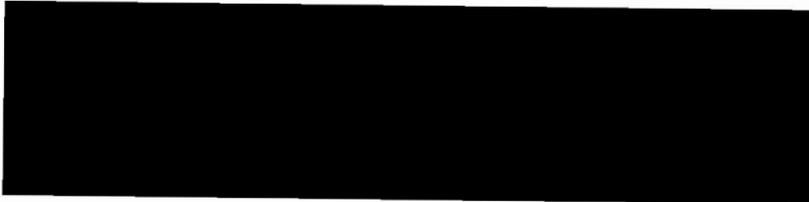


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FILE: WAC-02-133-51070 Office: CALIFORNIA SERVICE CENTER Date: **AUG 16 2006**

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, Chief  
Administrative Appeals Office

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

The petitioner is a nursing and rehabilitation facility. It seeks to employ the beneficiary permanently in the United States as a social and community services manager. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.<sup>1</sup>

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 who are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$21.00 per hour (or \$43,680 per year). On the petition, the petitioner claimed to have been established in 1996 and to currently employ 89 workers. The petitioner did not provide information about its gross annual income and net income. On the Form ETA 750B, signed by the beneficiary on April 8, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner submitted the petition without any evidence of the petitioner's ability to pay the proffered wage except a letter from its administrator stating its gross and net annual income. Therefore, the director issued a

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

request for evidence (RFE) on May 1, 2002, requesting evidence of the petitioner's ability to pay in the form of annual reports, tax returns or audited financial statements for 2000 and 2001, and quarterly wage reports for last four quarters. In response the petitioner submitted Form 941 Employer's Quarterly Federal Tax Returns filed by [REDACTED] for the quarters in 2000, 2001 and 2002.

On July 31, 2002 the director issued a second RFE requesting the petitioner's annual reports, copies of completed and signed federal tax returns, or audited financial statements for the years 2000 and 2001, and legal documentation to show the [REDACTED] the original name of the petitioner on the petition, is doing business as [REDACTED] such as business licenses and articles of incorporation for the petitioner. In response to the second RFE, counsel explained that the correct business name is [REDACTED] with federal identification number: [REDACTED] and submitted [REDACTED] 941 forms, business license and articles of corporation. Thus, Citizenship and Immigration Services (CIS) accepts that the petitioner's name is amended accordingly since it was done prior to issuance of the director's decision.<sup>2</sup>

On November 26, 2002, the director issued a notice of intent to deny (NOID) because the petitioner failed to submit its ability to pay the beneficiary's wage in the form of copies of annual reports, signed federal tax returns, or audited financial statements from 2000 to 2001 requested in the director's RFE. In response to the NOID, the petitioner resubmitted quarterly wage and withholding reports previously submitted, and audited financial statements as of December 31, 2001 for the petitioner. The record of proceeding thus closed before the director on December 26, 2002 upon receipt of the petitioner's response.

On November 22, 2004 the director denied the petition, finding that the 2001 audited financial statements submitted has not established its continuing ability to pay the proffered wage of \$43,680 with the net income of \$21,662 from the time the priority date was established up to the present.

On appeal counsel asserts that the director failed to consider all of the petitioner's assets, and failed to consider the previously submitted documents. Counsel submits the petitioner's audited financial statements for 2001, DE-6 forms for all quarters of 2001, and copies of the beneficiary's paystubs and W-2 forms for 2001 through 2003 issued by the petitioner.

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, counsel submits the beneficiary's W-2 forms for 2001 through 2003 and other documents of the beneficiary's compensation from the petitioner. These documents show that the petitioner paid the beneficiary \$31,143.09 in 2001, \$32,382.83 in 2002 and \$39,048.05 in 2003. Therefore, the petitioner did not establish that it paid the beneficiary the full proffered wage in these years, however, it established that it paid the partial proffered wage and is still obligated to have the ability to pay the differences of \$12,536.91 in 2001, \$11,297.17 in 2002 and \$4,631.95 in 2003 respectively.

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

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<sup>2</sup> CIS is without authority to amend a labor certification certified by DOL. Therefore, it can only amend the visa petition prior to the director issuing a decision.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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. Counsel asserts on appeal that the \$59,640 of depreciation in 2001 should be added back to the net income in determining the ability to pay the proffered wage. Counsel refers to a decision issued by the AAO concerning the depreciation, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel's reliance on depreciation is misplaced. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537

The record contains copies of the audited financial statements as of December 31, 2001 for the petitioner. The audited financial statements demonstrate the following financial information concerning the ability to pay the proffered wage of \$43,680 per year or the difference between the wage already paid to the beneficiary and the proffered wage from the priority date:

Tax Year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$21,662 <sup>3</sup>	\$12,536.91	\$9,125.09

Therefore, the petitioner had sufficient net income to pay the difference between the wage already paid and the proffered wage for the year 2001.

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<sup>3</sup> Net income reflected in Statement of Income and Retained Earnings.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner has established that it has the ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

However, there is an additional reason why the petition may not be approved that was overlooked by the director.<sup>4</sup> 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).

The record contains no evidence that [REDACTED] Facility qualifies as a successor-in-interest to the entity on the certified labor certification or that they are the same entity. Successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that both entities may be doing business at the same location does not establish a successorship. The record shows that the petitioner in the instant case, [REDACTED] is located at 3 Monarch Bay Plaza, Suite 203, Dana Point, California 92629. The labor certification application was filed with the Department of Labor on April 26, 2001 under the name of [REDACTED] [REDACTED] also located at 3 Monarch Bay Plaza, Suite 203, Dana Point, California 92629 with an IRS tax number [REDACTED]. All documents in the record concerning the petitioner and its ability to pay such as articles of incorporation, business license, federal tax returns, Form 941 quarterly wage reports and W-2 forms for the beneficiary only include the name of [REDACTED] and its federal employer identification number (FEIN) is [REDACTED]. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Counsel did not submit any supporting documents or evidence to explain how the petitioner has assumed all of rights, duties, and obligations of [REDACTED] pertinent to the approved labor certification application and the subsequent immigrant petition. 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 petitioner failed to establish that [REDACTED] Nursing Facility is the successor-in-interest to or the same entity as [REDACTED] on the certified labor certification.

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 petitioner also failed to establish [REDACTED]'s ability to pay the proffered wage for 2001.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence regarding the successor-in-interest issue. The director may also take the opportunity to have the petitioner update the record of proceeding with evidence of its continuing ability to pay, namely regulatory-prescribed evidence for 2002 and onwards. Similarly, the petitioner may provide additional evidence within a reasonable

<sup>4</sup> The director failed to amend the petitioner's name on the Form I-140.

period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.