



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JAN 15 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a warehouse and distribution business. It seeks to permanently employ the beneficiary in the United States as a warehouse worker. The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). The director denied the petition because the petitioner failed to establish that it has the ability to pay the proffered wage to the beneficiary beginning on the priority date.

As a threshold matter, the record indicates that the petitioner is [REDACTED]. On appeal, the petitioner's former president informed the AAO that the petitioner is no longer in existence. In a letter dated June 17, 2011 [REDACTED] former president of [REDACTED] and current president of [REDACTED] states "[REDACTED] the company [that] both [the beneficiary] and myself were employees at, ceased doing business as of December 2010." Mr. [REDACTED] states that he started a new company, [REDACTED] and asked the beneficiary to join [REDACTED]. As the petitioner's organization was dissolved, then no *bona fide* job offer exists, and the petition and appeal are therefore moot. Even if the appeal could be otherwise sustained, the approval of the petition would be subject to automatic revocation due to the termination of the organization's business. See 8 C.F.R. § 205.1(a)(iii)(D).

Further, the appealing party, [REDACTED] also failed to establish that it is a successor-in-interest to the entity that filed the petition and labor certification, [REDACTED]. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

An appellant may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The evidence in the record does not satisfy all three conditions described above because, it does not fully describe and document the transaction transferring ownership of the predecessor, it does not demonstrate that the job opportunity will be the same as originally offered, and it does not demonstrate that the claimed successor is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because the appellant has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer. Because the petitioner

has not had the opportunity to address this issue, it will not be the sole grounds for dismissing the appeal.

The director found that the petitioner had not established its ability to pay the proffered wage. On appeal, the appellant states that the petitioner ceased its business operations in December 2010. The appellant did not submit evidence of the petitioner's dissolution.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petition is supported by a labor certification application Form ETA 750 in the name of [REDACTED] certified by the United States Department of Labor (DOL), case number [REDACTED]. The evidence indicates that the labor certification application was amended on September 26, 2007 to change the name to that of the petitioner. The petitioner submitted the amended labor certification with the Form I-140 on January 8, 2008. The petitioner states that it initially filed under the name of [REDACTED] and that it changed its name and other identifying information such as the federal employer identification number (FEIN) from WBS Industries to [REDACTED] with the approval of the DOL. The director's decision denying the petition concludes that the petitioner failed to establish a successor-in-interest relationship with [REDACTED] but acknowledged that the Department of Labor (DOL) accepted the petitioner's changes to the labor certification before the October 27, 2007 certification date. Correspondence in the record addressed to [REDACTED] from the DOL lists the same case number as the petitioner's DOL case number, [REDACTED]. The AAO finds it is more likely than not that the petitioner established to the DOL that it is the successor-in-interest to [REDACTED] in the labor certification proceeding.

The director also noted that the petitioner had not established its ability to pay the proffered wage and that the petitioner was not willing to submit its tax returns. Counsel asserted that the petitioner had established its ability to pay the proffered wage considering the beneficiary's IRS

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Forms W-2 issued by both [REDACTED] and [REDACTED]. In his denial, the director declined to consider the amounts paid to the beneficiary by [REDACTED] in determining whether the petitioner has the ability to pay the proffered wage from the priority date. The AAO disagrees and would credit the petitioner with any amounts paid by [REDACTED] as the petitioner is the successor-in-interest to [REDACTED] in the labor certification proceeding. Nevertheless, for reasons more fully set forth below, the AAO will not consider amounts paid by either [REDACTED] or [REDACTED] when determining whether the petitioner has established the ability to pay.

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 DOL. *See* 8 C.F.R. § 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$9.43 per hour (\$19,614.40 per year). The Form ETA 750 states that the position requires travel.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The Form I-140, filed on April 30, 2001 indicates that the petitioner has been in business since 1998 and employs 20 people. On the Form ETA 750B, signed by the beneficiary on April 24, 2001, the beneficiary claimed to have worked for the petitioner from March 1997 to April 24, 2001, the date that the beneficiary signed the Form ETA 750B.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages,

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).

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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 record contains 2005, 2006, 2007, 2008, 2009, and 2010 Internal Revenue Service (IRS) Forms W-2 for the beneficiary listing the petitioner as the employer. The record also contains a 2010 IRS Form 1099-MISC for the beneficiary listing the petitioner as the payer. The petitioner paid the following wages:

- In 2005, the petitioner paid \$25,231.40.
- In 2006, the petitioner paid \$55,319.95.
- In 2007, the petitioner paid \$48,634.00.
- In 2008, the petitioner paid \$39,926.80.
- In 2009, the petitioner paid \$30,090.42.
- In 2010, the petitioner paid \$20,771.86.

Therefore, for the years 2005, 2006, 2007, 2008, 2009, and 2010, the petitioner established that it paid an amount at least equal to the proffered wage.²

In its response to the director's request for evidence (RFE), counsel stated that the labor certification filed on April 30, 2001 was filed by [REDACTED] and in 2005 [REDACTED] changed its name to [REDACTED]. Counsel also states that the petitioner filed an amendment to the Form ETA 750A with the Employment Development Department changing the name and address of the employer. The amendment was accepted by the DOL and the record contains a letter from the DOL dated September 27, 2007 listing [REDACTED] as the employer. The record also contains IRS Forms W-2 for the beneficiary listing [REDACTED] as the employer. [REDACTED] paid the named beneficiary the following wages:

- In 2001, [REDACTED] paid \$25,511.97.
- In 2002, [REDACTED] paid \$30,576.97.
- In 2003, [REDACTED] paid \$36,888.84.
- In 2004, [REDACTED] paid \$41,471.80.
- In 2005, [REDACTED] paid \$28,210.72.

² The petitioner paid the named beneficiary under the social security number [REDACTED] from 2006 to 2010. In 2005 the Form W-2 issued by the petitioner to the beneficiary did not contain a social security number.

Therefore, for the years 2001, 2002, 2003, 2004, and 2005, the petitioner established that [REDACTED] paid an amount at least equal to the proffered wage.³

The AAO will not accept the IRS Forms W-2 paid by either the petitioner or [REDACTED] as evidence of the petitioner's ability to pay the proffered wage to the beneficiary. The amounts claimed to have been paid by each entity in this case were paid to [REDACTED] under different social security numbers. This inconsistency is material as it affects the reliability of the IRS Forms W-2 as evidence of the petitioner's ability to pay and calls into question the identity of the beneficiary.⁴ Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). A person may not have more than one social security number. The record does not establish that the IRS recognizes [REDACTED] under either social security number [REDACTED]. No objective independent evidence of record resolves this inconsistency. As such, the AAO declines to consider wages paid to the beneficiary by either [REDACTED] or [REDACTED] as evidence of the ability to pay the beneficiary.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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

³ [REDACTED] paid the named beneficiary under the social security number [REDACTED] from 2002 to 2004. In 2005, [REDACTED] indicated under the social security number "applied for."

⁴ **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to:

...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.

(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 USCIS, 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 USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 23, 2011 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner has not submitted tax returns, audited financial statements or annual reports to establish the ability to pay. The AAO finds that the petitioner has not established the ability to pay the proffered wage to the beneficiary beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for

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the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361 Here, that burden has not been met.

ORDER: The appeal is dismissed.