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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 06 178 51823

Office: NEBRASKA SERVICE CENTER

Date:

OCT 10 2008

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

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

The petitioner provides information technology services. It seeks to employ the beneficiary permanently in the United States as a network engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The petitioner claims to be a successor-in-interest to the entity that filed the alien employment certification and requests that the beneficiary in this matter be substituted for the original beneficiary listed on the alien employment certification.¹

The director determined that the petitioner was not the successor-in-interest to the entity that filed the alien employment certification and 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. Thus, the director denied the petition accordingly.

On appeal, counsel submits a brief and one page of the following memorandum: Michael Aytes, Acting Associate Director, Domestic Operations, *AFM Update: Chapter 22: Employment Based Petitions (AD03-01)*, September 12, 2006 (hereinafter "AFM Memo"). For the reasons discussed below, we uphold the director's bases of denial.

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 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on June 25, 2001. The proffered wage as stated on the Form ETA 750

¹ Substitution of the beneficiary is permitted pursuant to *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) (invalidating the portion of the interim final rule, 56 Fed. Reg. 54925, 54930 (Oct. 23, 1991), which eliminated substitution of labor certification beneficiaries by amending the Department of Labor (DOL) regulation at 20 C.F.R. § 656.30(c)(1)).

is \$75,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 2006.

On the petition, the petitioner claimed to have an establishment date in 2004, a gross annual income of \$1,500,000, an undisclosed net income and 15 employees. In support of the petition, the petitioner submitted a letter from Perry Dev, the petitioner's Vice President, asserting that the computer consulting operations of the entity that filed the Form ETA 750, Innotrex Corp, were acquired by STR Corp, which the petitioner then acquired. The petitioner also submitted an "Assignment of Employees" from STR Corp to the petitioner and the petitioner's 2004 Internal Revenue Service (IRS) Form 1120S. The assignment of employees stipulates that the assignee "accepts all responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United State Department of Labor."

The director deemed the evidence submitted insufficient to demonstrate that the petitioner was a successor-in-interest to Innotrex Corp., or that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. Thus, on August 24, 2006, the director requested additional evidence pertinent to these issues.

In response, the petitioner submitted a July 31, 2000 Certificate of Amendment of Certificate of Incorporation by SysNET resolving that the name of the corporation is Innotrex Corp. Thus, the petitioner has established that SysNET and Innotrex are one and the same. The petitioner also submitted an agreement and affidavit dated April 1, 2003 whereby Innotrex assigned Sysnet Technology Resources (STR) 18 of its employees. STR accepted "all responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United States Department of Labor." The petitioner also submitted an October 17, 2001 letter from [REDACTED] Director of the Business and Trade Services at the legacy Immigration and Naturalization Service (INS), now CIS. [REDACTED] is responding to a question regarding an attorney's client that "purchased a significant portion of company M's business assets and acquired over 2,000 of its employees." [REDACTED] asserts that legacy INS had taken the position "that a company is a successor-in-interest when it has taken on all of the immigration related liabilities of the company it has acquired, merged, etc." (Emphasis added.)

Regarding the ability of the petitioner and its alleged predecessors to pay the proffered wage, the petitioner submitted the 2001 IRS Form 1120S tax return for SysNET Consulting Services, Inc. (which we accept does business as Innotrex), the 2002 and 2003 IRS Form 1120S tax returns for STR and the 2005 IRS Form 1120S tax return for the petitioner. In addition, the petitioner submitted the petitioner's quarterly returns for the third and fourth quarters of 2005 and the first quarter of 2006. Finally, the petitioner submitted a March 15, 2005 letter from [REDACTED], Senior Account Manager at Aquent, confirming that STR "has" an agreement with Aquent to sell current receivables at 75 percent of their face value to Aquent up to \$150,000.

In his final decision, the director, relying on a memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000), concluded that the letter from [REDACTED] was not official CIS policy. Rather, the director concluded that the correct standard was found in *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482 (Commr. 1986). Regardless, the director noted [REDACTED] referenced an acquisition or merger, something that had not occurred in the instant case. Finally, the director noted that the list of transferred employees did not include either the current or original beneficiary. Thus, the director concluded that the petitioner had not established that it was the successor-in-interest to Innotrex. In addition, the director determined that the evidence submitted did not establish the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that *Matter of Dial Auto Repair Shop*, 19 I&N Dec. at 482 is no longer a valid precedent because it predates the 1992 agreement between legacy INS and DOL whereby INS would consider whether a new employer was a successor-in-interest for alien employment certifications that had already been approved by DOL. Counsel further asserts that even if Mr. [REDACTED] letter is not considered, recent guidance, in the form of the AFM Memo, requires only that the successor-in-interest assume “substantially all of the rights, duties, obligations, and assets of the original entity.” Counsel continues to assert that the employee transfers from Innotrex to STR and from STR to the petitioner were assignments of “computer consulting operations.” Counsel notes that each agreement references the assignee’s assumption of all contractual obligations for the assigned employees. Counsel explains that the primary assets of an information technology firm are its employees; thus, the agreements represent the assignment of “substantially all” of the assignors’ assets and liabilities. Regarding the absence of the original beneficiary’s name from the list of assigned employees, counsel explains that the original beneficiary left the employ of Innotrex before it assigned employees to STR. Counsel concludes that only the successor-in-interest status is relevant, not whether the original beneficiary was included in the employee transfer that resulted in this alleged status.

