

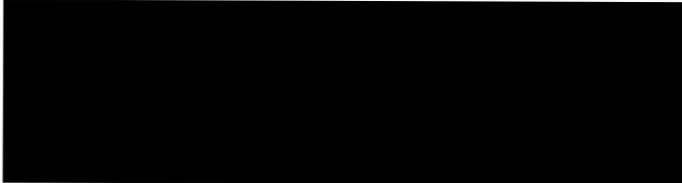
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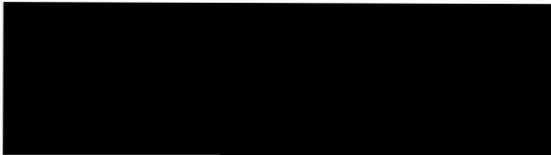
FILE: SRC-04-015-52461 Office: TEXAS SERVICE CENTER Date: **MAY 19 2006**

IN RE: Petitioner:
Beneficiary:



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

The petitioner is a jewelry retail firm. It seeks to employ the beneficiary permanently in the United States as a mold maker II/designer jewelry. 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 was a successor-in-interest and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 3, 2004 denial, the issue in this case is whether or not the petitioner is a successor-in-interest to the original entity named in the labor certification. If evidence shows that the petitioner is a successor-in-interest, then a second issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$35,318.00 per year.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a letter from the petitioner's certified public accountant, a copy of relevant parts of Section 368(a) of the Internal Revenue Code, copies of consolidated financial statements, and copies of financial statements for the original entity. Other relevant evidence in the record includes a copy of the petitioner's reorganization statement from the petitioner's 2002 tax return, copies of the petitioner's financial statements, a copy of the petitioner's bank slip, a copy of the petitioner's business license, copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2002 and 2003, a copy of the original entity's Form 1120 U.S. Corporation Income Tax Return for 2001, a copy of the original entity's payroll summary for 2001, a copy of the petitioner's payroll summary for 2003, and a letter from the petitioner. The record does not contain any other evidence relevant to the petitioner's status as a successor-in-interest and the petitioner's ability to pay the proffered wage.

Counsel states on appeal that documentary evidence shows that the petitioner has acquired all the assets and business of the original entity.

The first issue in this case is whether or not the petitioner is a successor-in-interest to the original entity named in the labor certification. The status of successor-in-interest requires documentary evidence that the petitioner has 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. 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 as of the priority date and continuing until the petitioner succeeded the original employer. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The record contains a copy of the petitioner's reorganization statement from the petitioner's 2002 tax return. It states:

A type D reorganization, as defined by S 368(a)(1)(d), is a transfer by one corporation (*GOLD N FASHION, INC. – Taxpayer Number [REDACTED]*) of substantially all of its assets to a controlled corporation (*ARK JEWELERS, INC. – Taxpayer Number [REDACTED]*) followed by a complete liquidation of the transferor corporation (*GOLD N FASHION, INC.*).

This statement does not show that the petitioner has met all four prongs of the definition of a successor-in-interest because it mentions assets, but not rights, duties, or obligations.

The record contains a letter from the petitioner's certified public accountant dated January 3, 2005 stating that "all the businesses and assets are transferred to [the petitioner.]" This statement also does not show that the petitioner has assumed all of the rights, duties, and obligations, and nothing in the record defines the term "businesses" to include rights, duties, and obligations.

The record contains a copy of the petitioner's compiled balance sheet and statement of income for 2002 and a copy of the original entity's balance sheet and statement of income for 2002, and counsel states that "Crown Jewelry, Inc. appears on both [the petitioner's and its predecessor's] statements, which concludes that [the petitioner] is running jewelry business and owns Crown Jewelry." Those balance sheets and statements of income are essentially compiled financial statements. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that

¹ 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).

where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's letter that accompanied those financial statements and notes on the bottom of each statement make clear that they were produced pursuant to a compilation rather than an audit. As the accountant's letter also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate that the petitioner is a successor-in-interest. In addition, those financial statements do not show that the petitioner has assumed all of the rights, duties, obligations and assets of the original entity.

The record likewise includes a copy of the petitioner's consolidated balance sheet and statement of income for 2002, a copy of the original entity's payroll summary for 2001, and a copy of the petitioner's payroll summary for 2003. These are likewise unaudited financial statements and, as stated above, are not persuasive evidence showing that the petitioner has assumed all of the rights, duties, obligations and assets of the original entity.

The record contains a letter from the petitioner dated September 11, 2003 stating that the original entity and the petitioner "are sister concerns." The letter is silent on whether the petitioner has assumed all of the rights, duties, obligations and assets of the original entity. The letter also fails to define "sister concerns."

The record contains a copy of the petitioner's bank slip with its name as "ARK JEWELERS INC. DBA CROWN JEWELRY," a copy of the petitioner's business license, and copies of the petitioner's and the original entity's tax returns showing that both entities have the same shareholders. Counsel states that "[t]hese documents also prove [that the petitioner] operates [j]ewelry trade and owns Crown Jewelry." Those documents provide information about the petitioner, but the fact that the two entities have the same shareholders is insufficient to show that the petitioner is a successor-in-interest. In addition, the original entity's tax return for 2002 does not indicate that it owned Crown Jewelry.

