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**U.S. Citizenship
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Services**

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BC



FILE: WAC-03-044-50438 Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2005

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:

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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and assembler of remote refrigerating systems and evaporators. It seeks to employ the beneficiary permanently in the United States as a refrigeration assembler and mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner was not a successor-in-interest to the petitioning entity on the labor certification and thus 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 and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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.

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 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 14, 1997. The proffered wage as stated on the Form ETA 750 is \$6.50 per hour, which amounts to \$13,520 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner but claimed to be self-employed as a refrigeration mechanic since October 1992.

On the petition, the petitioner claimed to have been established in June 1969, to have a gross annual income of \$1,845,000, and to currently employ 50 workers. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 18, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, [REDACTED] (Mr. [REDACTED], President & CEO of [REDACTED] Inc. [REDACTED]), submitted a letter to his then representative, stating the following, in pertinent part: "Your clients, when they started the process, they worked for [REDACTED] Co. In 1999 we transferred all employees to [REDACTED] Inc. In 2001 [REDACTED] Inc. merged

with [REDACTED] Inc.” The petitioner submitted [REDACTED]’s business license, quarterly wage reports, and corporate income tax return for 2001.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner’s continuing ability to pay the proffered wage beginning on the priority date, on September 12, 2003, the director requested additional evidence pertinent to that ability. The director sought evidence that [REDACTED] is a successor-in-interest to [REDACTED], the entity listed on the certified Form ETA 750A. The director sought federal tax returns from 1997 through 2001.

In response, the petitioner’s substituted counsel stated the following, in pertinent part:

At this time, the [REDACTED] employees have effectively been absorbed into [REDACTED] although this occurred in an informal manner through agreement of the common owners. . . . [REDACTED] Inc., [REDACTED] and [REDACTED] are all part of the same group of companies, with common ownership. However, as there has never been a change of ownership or formal merger, the [p]etitioner is unable to provide the specific type of documentation requested.

The petitioner submitted another letter, dated August 12, 2003, signed by Mr. [REDACTED], this time addressed to the director, which stated the following, in pertinent part:

We at this company are the petitioners for . . . [the beneficiary]. All of these employees started working with us under our original name [REDACTED], all of Bridgewater employees were merged to [REDACTED] Inc. on April 29, 1999. In April 11, 2001, [REDACTED] merged with OmniTemp Shop Department to form [REDACTED]. All companies have common ownership. . . . [B]y writing this letter we are assuming all the rights, duties, and obligations as the original employer and we continue to operate the same type of business as the original Bridgewater.

The petitioner submitted Form 1120 Corporate tax returns for [REDACTED] Inc. (Clermont, Bridgewater & Associates, located at 9301 Stewart and Gray Road, Downey, CA 90241, with an employer identification number [REDACTED] for years 1997 through 2000. [REDACTED]’s taxes reflect that it was incorporated in 1969, is co-owned [REDACTED] each by 50%, and that its business activity is sales of restaurant equipment. An attachment to [REDACTED] taxes reflects that three companies are “component members of a controlled group of corporations,” consenting to a tax apportionment plan, and those companies are: [REDACTED] Inc., [REDACTED] Industries, Inc. with a [REDACTED] with [REDACTED]. All three companies list their street address [REDACTED].

The petitioner also submitted Form 1120 Corporate tax returns for [REDACTED] “and subsidiaries,” located [REDACTED] with an EIN [REDACTED] 2001. [REDACTED]’s taxes reflect [REDACTED] is co-owned by [REDACTED] including [REDACTED] as well as [REDACTED] Inc., including [REDACTED] and Westac, including [REDACTED] that its business activity is a holding company for stock. [REDACTED] listed its subsidiaries as [REDACTED] (Clermont) and [REDACTED] both located at [REDACTED].

and Gray Road. Omnimet's EIN [REDACTED] and both list their principal business activity as manufacturing and/or installation.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on January 30, 2004, denied the petition. The director noted that although the two sets of tax returns indicated some similar ownership, he also noted that the two entities were very different and it was not clear that [REDACTED] Inc., [REDACTED] & Associates, and [REDACTED] do business in each other's names or are entirely different and that none of them match the name on the Form ETA 750A.

On appeal, counsel asserts that the director erred and the petitioner is a successor-in-interest and that he would submit a brief within 30 days. The AAO has not received any additional brief, evidence, or correspondence from the petitioner or counsel since the filing of the appeal. On June 7, 2005, the AAO faxed a notice to counsel and the petitioner's representative informing them that the AAO did not receive the brief counsel stated would be sent within 30 days of filing the appeal. The AAO requested a response within five (5) days from that faxed notice. More than three (3) weeks later, the AAO has still not received any response or communication from the petitioner or counsel. Thus, the appeal will be adjudicated based upon the record of proceeding as constituted upon filing the appeal.

