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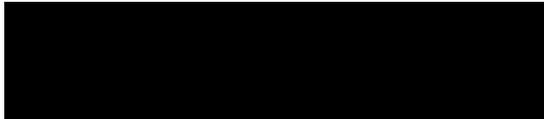


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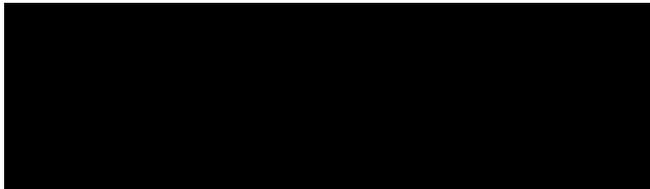
FILE: WAC 02 214 54542 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



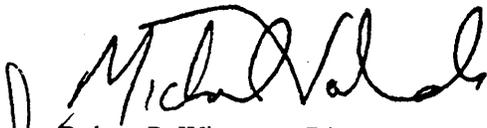
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The matter will be remanded.

The petitioner is a manufacturer and assembler of remote refrigeration systems and evaporators. It seeks to employ the beneficiary permanently in the United States as a refrigeration 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 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 granting 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 equals \$13,520 per year.

On the petition, the petitioner stated that it was established during June 1969 and that it employs 50 workers. The petitioner further stated that it has gross annual income of \$1,845,000 and net annual income of \$212,000.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from December 1993 to July 1997, but did not claim to have worked for the petitioner at any time since the priority date. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Downey, California.

The petitioner submitted no evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date in support of the petition. Therefore, on May 22, 2003, the California Service

Center requested, *inter alia*, evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center also specifically requested the petitioner's tax returns for the years from 1997 through 2002.

In response, counsel submitted a letter, dated February 18, 2003, from the president and CEO of ██████████ Incorporated, who previously signed a letter as president of the original petitioner. The February 18, 2003 letter states that the petitioner, in 1999, transferred all of its employees<sup>1</sup> to ██████████ Incorporated which, in 2001, merged with ██████████ Incorporated.

Counsel submitted the nominal 2001 Form 1120 U.S. Corporation Income Tax Return of ██████████ Inc. and subsidiaries." That return shows that ██████████ reports taxes based on a fiscal year running from September 1 of the nominal year to August 31 of the following year. During its fiscal year 2001, which ran from September 1, 2001 to August 31, 2002, ██████████ declared a loss of \$11,697 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that fiscal year ██████████ had current assets of \$5,934,700 and current liabilities of \$1,782,008, which yields net current assets of \$4,152,692.

Counsel also submitted a 1994, 1995, 1996, and 1997 Form W-2 Wage and Tax Statements showing that ██████████ Associates paid the beneficiary wages of \$16,579.65, \$18,598.46, \$19,023.65, and \$13,942.84 during those years, respectively. Because the priority date of the instant petition is October 14, 1997, evidence of amounts the petitioner paid to the beneficiary during prior years, and evidence pertinent to the petitioner's finances during prior years, is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The amount shown on the 1997 W-2 form, however, is relevant.

Counsel submitted Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002. Those reports show that ██████████ Incorporated paid total wages of \$1,205,969, \$1,187,652, \$1,589,780, and \$1,354,720 during those quarters, respectively.

Counsel also submitted photocopies of pay stubs showing amounts that ██████████ Associates paid to the beneficiary from 1993 to 1997. The most recent of those pay stubs is for the pay period from June 18, 1997 through June 24, 1997. Because all of those pay stubs were for work performed prior to the October 14, 1997 priority date, they are not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, even assuming that the petitioner and ██████████ & Associates are identical.

Counsel did not provide copies of annual reports, federal tax returns, or audited financial statements for 1997, 1998, 1999, 2000, or 2002, although they were specifically requested.

On May 22, 2003 the California Service Center issued another request for evidence in this matter. In that request the Service Center noted that a new petitioner appears to have been substituted for the petitioner who

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<sup>1</sup> That the petitioner transferred its employees is insufficient, of course, to demonstrate that a true successor-in-interest exists in this case.

originally filed in this matter, and asked for evidence that the new petitioner is the original petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).<sup>2</sup> The Service Center also reiterated its request for copies of annual reports, federal tax returns, or audited financial statements showing the petitioner's ability to pay the proffered wage from 1997 to 2002.

In response, Omniteam Incorporated submitted a letter, dated August 12, 2003, stating that [REDACTED] "merged to [sic] [REDACTED], Inc. on April 29, 1999," and that on April 11, 2001 [REDACTED] merged with [REDACTED] Shop Department to form OmniTeam. That letter further states that, ". . . by writing this letter we are assuming all the rights, duties, and obligations as the original employer . . ."

[REDACTED] also provided an additional copy of its 2001 tax return and additional copies of its Form 941 Employer's Quarterly Federal Tax Returns for all four quarters of 2002. It did not then provide annual reports, federal tax returns, or audited financial statements to demonstrate the petitioner's ability to pay the proffered wage during 1997, 1998, 1999, 2000, or 2002, although that evidence had been specifically requested twice.

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 October 25, 2003, denied the petition. That decision did not address the issue of whether the substituted petitioner is the original petitioner's successor-at-interest within the meaning of *Dial Repair Shop*.

On appeal, counsel provides the 1997, 1998, and 1999 Form 1120 U.S. Corporation Income Tax Returns of [REDACTED] Inc. [REDACTED] Associates," and the 2000 Form 1120 U.S. Corporation Income Tax Return of [REDACTED] Inc. and Subsidiaries."

Counsel argues that those returns show the petitioner's continuing ability to pay the proffered wage beginning on the priority date, stressing the gross receipts, total wage expense, and compensation to officers shown on those returns.

