

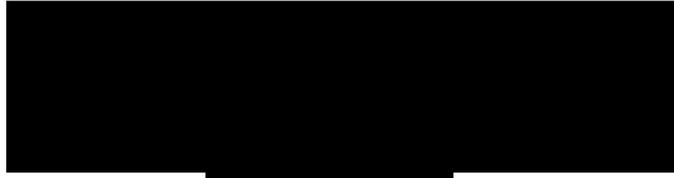
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**U.S. Citizenship  
and Immigration  
Services**

*B6*



FILE: [REDACTED]  
SRC 06 151 51533

OFFICE: TEXAS SERVICE CENTER

Date: **AUG 23 2007**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker or 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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a facility management and commercial and residential cleaning firm. It seeks to employ the beneficiary permanently in the United States as a cleaner. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, counsel submits additional evidence and contends that the petitioner has established its continuing ability to pay the certified wage.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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, 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, 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).

In this case, the Form ETA 750 was originally accepted for processing on January 31, 1990. The original employer named on the labor certification is "Unified Services, Inc." The petitioner identified on the Immigrant Petition for Alien Worker (I-140) is "Unibar Maintenance Services, Inc." This petitioner indicates that the beneficiary's proposed wage is \$6.15 per hour, which amounts to \$12,792 annually.

On the Form ETA 750B, signed by the current substituted beneficiary<sup>1</sup> on March 31, 2006, the beneficiary does not claimed to have worked for the petitioner.

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<sup>1</sup> According to the documentation contained in the record, this is the third beneficiary and the second substituted beneficiary.

On Part 5 of the I-140, the petitioner states that it was established on January 1, 1985 and employs more than 1000 workers. It also states that it has a gross annual income of over 24 million dollars and a net annual income of \$549,000.

As indicated above, the petitioner named on the I-140 is not the same employer as set forth on the ETA 750. According to a letter, dated January 18, 1999, by former counsel relating to an earlier I-140 filed on behalf of a different beneficiary, the petitioner is the successor in interest to the original sponsoring employer "Unified Services, Inc." This status arose in June 1998 when the current petitioner bought out Unified including its rights duties, obligations and assets.

In support of the petitioner's ability to pay the proffered wage of \$12,792 per annum, the petitioner provided partial and incomplete copies of its (Form 1120S) U.S. Income Tax Return for an S Corporation for 1999, 2000, 2001, 2002, 2003, and 2004.

On June 23, 2006, the director requested additional evidence in support of the petitioner's ability to pay the proffered wage. The director specifically requested copies of federal tax returns for every year from 1990 until 2005, including schedules. The director additionally requested copies of Wage and Tax Statements (W-2s) for any year that the beneficiary has worked for the petitioner.

In response, the petitioner provided additional partial copies of tax returns that it had initially submitted and further provided partial copies of its 1990 through 1998 federal tax returns.

On appeal, counsel submits a copy of a letter, dated September 27, 2006, signed by [REDACTED] as a certified public accountant urging consideration of the size and magnitude of the petitioner's overall business operations, including its available cash balance, depreciation expenses and available borrowing capacity in relation to 1994 and 1998.

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 may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. As noted above, in this matter, the beneficiary does not claim to have worked for the petitioner.

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). 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.

As an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid. A corporate petitioner's year-end current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18 of Schedule L of its federal tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The AAO finds that there have been such substantial omissions in the solicitation and submission of evidence in support of the petitioner's ability to pay the proffered wage, that a remand is necessary in order to meaningfully address the issues relevant to the petitioner's ability to pay the proposed wage offer. At the outset, it is noted that the regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its continuing ability to pay the certified wage at the time the priority date is established. In this case that date is January 31, 1990. The regulation at 20 C.F.R. § 656.30 also provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by CIS, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.<sup>3</sup> If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group*, the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired. Conversely, if a successorship-in-interest has occurred, 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). (Emphasis added.)

In this case, the record indicates that a buy-out occurred in June 1998. When the director requested that the petitioner provide copies of tax returns for every year since 1990, she should have clearly requested documentation showing that the predecessor employer had the ability to pay the wage since the priority date.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>3</sup> See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

This would include evidence covering 1990 through June 1998. It is the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. See *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). Because the director's request for additional evidence failed to specifically direct that the petitioner provide evidence demonstrating the predecessor employer's ability to pay, the case will be remanded for that purpose. The submission of evidence should include a copy of the 1998 Agreement for Sale of Business executed between Unified Services, Inc. and the petitioner as evidence of a change in ownership and assumption of rights, duties, obligations, and assets. It is noted that if the petitioner elects to submit federal tax returns rather than audited financial statements or annual reports, it should provide complete copies.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of Section 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(g)(2). 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.

The burden of proof in these proceedings remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner shall be forwarded to the AAO for review.