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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



11 APR 2007

File: WAC 00 043 52524 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Unit

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a butcher shop and market. It seeks to employ the beneficiary permanently in the United States as a butcher. As required by statute, the petition was accompanied by an individual labor certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. However, no further documentation has been received. Therefore, a decision will be made based on the record as it is presently constituted.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is June 10, 1997. The beneficiary's salary as stated on the labor certification is \$11.55 per hour or \$24,024.00 per annum.

Counsel initially submitted a copy of the petitioner's unaudited financial statement for December of 1998, and a copy of the petitioner's 1998 Form 1040 Schedule C, Profit and Loss from

Business Statement which reflected gross receipts of \$871,856; gross profit of [REDACTED] depreciation of [REDACTED] wages of [REDACTED] and a net profit of [REDACTED]

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage. On September 8, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of June 10, 1997.

In response, counsel submitted copies of the petitioner's 1997 and 1999 Form 1040 U.S. Individual Income Tax Return including Schedule C, Profit and Loss from Business Statement. The petitioner's 1997 Form 1040 reflected an adjusted gross income of [REDACTED] Schedule C reflected gross receipts of [REDACTED] gross profit of [REDACTED] depreciation of [REDACTED] wages of [REDACTED] and a net profit of [REDACTED]. The 1999 Form 1040 reflected an adjusted gross income of [REDACTED] Schedule C reflected gross receipts of [REDACTED] gross profit of [REDACTED] depreciation of [REDACTED] wages of [REDACTED] and a net profit of [REDACTED].

The director determined that the additional evidence was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel states that "this appeal will be based upon the new owner's ability to pay the proffered wage and employer will supplement this Notice with evidence to establish this critical factor."

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the record does not contain any evidence of the petitioner's personal expenses nor does it show that the petitioner had other income or assets not included on Form 1040 with which to pay the proffered wage. Therefore, it is impossible to determine if the petitioner had income sufficient to pay the beneficiary and meet any expenses incurred by the petitioner and his family.

A review of the 1997 federal tax return shows that the adjusted gross income is [REDACTED] which includes the net profit of [REDACTED] from the business. If one includes the depreciation, the total is [REDACTED]. When the beneficiary's wage is subtracted from the adjusted income, the result is [REDACTED] more than the amount required to meet any expenses incurred by the petitioner and his family.

A review of the 1998 federal tax return shows that the total of the net profit and the depreciation is [REDACTED] less than the proffered wage.

A review of the 1999 federal tax return shows that the adjusted

gross income is \$19,085 which includes the net profit of [REDACTED] from the business. If one includes the depreciation, the total is [REDACTED]. When the beneficiary's wage is subtracted from the adjusted income, the result is [REDACTED] less than the amount required to meet any expenses incurred by the petitioner and his family.

It is also noted that counsel claims that the current owner is a successor-in-interest to the prior petitioner who filed the labor certification. The only evidence that counsel has provided, however, is a copy of the Sale Escrow Instructions for the business showing the new owner as the buyer. The same instructions list the seller as [REDACTED] not [REDACTED] as listed on the Form 1040 tax forms and the labor certification. It is therefore, impossible to determine if the current petitioner is a true successor-in-interest to the prior petitioner.

The INS considers an entity to be a successor-in-interest when it has taken over all the obligations, liabilities, rights, and assets of the original business and continues to operate the same business operated by the original business. See Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm'r 1986). A mere statement by counsel or the petitioner is not considered to be independent, objective evidence, and it is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972); Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition and continuing to present nor has it provided any persuasive documentation to establish that the current petitioner is a successor-in-interest to the prior owner.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

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.