The record contains no evidence that the petitioner, Omniteam, qualifies as a successor-in-interest to [REDACTED] despite the August 12, 2003 letter stating that they are and have assumed all rights, duties, and obligations. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, the AAO concurs with the director's findings. The record of proceeding does not contain any evidence of a merger or acquisition, but of two distinct business entities engaged in different business activities, with different identification numbers and ownership compositions. Neither of the two business entities clearly incorporate the assets and liabilities of [REDACTED]. No evidence was presented that relates to [REDACTED] at all, such as its corporate tax returns in 1997 when it filed the labor certification application, or in 2002, when it filed the instant petition. If Omniteam had already acquired the assets and liabilities of [REDACTED] at the time it filed the visa petition, then the proper procedure would have been for Omniteam to file the petition and submit evidence that it was a successor-in-interest to [REDACTED] along with evidence of [REDACTED]'s ability to pay the proffered wage at the priority date until it transferred its assets and liabilities to [REDACTED]. [REDACTED] stated that an undocumented merger occurred between "Bridgewater" to Wesfac to [REDACTED]. If [REDACTED], or [REDACTED] is no longer doing business, the state corporate regulatory agency would have had to be notified and a certificate issued stating so. The record of proceeding does not contain any such evidence. It seems unlikely that multiple corporate entities would merge without any written protection against future contract disputes.

Since Omniteam has not submitted evidence of its successorship to [REDACTED] then counsel's reliance on the assets of [REDACTED] and [REDACTED] is not persuasive. 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). Citizenship and Immigration Services (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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1997, 1998, 1999, 2000, or 2001.

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. 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); *Ubedu v. Palmer*, 539 F. Supp. 647 (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. 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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through

¹ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

18. 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.

█ tax returns reflect the following information for the following years:

	<u>1997</u>	<u>1998</u>	<u>1999</u>
Net income ²	-\$73,366	\$22,618	\$28,816
Current Assets	\$257,622	\$218,876	\$544,955
Current Liabilities	\$137,190	\$73,501	\$271,744
Net current assets	\$120,432	\$145,375	\$273,211

Omniteam's tax returns reflect the following information for the following years:

	<u>2000</u>	<u>2001</u>
Net income ³	-\$50,722	-\$11,697
Current Assets	\$5,922,349	\$5,934,700
Current Liabilities	\$1,821,863	\$1,782,008
Net current assets	\$4,100,486	\$4,152,692

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997, 1998, 1999, 2000, or 2001. Both █ and █ demonstrate substantial net current assets in every relevant year, which are sufficient enough to pay the proffered wage. However, absent a preponderance of evidence that both entities are related to and/or successor-in-interests to █ their strong financial evidence may not be attributed to the petitioner. No regulatory sanctioned evidence was submitted from █ Refr. Thus, the petitioner has not, therefore, shown the ability to pay the proffered wage during any relevant year.

Omniteam failed to submit evidence sufficient to demonstrate that it is a successor-in-interest to █ Additionally, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is insufficient evidence in the record of proceeding that the beneficiary is qualified to perform the duties of the proffered position⁴. To be eligible for approval, a beneficiary must have the

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

³ See note 2, *supra*.

⁴ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

education and experience specified on the labor certification as of the petition's filing date, which as noted above, is October 14, 1997. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of refrigeration assembler and mechanic. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	X
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have three years of training in order to perform the job duties listed in Item 13, which states the following:

Designs, assembles and installs [sic] industrial refrigerating systems according to specifications and/or blueprints using knowledge of refrigeration, structural layout and function and design of system. Uses measuring instrument, such as tape, levels and squares. And welding equipment [sic]. Screws, bolts, rivets, welds, and brazes parts to assemble structural and functional components. May insulate shells and cabinets of systems. May install wiring to connect components to electric power source uses [sic] hand tools and acetylene welding equipment to affix parts of refrigeration fixture and/or equipment.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for Chromizing Refrigeration, in Mexicali, Baja California, Mexico, as a refrigeration mechanic from 1988 to January 1992 repairing domestic and commercial refrigeration, re-constructing and assembling air conditioning units, and running diagnostic checks on refrigerators and air conditioners.

With the initial petition, the petitioner submitted no evidence of the beneficiary's qualifications. Thus, the director requested additional evidence concerning the evidence of the beneficiary's qualifications on April 28, 2003. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week.

In response to the director's request for evidence, the petitioner submitted diplomas, with accompanying transcripts, issued to the beneficiary for completion of commercial and domestic refrigeration repair in 1989, in Spanish, with an English translation. The petitioner also submitted a translated notarized testimonial, dated May 14, 2003, on notary paper signed by [redacted] who worked with [the beneficiary] together in 1997 at a company [redacted] in this city of Mexicali Baja California, under the job description of refrigeration mechanic, working an average of 40 hours per week."

The director's subsequent request for evidence and decision failed to further address the beneficiary's qualifications

for the proffered position.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO notes that the testimonial and educational achievements do not reflect that the beneficiary acquired three years of qualifying employment experience prior to the priority date. The testimonial is not from the beneficiary's "trainer or employer" and does not provide a description of the "training received or experience." There is no letter at all in the record of proceeding [REDACTED] which fails to comply with the regulatory requirements set forth at 8 C.F.R. § 204.5(1)(3).

Additionally, the beneficiary indicated on the Form ETA 750B that he worked as a refrigeration mechanic from 1988 to January 1992 [REDACTED] set forth in his testimonial. The beneficiary indicated that he was in the United States in 1997. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on 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."

Because of the failure to submit evidence required under 8 C.F.R. § 204.5(1)(3) and the inconsistencies and discrepancies in the information and evidence provided, the petitioner has failed to establish that the beneficiary has three years of qualifying employment experience proving that he is qualified to perform the duties of the proffered position.

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.