



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



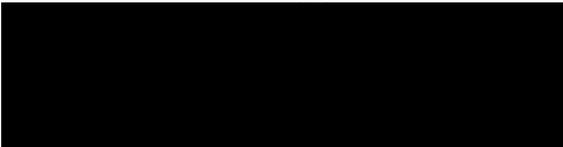
136

FILE: WAC-02-132-54316 Office: CALIFORNIA SERVICE CENTER Date: OCT 07 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, an appeal to the Administrative Appeals Office (AAO) was dismissed. The case is again before the AAO on a motion to reconsider the dismissal of the appeal. The motion will be granted and the appeal will be sustained. The petition will be approved.

The petitioner is a air conditioning service firm. It seeks to employ the beneficiary permanently in the United States as a heating and air conditioner installer-servicer. 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 December 8, 1997. The proffered wage as stated on the Form ETA 750 is \$27.15 per hour, which amounts to \$56,472.00 annually. On the Form ETA 750B, signed by the beneficiary on July 2, 1998, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on March 11, 2002. On the petition, the petitioner claimed to have been established in March 1990, to currently have fifteen employees, to have a gross annual income of \$1.3 million, and to have a net annual income of \$185,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 29, 2002, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and additional evidence relevant to the beneficiary's experience. The director also requested clarification of the relationship

between the name [REDACTED] which appears on the ETA 750 and the name of the petitioner as it appears on the I-140 petition, which is [REDACTED]

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on June 2, 2002.

In a decision dated July 22, 2002, the director determined that the evidence did not establish that the petitioner was a successor to [REDACTED]. The director determined that the submitted labor certification could not be reaffirmed and could not be given further consideration. The director therefore denied the petition due to the lack of an appropriate labor certification filed with the petition.

The petitioner then filed an I-290B notice of appeal on August 29, 2002, supported by a letter dated August 19, 2002 from counsel and additional evidence. The director treated the petitioner's submissions of August 29, 2002 as a motion to reopen and/or to reconsider.

In a decision dated January 2, 2003, the director denied the petitioner's motion to reopen and/or reconsider. The director found that the evidence did not establish how the change in ownership occurred between [REDACTED] [REDACTED]. The director then repeated his findings of his decision of July 22, 2002, and denied the petition. The case was then transmitted to the AAO for consideration of the petitioner's appeal, pursuant to the notice of appeal filed on August 29, 2002.

In a decision dated May 12, 2004 the AAO dismissed the appeal, finding that a successor in interest relationship had not been established between [REDACTED]

On June 15, 2004 the petitioner filed a new I-290B notice of appeal accompanied by a letter from counsel dated June 3, 2004 requesting that the AAO decision be vacated and that the petition be approved. The director then transmitted the file to the AAO. Although counsel's letter dated June 3, 2004 is not captioned as a motion to reconsider, the content of the letter is in substance a motion to reconsider the AAO's decision of May 12, 2004, and it will therefore be considered as a motion to reconsider.

With the motion, counsel submits additional evidence. In support of the motion, counsel states that the full corporate name of the petitioner is [REDACTED] and that a different form of the petitioner's name appearing on the petition does not indicate separate entities, but rather an abbreviation resulting from the omission of the [REDACTED] from the petitioner's name on the petition. Counsel further states that the Internal Revenue Service has recognized that [REDACTED] are the same entity, since they have the same taxpayer identification number.

Counsel also states that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period.

The first issue which will be addressed is whether the petitioner is the same corporate entity as the employer which filed the ETA 750 labor certification application, and if not, whether the petitioner is a successor in interest to the employer which filed the ETA 750.

The ETA 750 was filed in the name [REDACTED]. As noted above the priority date is December 8, 1997. A copy of a letter in the record dated June 5, 2002 from [REDACTED] states in pertinent part as follows:

This corporation, [REDACTED] started in March of 1990 as a Partnership with the name [REDACTED]. For the first four years this company was a partnership. In 1994 this company became a corporation with the name [REDACTED]. This company has been in business for over 12 years.

