

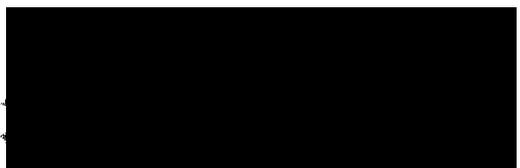
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship and Immigration Services



Ble

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **MAY 23 2005**
SRC-03-072-51890

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)

ON BEHALF OF PETITIONER:
[Redacted]

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides financial services. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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. Additionally, the director determined that a successor-in-interest to the petitioner, Financial Experts One Inc., was not incorporated prior to the priority date.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$28.50 per hour, which amounts to \$59,280 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner and failed to list his employment experience after 1996.

On the petition, filed on January 13, 2003, the petitioner claimed to have been established on August 17, 1999, to have a gross annual income of \$423,277, and to currently employ six workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation, for the year 2001. While the address of the petitioner on the petition did not match the address of the petitioner on its corporate taxes, its employer identification number (EIN) matched its representation that it was [REDACTED] when it filed the petition in January 2003.

On July 31, 2003, the director issued a notice of intent to deny the petition because the petitioner's attorney of record was [REDACTED] who was arrested, charged, and convicted of committing immigration fraud. The director's notice detailed a list of questions to verify the authenticity of the petition and the petitioner's sponsorship of the beneficiary that will not be recited in this decision due to its length and inclusion in the public record.

The petitioner hired new counsel and submitted a response to the director's notice of intent to deny on August 27, 2003. Counsel used the name Financial Experts One Inc. in reference to the petitioner, documents showing the incorporation of Financial Experts One Inc. and its acquisition of the petitioner, and financial documents for both entities. Included in these documents are the following relevant items: a commercial lease entered into by Financial Experts One Inc. on September 20, 2001; a print-out from Corporations Online Public Inquiry showing that Financial Experts One, Inc. filed to be incorporated on May 22, 2001; articles of incorporation showing that Financial Experts One, Inc. was incorporated on May 22, 2001; Financial Experts One, Inc.'s 2001 and 2002 corporate federal tax returns filed on Form 1120S with an EIN of [REDACTED] but an address not matching the petitioner's address on the visa petition; the petitioner's 2002 corporate tax return; unaudited balance sheets; a letter signed by the petitioner's president, dated February 4, 2002, stating that all of the petitioner's assets are to be transferred to Financial Experts One Inc.; a bank statement showing that Financial Experts One, Inc. held a balance of \$16,179.37 at the end of July 2003; and W-2 forms relating to Financial Experts One, Inc., but none showing wages paid to the beneficiary. The petitioner also submitted a statement that its president is the half-brother of the beneficiary.

On November 18, 2003, the director issued a second notice of intent to deny the petition stating that the evidence was insufficient to establish that Financial Experts One, Inc. is a successor-in-interest to the petitioner for failure to submit a contract or agreement illustrating a change in ownership and transition of assets between the two entities. The director stated that Financial Experts One, Inc. must demonstrate its ability to pay the proffered wage on the priority date, but since it was not in existence on the priority date, it could not do so. The director also stated that she had accessed documentation from the Florida Department of State Division of Corporations website that showed that Financial Experts Inc. filed an "Admin Dissolution for Annual Report" on September 19, 2003, and since it is no longer doing business, it could not demonstrate a continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted unaudited but compiled financial statements of Financial Experts One, Inc. as of October 2003, a previously submitted tax return, and an Asset Transfer Agreement, dated December 3, 2003, and stating that as of the date of closing, February 4, 2002, all of the petitioner's assets and liabilities, contractual rights, and licenses are assigned and transferred to Financial Experts One, Inc. The agreement is signed by [REDACTED] as president for both the petitioner and Financial Experts One, Inc. The petitioner's corporate tax return and Financial Experts One, Inc.'s corporate tax return reflect that Mr. [REDACTED] 100% shareholder and owner of both entities. Counsel's accompanying letter states that both entities are the same company, but that the petitioner served as a mortgage broker only and as the petitioner's business grew, its Board decided to change its name to Financial Expert One, Inc. and add licensed lending services to its business repertoire.

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 31, 2003, denied the petition. The director stated the following:

The evidence submitted indicates that Financial Experts One Inc [sic] is the successor in interest to [the petitioner]. Consequently, the petitioner must establish that Financial Experts One Inc [sic] has the ability to pay the proffered wage as of the priority date.

As noted earlier, the priority date is April 30, 2001. Financial Experts One Inc [sic] was incorporated on May 22, 2001. As Financial Experts One Inc did not legally exist as of the priority date, he cannot establish his ability to pay the proffered wage as of the priority date.

