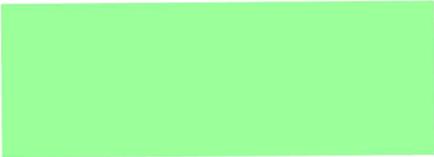


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)



Date: **MAY 20 2013**

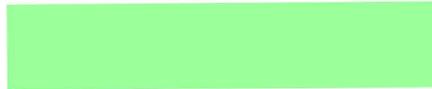
Office: TEXAS SERVICE CENTER

FILE: 

IN RE:

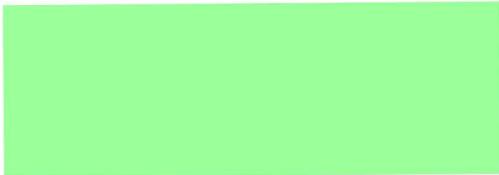
Petitioner:

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:

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.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting 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 appeal will be sustained. The petition will be approved.

The petitioner is a carpet cleaning business. It seeks to employ the beneficiary permanently in the United States as a supervisor, a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner failed to establish the continuing ability to pay the proffered wage from the priority date onward. The director denied the petition on May 1, 2008.

The Form ETA 750 was certified for [REDACTED] with an address of [REDACTED] Alexandria, Virginia, and the Form I-140 was submitted by that same organization. On May 30, 2008, [REDACTED] sold its business and transferred all ownership to [REDACTED] a Virginia limited liability company who continues to operate the same business at the same business location. The documentation submitted concerning the sale and transfer of ownership of this business shows that [REDACTED] qualifies as a valid successor-in-interest to the original petitioner, [REDACTED]. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

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.²

Upon review of the entire record, including evidence submitted on appeal and in response to the AAO's Request for Evidence (RFE), the AAO concludes that the petitioner has established that the petitioner had the continuing ability to pay the proffered wage from the priority date (January 27, 2004) onward.

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

¹ 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.

² 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).

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 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 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing on January 27, 2004. The proffered wage as stated on the Form ETA 750 is \$15.30 per hour (\$31,824 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position or two years of experience in any supervisory occupation.

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, 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.

The records show that the beneficiary has been paid wages exceeding the proffered wage from the priority date onward. Those wages were paid by [REDACTED] and its successor, [REDACTED] and are set forth as follows:

- 2004 [REDACTED] \$36,364.27
- 2005 [REDACTED] \$46,261.07
- 2006 [REDACTED] \$44,035.32

- 2007 [REDACTED] \$42,961.60
- 2008 [REDACTED] \$16,505.65 [REDACTED] \$20,703.12 Total wages of \$37,208.77
- 2009 [REDACTED] \$34,729.75
- 2010 [REDACTED] \$35,822.51
- 2011 [REDACTED] \$38,812.11
- 2012 pay stub showing earnings year-to-date of \$42,586.96 through December 16, 2012

As stated above, the wages paid to the beneficiary in all relevant years exceed the proffered wage and establish *prima facie* proof of the original petitioner's and its successor's ability to pay the proffered wage. It should further be noted that the petitioner has been in business (as stated on the petition) since 1981, and has submitted tax returns in support of its ability to pay the proffered wage for all required years. Based on the wages paid to the beneficiary as reported on the W-2 Forms in the record, it has been established that the petitioning entities have maintained the continuing ability to pay the proffered wage in all relevant years.

The petitioner has submitted suitable documentation to establish that the beneficiary has two years of supervisory experience as required by the Form ETA 750. It is noted that the petitioner responded to concerns raised by the AAO in its RFE regarding the beneficiary's work history and experience.

Under these circumstances, the appeal shall be sustained and the petition shall be approved.

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 appeal is sustained, and the petition is approved.