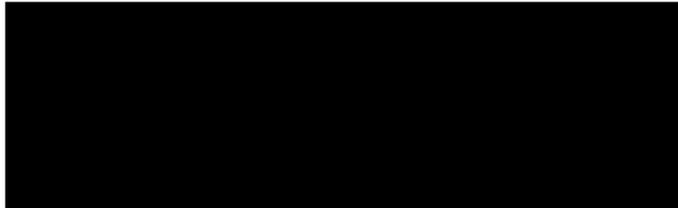




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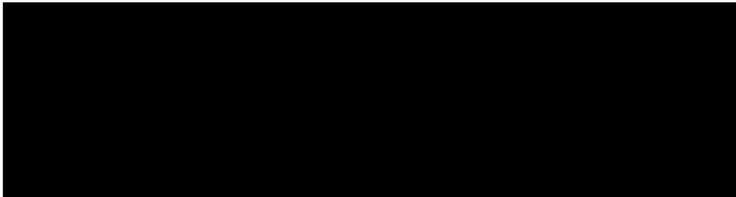
FILE: WAC 04 138 52272 Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2006**

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The petition will be remanded.

The petitioner is a transmission shop. It seeks to employ the beneficiary permanently in the United States as an automobile service station manager. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 unavailable in the United States.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

Eligibility in this matter hinges, in part, on the petitioner demonstrating 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). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on January 13, 1998. The labor certification states that the position requires two years experience.

With the petition counsel submitted

- Counsel's G-28;
- An original approved ETA 750 issued to Pacific Transmissions as prospective employer;
- The petitioner's owner's Form 1040 for the years 2000–2002; and,
- The beneficiary's W-2 (Wage and Tax Statements) for the years 1997–1998, and 2000–2002.

On July 16, 2004, the director issued a Request For Evidence (RFE) seeking documents pertinent to the beneficiary's experience and to the petitioner's ability to pay. Consistent with the requirements of 8 C.F.R.

§ 204.5(l)(3)(ii), the director requested that evidence of the beneficiary's experience be in the form of 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.

In response, counsel submitted:

- The beneficiary's October 6, 2004 statement;¹
- Copies of the petitioner's Form 1065 for the year 1998, and the owner's Form 1040 for the years 1999–2003;
- The petitioner's Form DE-6 for three quarters of the year 2004;
- The beneficiary's W-2 for the year 2003;
- A February 10, 1999 letter from [REDACTED] owner of [REDACTED] Montclair, California, stating that the beneficiary had worked for the company from October 1992 to January 1996 as a full-time service manager;
- The petitioner's statement of monthly expenses; and,
- The petitioner's Form 1040 for 2003.

On October 28, 2004, the director issued a second RFE again seeking evidence of the beneficiary's experience, noting that the letter from [REDACTED] "was insufficient" because it lacked contact and pay information. The director further requested the petitioner produce documents showing it is a successor in interest to the Pacific Transmissions, the company that had applied for the labor certification.

In response, counsel submitted:

- Counsel's letter of January 14, 2005, giving the contact information for the petitioner's owner and for that of the previous employer, [REDACTED];
- An ETA 750, part B, naming Atlantic Transmissions as the prospective employer in place of the petitioner;
- A January 5, 2005 letter, not on letterhead, from [REDACTED] stating that the beneficiary worked from 1992 to 1996 as a full-time mechanic rebuilding transmissions for Inland Transmission in Montclair California;
- An undated letter from bookkeeping service stating that in April 2003 the petitioner bought the business from [REDACTED], owner of [REDACTED] and changed the company's name to "Atlantic Transmission"; and,
- A current state auto repair dealer's license and seller's permit under the state sales tax giving the same company address as the petitioner's;
- The petitioner's Form 1065 for the year 1998; the Form 1040 for the years 1999–2001 for [REDACTED] [REDACTED] for [REDACTED] the Form 1040 for the year 2002 for [REDACTED] Transmission; and Schedule C of the Form 1040 for [REDACTED] dba Atlantic Transmissions for the year 2003;.

¹ "I worked for Inland Transmission and was payed [sic] in cash. The owner at the time was [REDACTED] [REDACTED]. He moved to Kenya, Africa, in 2002. I have no way of getting in contact with him [to verify the beneficiary's employment at Inland]."

² The letter includes [REDACTED] telephone number in the letter writer's handwriting.

On February 16, 2005, the director denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite two years of salient work experience. The director found the evidence insufficient,³ and found that inconsistencies in the evidence raised doubts about the evidence as a whole,⁴ among them that the previous employer was either [REDACTED] or [REDACTED] in the February 10, 1999 letter submitted earlier. The director also noted the beneficiary's handwritten letter that [REDACTED], the owner of his former employer, [REDACTED] had moved to Africa and was unavailable to confirm the information.

On appeal,⁵ counsel submits:

- A brief;
- An April 11, 2005 letter from the petitioner's owner describing how the petitioner's company name evolved during the years 1996–2003; and,
- An April 1, 2002 letter stating that [REDACTED] name had become [REDACTED] [REDACTED] was the company's new owner, and the beneficiary "is still [the beneficiary]."

Counsel asserts that "confusion regarding his prior employer, company name changes, etc. caused the Service to erroneously deny the petition." Counsel states that the beneficiary's former employer, [REDACTED] had three partners who were all natives of Kenya, Africa, and that [REDACTED] had since moved back to Kenya while the other two remained in the United States. The letter states that Inland's name had become [REDACTED] in order to build its customer base. Counsel also asserts that the beneficiary became a service manager two years before leaving [REDACTED] in January 1996. Counsel also notes that the business location, since 1996, has stayed the same. "It has been and remains an automobile service station, providing all kinds of repair and other services on autos."

While counsel's explanations and additional evidence resolve discrepancies the director noted in his decision, the record of proceedings continues to have discrepancies needing further clarification. We note that the letters submitted from former employers are not on letterhead nor do they provide the information required by the above-cited regulations. It is understandable that the various ownership and name changes have caused some confusion. However, the larger question remains of whether the evidence establishes the later companies as successors in interest to the petitioner.

A successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the original employer and continues to operate the same type of business as the original employer.

³ The director notes that [REDACTED] January 5, 2005 letter was not on letterhead and did "not include contracts and pay statements as previously requested. In addition the phone number was included only by the Attorney and not by the author of the letter."

⁴ The director cites *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

⁵ The I-290B erroneously states that counsel represents the beneficiary in the appeal. The record, however, contains counsel's G-28 signed by the petitioner's owner on April 12, 2004. The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) Meaning of affected party. For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The successor-at-interest petitioner is also obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

ORDER: In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.