



U.S. Citizenship  
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Services

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FILE: EAC-02-226-52172 Office: VERMONT SERVICE CENTER

Date **MAY 23 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, Director  
Administrative Appeals Office



accompanying letter from counsel stated that the petitioner “amended the name of the corporation that is now known as Nova Surfaces Inc.” and that, “[t]his new corporation is the successor in interest to the previous entity and has acquired all of the company’s assets/liabilities and immigration obligations.”

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

	The petitioner <u>2001</u>	<u>2002</u>
Net income <sup>1</sup>	-\$76,280	\$28,930
Current Assets	\$88,181	\$232,540
Current Liabilities	\$73,107	\$35,797
Net current assets	\$15,074	\$196,743

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 July 8, 2003, denied the petition, citing the petitioner’s loss in 2001.

On appeal, counsel asserts that the petitioner’s assets are sufficient to demonstrate its continuing ability to pay the proffered wage. The petitioner resubmits the 2002 corporate tax return of [REDACTED] as well as the petitioner’s 2002 corporate tax return submitted for the first time on appeal. The petitioner’s 2002 corporate tax return reflects that its net income was -\$38,117 and its net current assets were \$0.

At the outset, the record contains no evidence that [REDACTED] qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that [REDACTED] has assumed all of the rights, duties, and obligations of the petitioner. Even if [REDACTED] were doing business at the same location as the petitioner, it would not necessarily establish that Nova Surfaces is a successor-in-interest to the petitioner. 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, counsel merely asserts that there is a qualifying relationship between the petitioner and [REDACTED] without providing any documentation. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO notes that the petitioner and Nova Surfaces have different EIN and addresses and their ownership is different. The petitioner is 100% owned by [REDACTED] but [REDACTED] is co-owned by [REDACTED]. Counsel on appeal states that the petitioner “was acquired” by [REDACTED] however, no documentation, such as a purchase and acquisition agreement, or

<sup>1</sup> Ordinary income (loss) from trade or business activities as reported on Line 21.

other type of documentation illustrates that the petitioner's liabilities and assets have transferred [REDACTED]

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2001 or 2002<sup>3</sup>.

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); *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. 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, counsel's argument that the petitioner's total assets should have been 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.

<sup>2</sup> If those liabilities and assets have not transferred, then the petitioner may not rely upon [REDACTED] since 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 that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, \*3 (D. Mass. Sept. 18, 2003).

<sup>3</sup> The beneficiary indicated on Form ETA 750B, under a penalty of perjury, that he was not employed by the petitioner during those years.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> 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 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.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a negative net income and net current assets of only \$15,074 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets in that year. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001. Even [REDACTED] were to establish that it was a successor-in-interest to the petitioner, the petitioner has failed to establish its continuing ability to pay the proffered wage beginning on the priority date in 2001<sup>5</sup>.

The petitioner has failed to establish that [REDACTED] its successor-in-interest. The petitioner's 2002 tax return submitted on appeal reflects negative net income and no end-of-year current assets or liabilities. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002<sup>6</sup>.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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>4</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup> As noted above, 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. at 481. Although [REDACTED] if it could establish that it is a successor-in-interest to the petitioner, could demonstrate an ability to pay the proffered wage in 2002 out of its net income or net current assets since both are greater than the proffered wage, it would still have to overcome the petitioner's deficiency in 2001.

<sup>6</sup> See note 5, *supra*.