Regarding the ability to pay the proffered wage, counsel asserts that the director should have considered the letter from Aquent and that consulting companies which prepare their tax returns using the “cash basis” accounting method will show less earnings than expenses because the revenue is “delayed.”

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). We will evaluate counsel’s legal assertions below.

Successor-in-Interest

The DOL regulation at 20 C.F.R. § 656.30(c)(2) provides: “A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.” As stated above, there are limited provisions that allow an employer to

substitute a beneficiary,² as was done in this case, and that allow a successor-in-interest to utilize an alien employment certificate issued to its predecessor. *Matter of Dial Auto Repair Shop*, 19 I&N Dec. at 482.

We concur with the director that the petitioner has failed to establish that STR is the successor-in-interest to SysNET or that the petitioner is the successor-in-interest to STR. The alien employment certification was filed by Innotrex Corp. on June 25, 2001. The petitioner submitted a July 31, 2000 Certificate of Amendment of Certificate of Incorporation by SysNET resolving that the name of the corporation is Innotrex Corp. Thus, at issue is whether STR was the successor-in-interest to SysNET/Innotrex and whether the petitioner is the successor-in-interest to STR.

In his letter, [REDACTED] is responding to a question regarding an attorney's client that "purchased a significant portion of company M's business assets and acquired over 2,000 of its employees." [REDACTED] asserts that legacy INS had taken the position "that a company is a successor-in-interest when it has taken on all of the immigration related liabilities *of the company it has acquired, merged, etc.*" (Emphasis added.)

Even if we accepted the letter as authoritative for the proposition that the successor-in-interest must have only assumed the predecessor's immigration related rights, duties, obligations and assets, the letter from [REDACTED] presupposes an acquisition or merger. An assignment of a handful of employees does not constitute a buy-out or merger of any portion of the predecessor's business.

Regardless, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

The director relied on *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482, which counsel asserts lost its precedential value after 1992. We note that the legacy INS, Office of Examinations, issued a memorandum on April 28, 1992, entitled "I-140 Issues." The final section of this memorandum asserts that legacy INS would make determinations regarding successor-in-interest matters, defining these cases as "those where the prospective employer of an alien *has been bought out or merged, etc.*" (Emphasis added.) The memorandum concludes:

² Substitution of the beneficiary is permitted pursuant to *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) (invalidating the portion of the interim final rule, 56 Fed. Reg. 54925, 54930 (October 23, 1991), which eliminated substitution of labor certification beneficiaries by amending the DOL regulation at 20 C.F.R. § 656.30(c)(1)).

In these cases, petitioner should be requested to furnish evidence relating to the taking over of the predecessor business by the successor. Such evidence is usually in the form of a contract or agreement. . . . Although it refers to former procedures with the Department of Labor, see Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986), for guidance.

Thus, rather than replacing the guidance in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482, the 1992 memorandum implementing the agreement between legacy INS and DOL specifically references that decision as providing the proper guidance. Moreover, it is significant that the memorandum requires “the taking over” of the predecessor business, implying far more than a simple assignment of employees.

If the petitioner is purchased, merges with another company, or is otherwise under new ownership, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. See *Matter of Dial Auto Repair Shop*, 19 I&N Dec. at 482. 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. *Id.* The Commissioner in that case specifically stated that the petitioner in that matter had failed “to adequately describe *the transfer of business* from [redacted] Auto Body to Dial Auto Repair.” *Id.* at 483 (emphasis added).

Similarly, the record lacks evidence that SysNET transferred any of its business to STR or that STR transferred any of its business to the petitioner. The only rights, duties, obligations and assets of the predecessor assumed by STR and subsequently by the petitioner were the poorly defined “responsibilities and obligations relating to the employees listed herein, including, but not limited to, matters pertaining to the United States Immigration and Naturalization Service and the United States Department of Labor” and “contractual obligations” associated with those employees.

The record does not contain balance sheets for the assignors in the years that they assigned their employees. Nevertheless, the tax returns do show in general that the relevant companies all show significant assets and liabilities unrelated to their employees. For example, SysNET finished 2001 with \$740,378 in assets and over \$1,000,000 in liabilities (the exact number is unclear because the Schedule L for that year is barely legible). STR finished 2003 with \$129,489 in total assets and \$268,857 in liabilities. Even before assuming the rights and obligations for a handful of STR’s employees, the petitioner began 2005 with \$42,620 in assets and \$26,160 in liabilities.

Moreover, the record does not suggest that these companies had other business activities and transferred all or even substantially all of their “computer consulting operations.” SysNET lists its sole business activity as “software consulting” on its 2001 tax return, Schedule B. Similarly, STR lists its sole business activity as “consulting” on its 2002 and 2003 tax returns, Schedule B.

