sufficient to establish such a relationship, as it does not document any actual assets that [REDACTED] assumed, or rights, obligations, or duties, with regard to the petitioner. Although the accountant states that the merger of the two businesses was effected by a handshake, this fact is not mentioned in the affidavit provided by the interested parties. But more importantly, in petitions involving successor of interest issues, the [REDACTED] as the successor to the merged [REDACTED], is required to file a new I-140 petition, in addition to establishing that it is a successor in interest and that the previous petitioner had the ability to pay the proffered wage as of the priority date and that the successor in interest had the ability to pay the wage as of the date it acquired the previous petitioner.

Although the record contains the IRS federal income tax returns for Felos, Inc., the record is devoid of any evidence to establish that the petitioner, [REDACTED], had the ability to pay the proffered wage of \$32,000 as of the priority date, namely April 25, 2001. Since the petitioner in the instant petition clearly has stated that it had to relocate or merge in July 2002 due to a decline in business and closing of hotels, it is most unlikely that such an ability to pay could have been established. Nevertheless, there is no evidence in the record to even examine this part of the adjudication.

Since the petitioner has merged and the ownership appears to have changed significantly, the successor business, Felos, Inc., d/b/a [REDACTED] would have had to submit a new I-140 petition for the beneficiary. Since the instant petition does not establish any successor in interest, the petition may not be approved because the petitioner cannot establish its ability to pay the proffered wage 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.