(Letter from [REDACTED] June 5, 2002).

An Internal Revenue Service letter dated December 31, 1997 refers to a taxpayer identification number with the last three digits "578" and has as the first line of the address block [REDACTED] and as the second line of the address block [REDACTED].

The taxpayer identification number ending in "578" is the same number which appears on the instant I-140 petition filed in the name [REDACTED].

A letter in the record dated August 13, 2002 from [REDACTED] states as follows:

[REDACTED] is the successor in interest to [REDACTED] assumes all rights, duties, obligations and assets of [REDACTED] and continues to operate the same type of business as [REDACTED].

[REDACTED] is willing to sponsor [the beneficiary] in all his immigration matters.

(Letter from [REDACTED] August 13, 2002).

The letter dated August 13, 2002 was submitted to the director on appeal in response to the director's finding in his denial decision dated July 22, 2002 that the petitioner, named on the I-140 petition as [REDACTED] was not a successor to [REDACTED] the name of the employer as it appears on the ETA 750.

The record contains copies of articles of incorporation of [REDACTED] dated March 14, 1994, with a date stamp of the California Secretary of State showing filing on March 16, 1994. The record also contains a partial copy of organizational minutes of [REDACTED] dated May 6, 1994.

The record contains copies of tax returns of [REDACTED] for 1997, 1998, 1999, 2000, 2001, and 2002. On the 1997 return the address block of the taxpayer shows on the first line the name [REDACTED] and on the second line the name [REDACTED] which is apparently a trade name. The returns for 1998 through 2002 show only the name [REDACTED] in the address block of the taxpayer. On each of those returns the employer identification number is the number ending in "578" referred to above.

On the I-290B filed on August 29, 2002, counsel refers to the petitioner's predecessor as [REDACTED]. However no evidentiary documents in the record mention that name. 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 evidentiary documents refer to [REDACTED]. Counsel also refers repeatedly in his submissions to [REDACTED] as the petitioner's corporate name. However in his letter dated June 7, 2004 counsel states that the omission of [REDACTED] from the petitioner's name on the I-140 petition was an abbreviation and was an error.

The only evidentiary documents containing the petitioner's name in the form [REDACTED] are the I-140 petition itself and the letter dated August 22, 2002 from [REDACTED] mentioned above, which was submitted in response to the director's decision finding that [REDACTED] was not a successor in interest to [REDACTED].

Counsel's repeated references to incorrect forms of the petitioner's name add confusion to the record. However, the evidentiary documents in the record are sufficient to establish that during the period relevant to the instant petition, from 1997 to the present, only one corporate legal entity has existed. The legal name of that entity is [REDACTED]. After its incorporation in 1994, the evidence indicates that [REDACTED] Incorporated, continued to use the trade name of [REDACTED] which had been the name of the business when organized as a partnership up until 1994. The ETA 750 was filed under the trade name of [REDACTED]. The ETA 750 therefore raises no issue of a successor in interest between [REDACTED] and [REDACTED] since the two names are merely the trade name and the legal corporate name for the same entity. Documentary evidence of this fact is found in the IRS letter dated December 31, 1997, which shows both the legal corporate name and the trade name, under the same taxpayer identification number.

The name on the I-140 petition, however, is [REDACTED]. Although that name would suggest a different corporate entity, the I-140 shows the IRS tax number to be the same number as appears on the tax returns of [REDACTED]. That information is sufficient to establish that the legal corporate name of the petitioner is [REDACTED].

For the foregoing reasons, the evidence is sufficient to establish that the petitioner is the same corporate entity which submitted the ETA 750, under the trade name of [REDACTED]. Since no change in corporate identity has occurred since the filing of the ETA 750, the petition raises no issue of a successor in interest. The only change in organizational structure was one which occurred in 1994 when the partnership [REDACTED] was reorganized as a corporation, [REDACTED]. The incorporation occurred approximately three years prior to the filing of the ETA 750, therefore that organizational change is not relevant to the instant petition.

