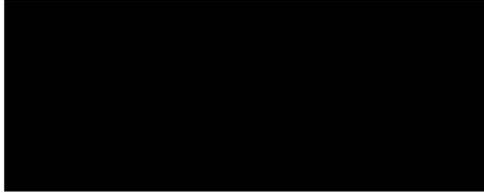


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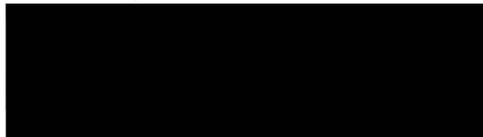


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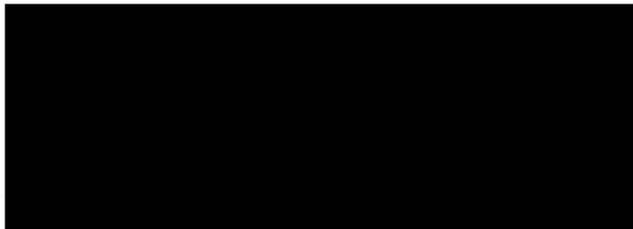
Date: JUN 21 20

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 2004 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director determined that the petitioner failed to demonstrate that the petitioner is a successor-in-interest to business entity listed on the certified labor certification application, Classic Roofing.

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 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 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 U.S. Department of Labor. See 8 CFR § 204.5(d). 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 November 11, 2000. The proffered wage as stated on the Form ETA 750 is \$23.27 per hour (\$48,401.60 per year). The Form ETA 750 states that the position requires two years of experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Counsel submitted evidence on appeal consisting of certified amended articles of incorporation for JT&B Enterprises, Inc. (JTB) amending their name to the petitioner's name on April 10, 2000 with a stamp from the Secretary of State of the State of California on April 20, 2000 and a business license issued to "JT&B Enterprises Inc dba All American Roofing" on April 14, 1993. Other relevant evidence in the record includes JTB's corporate tax returns for 2000, 2001, and 2002; JTB's request for an extension of time to file its 2003 corporate tax return; the petitioner's tax return for 2003; the petitioner's quarterly wage reports for the first quarter of 2004; JTB's quarterly wage reports for all four quarters of 2003; declarations by [REDACTED], the petitioner's president; a Business Tax Certificate issued to the petitioner in July 2003; and the petitioner's bank records² and utility bills. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1986, to currently employ 25 workers, and to have a gross annual income of \$3,259,710 and a net annual income of \$1,162,037. On the Form ETA 750B, signed by the beneficiary on June 21, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred by failing to draw a favorable inference from the evidence presented.

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 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).

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid 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. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

At the outset, the director identified an issue concerning the identity of the petitioning entity that needs to be discussed before further analysis will be made. The Form ETA 750A was certified for Classic Roofing located at 4420 Shopping Ln., Simi Valley, CA 93063. The work location was listed as "L.A. Co. Area." The visa petition was filed on behalf of All American Roofing. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year and it was incorporated on June 1, 1992 as "All American Roofing, Inc. All American Roof Store." Its employer identification number (EIN) as represented on the visa petition is [REDACTED] and its address is 412 Constitution Avenue in Camarillo, California 93012.

The corporate tax returns for 2000 through 2002 are for "JT&B Enterprises, Inc. All American Roof Store" at 412 Constitution Avenue in Camarillo, California 93010 with an EIN of 77-0310970. The tax return reflects an incorporation date as June 1, 1992. All tax returns list [REDACTED] as 100% owner. The quarterly wage reports all contain the same employer account information and data regardless of name – some are "All

American Roofing, Inc. All American Roofing” at the 412 Constitution Avenue address and some are “JTB All American Roofing” at the same address. They both use an employer account number [REDACTED]

A declaration from [REDACTED] dated July 12, 2004, states the following: “I, [REDACTED], president of All American Roofing, am taking over the sponsorship of the [beneficiary]. I am assuming the position of the former employer. [sic] Classic Roofing Company, Inc., [sic] who is now out of business.” Another one, dated March 10, 2003, states that the petitioner “will serve as an employee sponsor for the [beneficiary] under the same terms and conditions as those approved for Classic Roofing in their employment petition for the above gentleman. The reason for this substitution is that as of March, 2003, Classic Roofing has gone out of business.”

The record of proceeding also contains a declaration from the beneficiary, dated October 9, 2004, that states the following:

The original sponsor was Classic Roofing, however that company went out of business around March of 2003. My current employer is All American Roofing who has agreed to sponsor me and assume all rights duties, obligations, and assets of the original employer.

The taxes for 2000 and 2001 for [the petitioner] show the address of 2894 Bunsen Ave. Ste N, Ventura CA 93003 because that was the address where the business was located at that time. The taxes for 2002 show the current location of 412 Constitution Ave. Camarillo CA 93012. The reason of the change was because the business increase [sic] and the owner had to move to a bigger location.

All of the relevant documentation in the record of proceeding is about JTB and the petitioner. It is clear from those evidentiary submissions that JTB and the petitioner are the same entity considering the tax returns, quarterly wage reports, certified amended articles of incorporation, business license, and declarations that all reflect that JTB is the same and/or doing business as the petitioner. However, despite a mere statement from the petitioner’s owner that he would assume all of the rights and duties from Classic Roofing, the record contains no evidence that the petitioner qualifies as a successor-in-interest to *Classic Roofing*. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Even if the petitioner were doing business at the same location as the predecessor would not establish that the petitioner is a successor-in-interest. A mere statement is insufficient. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In addition, 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. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, since the priority date is November 11, 2000 and the labor certification application was approved on January 16, 2003 in Classic Roofing’s name, only Classic Roofing would have been able to apply for a visa petition for the beneficiary utilizing that labor certification unless the petitioner was a successor-in-interest to it, and the record of proceeding does not reflect that it is. There are

no provisions for the substitution of unrelated petitioning entities³. Thus, the record would need to contain the corporate tax returns for Classic Roofing covering the priority date year up until the time the petitioner acquired all interests in that business. The record of proceeding, as noted above, contains no corporate documentation pertaining to Classic Roofing.

The tax returns that are in the record of proceeding demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$48,401.60 per year from the priority date:

- In 2000, the Form 1120 stated net income⁴ of \$40,261.
- In 2001, the Form 1120 stated net income of \$3,536.
- In 2002, the Form 1120 stated net income of \$30,932.
- In 2003, the Form 1120 stated net income of \$21,548.

Therefore, for the years 2000 through 2003, presuming that the petitioner could establish that it is a successor-in-interest to Classic Roofing and could file the instant petition on behalf of the beneficiary using Classic Roofing's certified labor certification application, it did not have sufficient net income to pay the proffered wage in any year.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2000 were \$29,218.
- The petitioner's net current assets during 2001 were \$68,990.
- The petitioner's net current assets during 2002 were \$77,001.
- The petitioner's net current assets during 2003 were \$131,022.

³ The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁴Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Therefore, in the year 2000, the petitioner would not have had the ability to pay the proffered wage out of its net current assets even if it could establish it was a successor-in-interest to Classic Roofing. If it could prevail on the successor-in-interest theory, however, the petitioner would have sufficient net current assets to pay the proffered wage from 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. It has also failed to submit evidence that it is a successor-in-interest to Classic Roofing and that Classic Roofing has or had the ability to pay the proffered wage beginning on the priority date.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on 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.