The nominal 1997, 1998, and 1999 returns show that [REDACTED] Inc. [REDACTED] Associates reported taxes pursuant to a fiscal year that ran from May 1 of the nominal year to April 30 of the following year.

The fiscal year 1997 return, which covers the period from May 1, 1997 to April 30, 1998, shows that [REDACTED], Incorporated declared a loss of \$73,366 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$257,652 and current liabilities of \$137,190, which yields net current assets of \$120,432.

The fiscal year 1998 return, which covers the period from May 1, 1998 to April 30, 1999, shows that [REDACTED], Incorporated declared taxable income before net operating loss deduction and special deductions of

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<sup>2</sup> Although the Request for Evidence did not explicitly refer to *Dial Repair Shop* it asked for documentation to show how the change in ownership occurred and documentation to show that the substituted petitioner had assumed all of the original petitioner's rights, duties, obligations, and assets.

\$22,618 during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$218,867 and current liabilities of \$73,501, which yields net current assets of \$145,375.

The fiscal year 1999 return, which covers the period from May 1, 1999 to April 30, 2000, shows that [REDACTED] Incorporated declared taxable income before net operating loss deduction and special deductions of \$28,815 during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$544,955 and current liabilities of \$271,744, which yields net current assets of \$273,211.

The fiscal year 2000 return shows that during the period from September 1, 2000 to August 31, 2001, [REDACTED], Inc. and Subsidiaries declared a loss of \$50,722 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year [REDACTED] had current assets of \$5,922,349 and current liabilities of \$1,821,863, which yields net current assets of \$4,100,486.

Counsel's reliance on the size of the petitioner's, [REDACTED], and [REDACTED] gross receipts and the size of their various expenses is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient. Showing that the petitioner's gross receipts exceeded, or greatly exceeded, the proffered wage is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>3</sup> or otherwise increased its net income,<sup>4</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 at any time since the priority date.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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); *Ubeda 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.*

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<sup>3</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>4</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

*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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$13,520 per year. The priority date is October 14, 1997.

During 1997 the petitioner paid the beneficiary \$13,942.84. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1997.

The petitioner did not demonstrate that it paid any wages to the beneficiary during any year after 1997 and must show the ability to pay the proffered wage during those years out of its net income, its net current assets, or other funds at its disposal during those years.

During its fiscal year 1998 the petitioner declared taxable income before net operating loss deduction and special deductions of \$22,618. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998

During its fiscal year 1999 the petitioner declared taxable income before net operating loss deduction and special deductions of \$28,815. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 1998

During its fiscal year 2000 [REDACTED] Inc. and Subsidiaries declared a loss of \$50,722 as its taxable income before net operating loss deduction and special deductions. [REDACTED] is unable to show that, if it had been obliged to pay the proffered wage, it would have been able to pay it out of its income during that year. [REDACTED] ended the year, however, with net current assets of \$4,100,486. That amount is sufficient to pay the proffered wage. Assuming that [REDACTED] qualifies as the petitioner in this matter, the petitioner has demonstrated the ability to pay the proffered wage during 2000.

During its fiscal year 2001 [REDACTED] declared a loss of \$11,697 as its taxable income before net operating loss deduction and special deductions. [REDACTED] is unable to show that, if it had been obliged to pay the proffered wage, it would have been able to pay it out of its income during that year. [REDACTED] ended the year, however, with net current assets of \$4,152,692. That amount is sufficient to pay the proffered wage. Assuming that [REDACTED] qualifies as the petitioner in this matter, the petitioner has demonstrated the ability to pay the proffered wage during 2001.

Assuming that [REDACTED] qualifies as the petitioner in this case, the petitioner has demonstrated the ability to pay the proffered wage during each fiscal years for which evidence was submitted.<sup>5</sup>

The decision of denial did not address the issue of whether Omniteam is the petitioner's successor-in-interest within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). Pursuant to that decision, the successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. 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.

The successor-at-interest petitioner is obliged to show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-at-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business.

The letter of August 12, 2003, described above, is insufficient to show that the substituted petitioner assumed all of the liabilities of the original petitioner. The petitioner must show that, by the very nature of the merger, acquisition, or other transaction that caused the original petitioner to be subsumed, the substituted petitioner assumed all of its debts and obligations. No evidence in the record demonstrates that those debts and obligations were assumed by the substituted petitioner, rather than assumed by another entity or extinguished.

This office notes, however, that basis of the original decision has been overcome, and the decision did not address the successor-in-interest issue. As such, the substituted petitioner has not been accorded an opportunity to be heard on that issue.

The matter will be remanded to the Service Center for further consideration and action, including issuance of a new decision. The director may request additional evidence pertinent to the acquisition of the interests of

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<sup>5</sup> The tax returns submitted do not cover the months of May, June, July, or August 2000. Upon remand, even if the successor-in-interest issue is decided in the petitioner's favor, the director may wish to request evidence of the petitioner's ability to pay the proffered wage during those months. Further, that the February 18, 2003 letter states that the petitioner transferred its employees to [REDACTED] at some time during 1999 appears to indicate that the petitioner's fiscal year 1999 tax return cannot be used to show the petitioner's ability to pay the proffered wage during the portion of 1999 after the transfer or during the first four months of 2000. Again, as per *Dial Repair Shop, Supra*, the petitioner is obliged to provide evidence establishing the date and the nature of the two transfers of interest the evidence indicates took place from the original petitioner to [REDACTED] and from [REDACTED] to [REDACTED]. Further still, the record contains no evidence of the ability of [REDACTED] to pay the proffered wage during the period after it acquired some unstated interest in the petitioner.

the original petitioner by the substituted petitioner, or evidence pertinent to any other issue bearing on whether the instant petition may be approved.

**ORDER:** The petition is remanded for further consideration and action in accordance with the foregoing.