As stated above, the original beneficiary listed on the alien employment certification in this matter is not even one of the assigned employees. While counsel’s assertion that the only issue is whether the petitioner is the successor-in-interest to Innotrex might be reasonable in some circumstances, we

cannot ignore the minimal assignment of “assets” in this matter, a handful of employees. There is no evidence that either SysNET or STR terminated its computer consulting operations after the employee assignments. Given the extremely tenuous connections between SysNET and the corporations which have allegedly succeeded to its interests, the absence of the original beneficiary from the list of transferred employees is at least relevant.

In light of the above, we uphold the director’s conclusion that the petitioner is not successor-in-interest to the entity that filed the alien employment certification of record. Thus, that alien employment certification cannot support this petition.

Ability to Pay the Proffered Wage

As quoted above, the regulation at 8 C.F.R. § 204.5(g)(2) details the requirements that a petitioner demonstrate its ability to pay the proffered wage as of the priority date. Moreover, where a valid successor-in-interest relationship exists, the successor must demonstrate that the predecessor had the ability to pay the proffered wage. *Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481, 482. Thus, had the petitioner demonstrated that it was the successor-in-interest to Innorex, which it did not, it would be necessary to consider whether the petitioner and its alleged predecessors had the ability to pay the proffered wage during the relevant periods.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 did not establish that it or its purported predecessor-in-interest employed and paid the beneficiary any wages in 2001 through 2005.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner’s ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

While some of the tax returns are barely legible, the tax returns in the record appear to reflect the following information for the following years:

	2001 [†]	2002 [‡]	2003 [‡]	2004*	2005*
Net income	\$183,592	(\$45,697)	(\$204,857)	\$16,360	\$46,173
Current Assets	\$117,446	\$15,940	\$85,516	*	\$162,325
Current Liabilities	\$466,019	\$30,832	\$268,857	*	\$116,711
Net current assets	(\$348,573)	(\$14,892)	(\$183,341)	*	\$41,614

[†] From SysNET's return.

[‡] From STR's returns.

* From the petitioner's returns. The petitioner did not complete Schedule L in 2004; thus, we cannot determine the petitioner's current assets or current liabilities or calculate its net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary. In 2001, SysNET shows sufficient net income to cover the proffered wage. In 2002 and 2003, as acknowledged by counsel on appeal, STR shows a net loss and negative net current assets. The petitioner, therefore, has not demonstrated STR's ability to pay the proffered wage out of its net income or net current assets. The petitioner's net income in 2004 and 2005 is less than the proffered wage in both years.

³ According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

We cannot determine the petitioner's net current assets in 2004. In 2005, the petitioner's net current assets were also less than the proffered wage. Thus, the petitioner has not demonstrated its own ability to pay the proffered wage out of its net income or net current assets in 2004 or 2005.

Significantly, SysNET did not assign any employees to STR until April 2003. Thus, it is not clear why STR's tax return, and not that of SysNET, is relevant prior to 2003. Similarly, STR did not assign any employees to the petitioner until January 2005. Thus, it is not clear why the tax return of the petitioner, and not that of STR, is relevant for 2004. Without SysNET's 2002 tax return and STR's 2004 tax return, we cannot conclude whether they were able to pay the proffered wage in those years.

Counsel relies on the letter from Aquent to establish STR's ability to pay the proffered wage in 2002 and 2003. Counsel is not persuasive. Aquent agrees to buy STR's "current receivables" at 75 percent of face value. While this may assure that STR receives at least 75 percent of its current receivables when owed, it does not constitute additional funds available to SRT. As we have already considered the petitioner's net current assets above, which take into account current receivables, the agreement with Aquent could only serve to reduce those receivables by 25 percent. Moreover, the record lacks evidence that the petitioner has a similar agreement with Aquent or another entity. Thus, the agreement between SRT and Aquent cannot establish the petitioner's ability to pay the proffered wage in 2005. The petitioner has not demonstrated that any other funds were available to pay the proffered wage.

Finally, counsel's assertions regarding the significance of "cash basis" accounting are not persuasive. While SysNET and STR both indicate that they used "cash basis" accounting, the petitioner indicated on both its 2004 and 2005 tax returns, schedule B, that they were prepared using the accrual basis method. A company's choice of accounting methods attributes income to various years as appropriate. Changing from the cash method to the accrual method may change the year-to-year *distribution* of the petitioner's current assets and liabilities, but the petitioner has not satisfactorily demonstrated why changing from the cash to accrual method would make available tens of thousands of dollars that would otherwise not have appeared in any year.

In light of the above, even if we accepted that the petitioner is the successor-in-interest to Innotrex, and we do not, the petitioner failed to submit evidence sufficient to demonstrate that its purported predecessors-in-interest or it had the ability to pay the proffered wage during 2001 through 2005. Therefore, the petitioner has not established a continuing ability to pay the proffered wage beginning on the priority date.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not 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 not met that burden.

ORDER: The appeal is dismissed.