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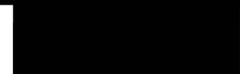
U.S. Citizenship  
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: OCT 14 2008

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IN RE:

Petitioner:



Beneficiary:

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:



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 software development services. It seeks to employ the beneficiary permanently in the United States as a software 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 (DOL). The director determined that the petitioner had not established that it was the successor-in-interest to the entity that filed the alien employment certification, Noriden Corporation, and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we find that the record as a whole is inconsistent regarding the prior and current relationship between the petitioner and Noriden Corporation. As the petitioner has not established with consistent credible evidence that the petitioner is the successor-in-interest to Noriden Corporation, we uphold the director's decision.

The 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."

Prior to March 17, 1992, DOL determined whether the same job offer remained in situations involving a new employer. On March 17, 1992, through an agreement with DOL, it was decided that the legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), would determine whether a successor-in-interest relationship existed between the original and new employer in the adjudication of Form I-140 petitions when an alien employment certification has already been issued. Michael Aytes, *AFM Update: Chapter 22: Employment-based Petitions*, AD03-01 (Sept. 12, 2006) (2006 Memo). *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (Comm. 1986) is the designated guidance for these determinations. See James A. Puleo, Assoc. Comm., *I-140 Issues*, CO 1803-C (April 28, 1992) (1992 Memo); James A. Puleo, Acting Exec. Assoc. Comm., *Amendment of Labor Certifications in I-140 Petitions*, HQ 204.24-P (Dec. 10, 1993) (1993 Memo).

In *Matter of Dial Auto*, the Commissioner held that a successor-in-interest relationship would be established if the petitioner documented that it had "assumed all of [the predecessor's] rights, duties, obligations, etc." 19 I&N Dec. at 482. Thus, a petitioner attempting to use an alien employment certification issued to a different business must submit documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. See 1993 Memo.

The 2006 Memo provides the following guidance as part of an update of the *Adjudicator's Field Manual*:

Successor in interest occurs when the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change such as corporate restructuring or merger with another business entity, and the new or merged, or restructured entity assumes substantially all of the rights, duties, obligations, and assets of the original entity. The petitioner must submit evidence of the change in ownership, the restructuring of the organization, or merger (usually by the submission of a contract or agreement).

As stated above, the alien employment certification was filed by [REDACTED] listing its address as [REDACTED]. [REDACTED] filed the Form ETA 750 on July 28, 2003 and DOL certified the form on August 31, 2006. The ETA 750 certified by DOL is not amended to reflect a new employer. On Block 7 of the ETA 750, Noriden indicated that the Corporate Place address was also the address where the beneficiary would work. On the Form I-140, the petitioner listed counsel's address on Part 1. In Part 6, however, the petitioner indicated that the beneficiary would work at [REDACTED] New Jersey. This is also the address for the petitioner listed on the Form G-28, Notice of Entry of Appearance as Attorney or Representative. The petitioner lists a Post Office Box address in [REDACTED] New Jersey on its tax returns and on the Form W-2 it issued to the beneficiary in 2005. In 2003, Noriden issued the beneficiary a Form W-2 listing Noriden's address as a Post Office Box [REDACTED] New Jersey. In 2004, [REDACTED] issued the beneficiary a Form W-2 listing [REDACTED] address as the Post Office Box in East Brunswick, New Jersey, used by the petitioner.

Initially, the petitioner submitted a document entitled "Resolutions of the Board of Directors" for the petitioner dated December 31, 2003. The resolution states:

- Noriden is a wholly owned subsidiary of the Corporation as of today.
- Noriden's capital and operation will be merged into Corporation within six (6) month[s].
- The Corporation will wholly own the current Noriden Corporation's shares when the operation is merged in six (6) month[s].
- The Corporation will wholly own Noriden subsidiary Infostream Software, Inc. when the merger becomes effective in six (6) month[s].

Thus, the resolution unambiguously states that as of December 31, 2003, [REDACTED] was a wholly owned subsidiary of the petitioner and that the petitioner resolved to "merge" with [REDACTED]. The document also provides the percentage of shares each shareholder will own after the merger and that

any one of the directors or officers of the corporation is authorized to sign all documents and perform such acts as may be necessary or desirable to give effect to the above resolutions.

In support of the petition, the petitioner submitted its 2003, 2004 and 2005 Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns. On Schedule K, line 3, for all three tax returns (including 2003), the petitioner indicated that at the end of the tax year it did not “own, directly or indirectly, 50% or more of the voting stock of a domestic corporation.”