On appeal, counsel asserts that the evidence is sufficient to demonstrate that all assets were transferred from the petitioner to Financial Experts One, Inc and that they are the same company. The petitioner resubmits previously submitted evidence, as well as audited financial statements. The audit reviewed Financial Experts One, Inc.'s balance sheet as of February 28, 2002 but states nothing about the receipt of the petitioner's assets.

At the outset, the director erroneously states that Financial Experts One, Inc. must demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Rather, the successor-in-interest must show *its predecessor's* ability to pay the proffered wage on the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The AAO concurs with the director's finding that Financial Experts One, Inc. is a successor-in-interest to the petitioner. Since both entities are wholly-owned by one individual, the letter commemorating the transfer of assets from February 2002 was sufficient evidence of such a transfer since Mr. Ruiz is capable of contractually binding both entities.

The issue in this case is whether or not the predecessor entity, the initial petitioner (Financial Experts Inc.), demonstrated its ability to pay the proffered wage as of the priority date, and whether or not the successor-in-interest entity, the subsequent petitioner (Financial Experts One, Inc.), can demonstrate a continuing ability to pay the proffered wage from the date it acquired the initial petitioning entity's assets and liabilities, which is February 2002.

At the outset, the unaudited financial statements that counsel submitted in response to the director's notices of intent to deny are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Also at the outset, counsel's reliance on the balance in the successor-in-interest's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioning entity's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the successor-in-interest in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the successor-in-interest. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the successor-in-interest's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the successor-in-interest's net current assets.

The predecessor's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ¹	\$82,898	\$6,628
Current Assets	\$12,286	\$0
Current Liabilities	\$353	\$0
Net current assets	\$11,933	\$0

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

The successor-in-interest's tax return reflects the following information for 2002:

	<u>2002</u>
Net income ²	\$32,557
Current Assets	\$22,332
Current Liabilities	\$808
Net current assets	\$21,524

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.

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. 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.³ A corporation's year-end current

² See note 1, *supra*.

³ 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,

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 predecessor petitioning entity had net income of \$82,898 and net current assets of \$11,933 in 2001 and for the first month in 2002 showed net income of \$6,628 and no net current assets. The proffered wage is \$59,280. The predecessor petitioning entity's net income of \$82,898 in 2001 is greater than the proffered wage and thus demonstrates the predecessor petitioning entity's ability to pay the proffered wage beginning on the priority date. In 2002, the petitioner is liable for demonstrating that it could pay one month of the proffered wage, which would be \$4,940 dividing \$59,280 by twelve months. The petitioner's net income of \$6,628 in 2002 is greater than the pro-rated proffered wage in 2002 and thus demonstrates the predecessor petitioning entity's ability to pay the proffered wage throughout the timeframe it is obligated to do so.

The successor-in-interest's net income in 2002 was \$32,557 and its net current assets were \$21,524. It is obligated to demonstrate it could pay eleven months of the proffered wage, which would be \$54,340, multiplying \$4,940 by eleven. The petitioner's net income and net current assets are less than that pro-rated proffered wage, and thus fails to demonstrate the successor-in-interest's continuing ability to pay the proffered wage throughout the timeframe it is obligated to do so.

Beyond the decision of the director, the AAO is also concerned about inconsistent and seemingly deceptive representations made by the petitioner⁴. The predecessor entity was acquired in February 2002, but the petitioner filed the instant petition using its name, identifying information, and evidence pertaining to it, when it filed the petition in January 2003. The petitioner stated its intention to transfer all assets and liabilities from the predecessor entity to the successor-in-interest entity in its letter signed by Mr. [REDACTED] in February 2002. The proper and legal expectation was that the successor-in-interest would file the petition along with an explanation of the change in ownership and transfer of assets and liabilities. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition." *Matter of Ho*, 19 I&N Dec. at 591-592 also 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."

Also beyond the decision of the director⁵, in response to a notice of intent to deny and a specific query concerning familial relationships involved in this matter, only then did the petitioner disclose its president's half-brother relationship to the beneficiary. The petitioner did not disclose that fact to CIS when it initially filed the petition

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

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).

⁵ See note 4, *supra*.

nor is it indicated that it made the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process, since there is no such inclusion in the copy of the alien labor certification filing submitted to DOL that the petitioner submitted to CIS in response to the director's first notice of intent to deny. According to DOL precedent and regulations, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although the petitioner's president made a statement in response to the director's first notice of intent to deny that the offer was valid and legitimate, its failure to make critical disclosures to DOL and CIS initially undermine that notion. The AAO cannot conclude that the petitioner is extending a *bona fide* job offer to the beneficiary.

Despite its demonstration that it could pay the proffered wage in 2001, the petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. Additionally, the petition is denied based on inconsistent and deceptive representations made by the petitioner when it initiated these proceedings as well as lack of proving that it is extending a *bona fide* job offer to the beneficiary.

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.