For the above reasons, the evidence establishes that the petition was filed by the corporation for which the legal name is [REDACTED]. The ETA 750 was filed under a trade name of that corporation, and the I-140 petition was filed under an abbreviated version of the petitioner's corporate name, omitting [REDACTED] by error. Since the same corporation filed the ETA 750 labor certification application and the I-140 petition, no issue of a successor in interest is relevant to the instant petition.

A second issue raised by the evidence in the instant petition is whether the petitioner's 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 July 2, 1998, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has been employed by the petitioner.

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 a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1997, 1998, 1999, 2000, 2001 and 2002. The petitioner's tax year runs from July 1 of each year until June 30 of the following year. For example, the petitioner's tax return for 2002 ran from July 1, 2002 until June 30, 2003. The petitioner's motion to reconsider was submitted on June 15, 2004. As of that date, the petitioner's tax return for its 2002 tax year was the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$16,262.00	\$56,472.00*	-\$40,210.00
1998	\$15,311.00	\$56,472.00*	-\$41,161.00
1999	\$10,790.00	\$56,472.00*	-\$45,682.00
2000	\$5,289.00	\$56,472.00*	-\$51,183.00
2001	-\$13,326.00	\$56,472.00*	-\$69,798.00
2002	\$0.0	\$56,472.00*	-\$56,472.00

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

The foregoing figures to establish the ability of the petitioner 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	
1997	\$200,006.00	\$299,720.00	\$56,472.00*
1998	\$299,720.00	\$467,142.00	\$56,472.00*
1999	\$467,142.00	\$148,937.00	\$56,472.00*
2000	\$148,937.00	\$147,351.00	\$56,472.00*
2001	\$147,351.00	\$69,327.00	\$56,472.00*
2002	\$69,327.00	\$82,899.00	\$56,472.00*

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

The foregoing figures are sufficient to establish the petitioner's ability to pay the proffered wage in each of the years relevant to the instant petition.

The record also contains copies of unaudited financial statements for the twelve-month period ending June 30, 2001. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. In the instant case, however, the unaudited financial statements are submitted as supplemental evidence for the tax returns discussed above. The information on the unaudited statements appears to be based on a different accounting method than that used for the petitioners tax returns. Nonetheless, the information on the unaudited financial statements appears to be generally consistent with the information on the petitioner's Form 1120 tax return for its 2001 tax year. Therefore, the unaudited financial statements provide some additional corroboration to the tax return evidence discussed above.

The evidence in the record is therefore sufficient 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 other issue is whether the petitioner has established 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 priority date 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). As noted above, the priority date in the instant petition is December 8, 1997.

The Form ETA 750 states that the position of three years of experience in the offered position.

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.

Concerning the beneficiary's work experience, the record contains a copy of a letter dated February 4, 2002 from the director of an air conditioning company in Puebla, Mexico, stating the beneficiary's experience as a heating and air conditioning installer and servicer from January 1989 to January 1994. That letter is sufficient to establish that the beneficiary had three years of experience in the offered position as required on the ETA 750.

In his decision of January 2, 2003 denying the petition, the director found that the petitioner had failed to establish that it was a successor in interest to the employer which submitted the ETA 750 labor certification application. However, as shown above, the assertions of counsel on appeal and the evidence in the record, including evidence pertaining to the IRS employer identification number of the petitioner, are sufficient to overcome the decision of the director.

In summary, the evidence in the record establishes that the petitioner is the same corporate entity which submitted the ETA 750. Therefore no issue of a successor in interest is applicable to the instant petition. The evidence is also sufficient 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, and to establish that the beneficiary met all requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor.

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 met that burden.

ORDER: The motion is granted. The appeal is sustained. The petition is approved.