In response to the director’s request for additional evidence, the petitioner submitted a document entitled “Resolutions of the Board of Directors” for Noriden dated January 1, 2004. The document resolves to “transfer all assets, tangible and intangible, including good will, client database, payroll records, equipments, and all aspects of business operations, free of liens, claims and judgments from any third parties, to [the petitioner].”

The petitioner also submitted a “Bill of Sale” dated January 1, 2004. The Bill of Sale purports to transfer from Noriden to the petitioner “all the goods and chattels, property and effects, listed in Schedule ‘A’ attached and incorporated herewith; and . . . [the] good will and business operations.”

The director concluded that the resolutions only evidenced the petitioner’s intent to merge with the Noriden and that the Bill of Sale was insufficient evidence of the sale because it was only signed by a representative of Noriden. The director also expressed concern that the Bill of Sale did not indicate “how financial assets and liabilities will be addressed after the merger/sale.”

On appeal, counsel references an October 17, 2001 letter from [redacted] of the Business and Trade Services at the legacy 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.”

The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer’s analysis of an issue. *See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

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 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> Cir. 2000) (an agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482 does not suggest that assuming only the predecessor's immigration rights, duties and obligations is sufficient.

Also on appeal, counsel asserts that the resolutions qualify under New Jersey law as "authorizations" and, thus, evidence more than mere intent. In addition, counsel asserts that the Bill of Sale "evidences the conveyance of all assets and the whole business operations from [redacted] Corporation to the petitioner Integrated Solutions, Inc." Counsel further asserts that the Bill of Sale only needs the signature of one officer of the conveying corporation because of the resolutions. Finally, counsel asserts that the petitioner operates from the same location as [redacted] and assumed [redacted] immigration liabilities, as evidenced by the 2005 Form W-2 issued by the petitioner to the beneficiary.

The record is inconsistent regarding the relationship between [redacted] and The petitioner both before and after the alleged "merger." The December 31, 2003 resolution states that Noriden was, as of that date, a wholly owned subsidiary of the petitioner and that within six months the two corporations would merge into a single corporation. As stated above, however, as of the end of the 2003 tax year, which is the calendar year for the petitioner, the petitioner indicated that it did not, in fact, own 50 percent or more of a domestic corporation. Moreover, contrary to counsel's assertion, according to the evidence of record, [redacted] and the petitioner did not operate from the same physical location, although they did share a Post Office Box in 2004 after the "merger" allegedly occurred.

In addition, [redacted] issued the beneficiary a 2004 Form W-2 for \$76,955.63. The amount of wages suggests that the Form W-2 covers most if not all of 2004. Yet [redacted] was allegedly merged with the petitioner on January 1, 2004. Finally, [redacted] has filed 11 immigrant and nonimmigrant petitions with CIS since January 1, 2004, the alleged date of the "merger," including a nonimmigrant visa petition in behalf of the beneficiary in the matter before us on November 4, 2004.<sup>1</sup>

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the above inconsistencies.

On appeal, counsel asserts that a signature from an officer of the "conveying corporation" is sufficient to effect a conveyance of all assets and the whole business operation." The December 31, 2003 resolution, however, references a "merger." Where a corporation owning at least 90 percent of another corporation seeks to merge with that subsidiary, it is the parent corporation, and not the subsidiary, that must approve the plan. [redacted] We acknowledge, however, that the December 31, 2003 resolution appears to document the petitioner's approval of the *plan*.

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<sup>1</sup> Counsel is also the attorney of record for this nonimmigrant visa petition.

Counsel further asserts on appeal: "In New Jersey, the transfer of assets and business from [redacted] Corporation to [the petitioner] is not required to be filed or authorized by any court, any appropriate Secretary of State, tax authority, or any other such entity." 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). Counsel did not submit any statutory language in support of his assertion. Regardless, the December 1993 resolution does not state that [redacted] would simply transfer its assets and business to the petitioner, but that [redacted], as a wholly owned subsidiary, would "merge" into the petitioner. A certificate of merger "shall" be executed on behalf of the parent corporation to effect the merger of a subsidiary corporation. [redacted] The executed original and a copy of the certificate "shall" be filed in the office of the Secretary of State and the merger shall become effective upon the date of the filing or at a later time, not to exceed 90 days from the date of filing, as may be set forth in the certificate. N. J. § 14A:10-5.1(4). The Secretary of State then forwards a copy of the Director of the Division of Taxation. *Id.* Thus, had the merger referenced in the December 31, 2003 resolution occurred, a certificate of merger should have been prepared and filed with the New Jersey Secretary of State. The record contains no evidence that the petitioner prepared or filed a certificate of merger.