The record contains a copy of Section 368(a) of the Internal Revenue Code. According to Section 368(a)(1), "reorganization" means:

(D) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor, or one or more of its shareholders (including persons who were shareholders immediately before the transfer), or any combination thereof, is in control of the corporation to which the assets are transferred; but only if, in pursuance of the plan, stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354, 355, or 356.

The regulation specifically mentions assets, but not rights, duties, or obligations. In addition, no evidence in the record shows that the latter part of the regulation has been satisfied; nothing in the record documents that a qualifying transaction took place and nothing in the record defines "section 354, 355, or 356."

Counsel also states that "[t]he [Internal Revenue Service (IRS)] has accepted the reorganization of [the petitioner] to be valid and in cognizance with the law." Nothing in the record shows that the IRS has explicitly accepted the reorganization. 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)).

Despite the foregoing, the AAO, in certain instances, will consider the totality of circumstances where a case presents some unique factors. According to the tax returns, both the petitioner and the original entity have two shareholders, each owing 50% of the voting stocks. Thus, the petitioner is a small corporation and may not have formal documentation of the transfer. Moreover, the reorganization appears to simply consist of the owners rearranging their businesses, thereby making it unlikely that formal paperwork showing the reorganization exists. In addition, the case at hand is distinguishable from *Matter of Dial*. In *Matter of Dial*, "counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [its predecessor] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted." 19 I&N Dec. 481, 482. The petitioner in this case did submit further evidence in support of its original submission of the petitioner's reorganization statement to show that the original entity was reorganized and the petitioner is the successor-in-interest.

Due to these unique factors, the AAO determines that it is unlikely that documentation showing that the petitioner has assumed all the rights, duties, obligations and assets of its predecessor exists. Moreover, evidence in the record, specifically the petitioner's reorganization statement from the petitioner's 2002 tax return, shows that such reorganization did take place. Therefore, the AAO finds that the petitioner is a successor-in-interest.

The second issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As stated above, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage as of the priority date and continuing until the petitioner succeeded the original employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). According to the petitioner's tax returns, it is incorporated in September 6, 2002. Thus, the petitioner must show that its predecessor, Gold N Fashion, Inc., had the ability to pay the proffered wage as of the priority date and that the petitioner had the ability to pay the proffered wage beginning on September 6, 2002.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 29, 2001, the beneficiary did not claim to have worked for the petitioner's successor.

The copy of the original entity's payroll summary for 2001 indicates that the beneficiary was paid \$2,500.00 in wages from January to December, 2001. However, as stated above, the payroll summary is an unaudited financial statement and thus is not persuasive evidence. Moreover, \$2,500.00 is well below the proffered wage.

As another means of determining the petitioner’s ability to pay the proffered wage, CIS will next examine the petitioner’s net income figure as reflected on the petitioner’s federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to “add back to net cash the depreciation expense charged for the year.” *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains a copy of Gold N Fashion, Inc.’s Form 1120 U.S. Corporation Income Tax Return for 2001 and copies of the petitioner’s Form 1120 U.S. Corporation Income Tax Returns for 2002 and 2003. The record before the director closed on October 26, 2004 with the receipt by the director of the petitioner’s submissions in response to the RFE. As of that date the petitioner’s federal tax return for 2004 was not yet due. Therefore the petitioner’s tax return for 2003 is the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$65,143.00	\$35,318.00*	\$29,825.00
2002	\$117,342.00	\$35,318.00*	\$82,024.00
2003	\$128,688.00	\$35,318.00*	\$93,370.00

* The full proffered wage, since the record contains no persuasive evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2001, 2002, and 2003. Even though the petitioner is supposed to show that its predecessor had the ability to pay the proffered wage up to the date of reorganization, which is September 6, 2002, and the petitioner does not have to show its ability to pay the proffered wage until September 6, 2002, the record only contains the petitioner’s Form 1120 U.S. Corporation Income Tax Return for 2002. Since the petitioner succeeded its predecessor in the reorganization and its tax return for 2002 appears to cover the whole year and not just from September 6, 2002 onward, the AAO determines that the petitioner’s tax return will suffice in this instance

The record contains numerous copies of the petitioner's reorganization statement from the petitioner's 2002 tax return. One of the copies includes information on its backside showing that the petitioner has filed an I-140 petition for another employee with the same priority date, and that petition appears to have been approved by the director on February 23, 2006. The petitioner must show that it has the ability to pay all the wages as of the priority date.

The petitioner's net income for 2002 and 2003, as shown above, is more than double the beneficiary's proffered wage. Even though the AAO lacks information regarding the other employee's proffered wage, the AAO assumes that it is equivalent to the beneficiary's proffered wage. The original entity's net income for 2001 is less than double the beneficiary's proffered wage. However, the original entity has net current assets of \$250,232.00 for 2001, and this amount is more than 7 times the proffered wage.² Thus, even though the petitioner filed more than one I-140 petition, the AAO still finds that the petitioner has established its ability to pay the proffered wage to the beneficiary as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal have overcome the decision of the director.

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 met that burden.

ORDER: The appeal is sustained.

² Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.