Thus, while the petitioner may have authorized a merger of an alleged subsidiary, there is no consistent and credible evidence that [redacted] was a wholly owned subsidiary of the petitioner at the end of 2003 or that an actual merger took place. Specifically, the petitioner did not indicate that it had a wholly owned subsidiary on its 2003 tax return, Schedule K; no certificate of merger was filed with the New Jersey Secretary of State and [redacted] continued to issue exist after the date of the alleged merger, issuing Forms W-2 for most if not all of 2004 and filing visa petitions in 2004 and 2005.

As stated above, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. The record does not resolve the above inconsistencies.

In light of the above, we uphold the director's finding that the petitioner has not established that it is the successor-in-interest to the entity that filed the alien employment certification. Moreover, the petitioner has never explained why, if the merger occurred as claimed, it didn't seek to amend the ETA 750 while it was pending with DOL. The petitioner claims to have merged with its subsidiary in January 2004, more than two and half years before DOL certified the ETA 750. Thus, it is not even clear that the successor-in-interest issue should fall under our jurisdiction. Rather, it appears that the issue should have been resolved before DOL.

Beyond the decision of the director, even if we accepted that the petitioner is the successor-in-interest to [redacted] and we do not, the record does not establish [redacted] ability to pay the proffered wage as of the priority date. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has

all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. See, e.g., *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petitioner must establish not only its own ability to pay the proffered wage, but also the ability of the predecessor entity to pay the proffered wage as of the priority date until the time of the alleged merger. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482.

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 August 31, 2006. The proffered wage as stated on the Form ETA 750 is \$84,500 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for Noriden as of June 2002.

On the petition, the petitioner claimed to have an establishment date in 1996, a gross annual income of \$2,200,000, a net income of \$7,500 and 17 employees. In support of the petition, the petitioner submitted its 2003 through 2005 IRS Form 1120 tax returns and Forms W-2 issued to the beneficiary by ██████████ in 2003 and 2004 and the petitioner in 2005. In 2005, the petitioner paid the beneficiary \$122,884.50, more than the proffered wage. In 2004, Noriden paid the beneficiary \$76,955.63, \$7,544.37 less than the proffered wage. In 2003, Noriden paid the beneficiary \$35,481.53, \$49,018.47 less than the proffered wage.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), 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 employed and paid the beneficiary the full proffered wage in 2004 after the alleged merger took place on January 1, 2004. ██████████ did not pay the beneficiary the full proffered wage in 2003 or 2004.

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.

In 2004, the petitioner listed a taxable income before net operating loss deduction and special deductions of \$2,263, less than the proffered wage. Even if we were to consider [REDACTED] payment of wages to the beneficiary even though those wages were paid after the petitioner allegedly became [REDACTED] successor-in-interest, and we reiterate that it would be improper to do so, the petitioner's taxable income does not cover the difference between the wages paid by Noriden in 2004 and the proffered wage. The record does not contain [REDACTED] tax return for 2004 or any other evidence referenced at 8 C.F.R. § 204.5(g)(2). Thus, we cannot evaluate whether [REDACTED] had sufficient net income to pay the proffered wage in 2004. In 2003, before the alleged merger, [REDACTED] must show the ability to pay the \$49,018.47 difference between the proffered wage and the wages paid. As the petitioner has not submitted [REDACTED] 2003 tax return or any of the other evidence listed at 8 C.F.R. § 204.5(g)(2), we cannot determine whether [REDACTED] had sufficient net income from which to pay the proffered wage in 2003.

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.<sup>2</sup> 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.

In 2004, the petitioner had \$50,756 in current assets and \$162 in current liabilities, resulting in net current assets of \$50,594. These net current assets are not enough to pay the full proffered wage. As acknowledged above, ██████ paid the beneficiary wages in 2004, but these wages cannot be credited to the petitioner's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003). Even if we considered whether ██████ had the ability to pay the proffered wage in 2004, despite the fact that the alleged merger occurred on January 1, 2004, the record does not contain ██████ 2004 tax return. Thus, we cannot determine whether ██████ net current assets are sufficient to cover the difference between the wages paid and the proffered wage. Finally, without ██████ tax return for 2003 (or other evidence listed at 8 C.F.R. 204.5(g)(2)), we cannot determine whether its net current assets in 2003 were sufficient to cover the \$49,018.47 difference between the proffered wage and the wages paid.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown its ability or Noriden's ability to pay the proffered wage during the pertinent periods.

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.

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