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U.S. Citizenship
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Services

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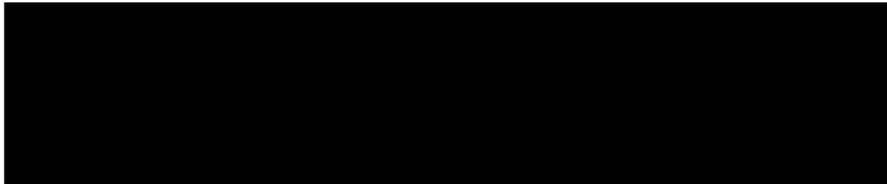
Office: NEBRASKA SERVICE CENTER

Date: AUG 20 2007

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:



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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning business. It seeks to employ the beneficiary¹ permanently in the United States as an alteration tailor. 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 2003 priority date of the visa petition based on the petitioner's net income or net current assets and continuing through tax year 2004. The director 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 16, 2005 denial, the single 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 nature, for which qualified workers are not available in the United States.

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on July 31, 2003. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour (\$26,000 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

¹ The beneficiary is a substituted beneficiary for J [REDACTED]

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 appeal.² On appeal, counsel submits an excerpt from the website, www.Investorwords.com, that defines the word depreciation; an independent auditor's report for financial statements from January 1, 2003 to December 31, 2003 for [REDACTED]; an independent auditor's report for financial statements from January 1, 2004 to December 31, 2004 for [REDACTED]; copies of the beneficiary's cancelled paychecks from March 2005 to November 2005; and a copy of the beneficiary's W-2 Form for tax year 2005 that indicates she earned \$18,666.70.

The record also contains the petitioner's financial statement dated May 11, 2004; the unaudited personal financial statement of the petitioner's 51 percent officer/shareholder and his wife as of December 31, 2003 for tax year 2003; copies of the petitioner's 2003 and 2004 Forms 1120,³ copies of the petitioner's Forms 941, Quarterly Federal Tax Return showing wages paid for 2003 and 2004; Form 940-EZ for tax year 2003 that indicates that [REDACTED] paid \$84,102 in wages in 2003; copies of Forms 941 for the second, third and fourth quarters of 2003 for [REDACTED] (EIN of [REDACTED]); copies of Forms 941 for all four quarters of 2004 under the name [REDACTED] (EIN of [REDACTED]); a Form W-3 transmittal of Wage and Tax Statements for 2004 for [REDACTED] and W-2 Forms for five employees of [REDACTED] for tax year 2004.

The petitioner also submitted Articles of Incorporation dated February 4, 2004 filed for [REDACTED] with the Illinois Secretary of State's office, and a business license from the Village of Niles Community Development for the year 2005 for [REDACTED]. The record also contains two notarized Foster Bank letters that stated the petitioner, identified as [REDACTED] had \$98,649.74 and \$12,840.13, respectively, in its checking bank account as of September 8, 2004 and August 27, 2005. Finally the record contains photos of the petitioner's business and three checks dated April, May and June 2005, each in the amount of \$1,691.93 from [REDACTED] to the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

² 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).

³ The petitioner submitted these tax returns in response to the director's request for further evidence dated July 19, 2005. The tax return for 2003 was for [REDACTED]. This tax return has an Employer Identification Number (EIN) of [REDACTED]. The petitioner then submitted two 2004 Form 1120 tax returns, one return for [REDACTED] and the other tax return for [REDACTED]. The tax return for [REDACTED] indicated it was incorporated on January 1, 2004, while the tax return for JH [REDACTED] indicates it was incorporated on August 8, 2002. The EIN for [REDACTED] is [REDACTED]. All three returns provide the same business address of [REDACTED] Niles, Illinois. The petitioner stated that [REDACTED] and [REDACTED] had recently been reincorporated under the name Nissi Cleaners, although the business and ownership remained the same. The AAO will comment on the petitioner's claimed reincorporation more fully further in these proceedings.

⁴ The photographs submitted to the record of the petitioner's business indicate the initials AM on the business license stand for America.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, to have five employees, to have gross annual income of \$382,088 and a net annual income of \$49,148. On the Form ETA 750B, signed by the beneficiary on September 20, 2004, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage. Counsel states that while she did not disagree with the CIS definition of depreciation, depreciation is also a non-cash expense, which lowers the petitioner's reported income while increasing the petitioner's cash flow. Counsel states that the petitioner had available cash flow that could be applied to the beneficiary's salary. Counsel also asserts that the independent auditor's report for the petitioner's financial statement for 2003 and 2004 show total revenues of \$453,161, net income of \$88,344 and total assets of \$320,978 in tax year 2003, and total revenues of \$401,452, net income of \$30,054 and total assets of \$309,981 in tax year 2004. Counsel also asserts that the beneficiary's W-2 Form for 2005 and her salary checks also establish the petitioner's ability to pay the proffered wage.

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, Citizenship and Immigration Services (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).

The AAO notes that counsel submits notarized statements with regard to bank balances in the petitioner's Foster Bank checking account. Counsel's reliance on the balances in the petitioner'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 petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner 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 petitioner. 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 petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Further on appeal, counsel asserts that the petitioner's depreciation contributes to the petitioner's cash flow and therefore the petitioner's depreciation should be considered an additional manner of establishing the petitioner's ability to pay the proffered wage. However, counsel provides no further regulatory or statutory authority that such an analysis would be warranted in the consideration of a petitioner's ability to pay the proffered wage. As previously stated, 8 C.F.R. § 204.5(g)(2), required one of three types of evidence to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner 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 petitioner.

The AAO also notes that the director in his decision described the change in the petitioner's name as a successor in interest issue, while counsel described the change in names as a "reincorporation" of the petitioner with no change in the ownership. However, counsel does not define "reincorporation." The record contains no evidence that the petitioner qualifies as a successor-in-interest to H [REDACTED]

This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest 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).⁵

In response to the director's request for further evidence, counsel stated that the applicant had "reincorporated" itself into Nissi Cleaners, Inc. However, 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). In addition, 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)).

In this case, the labor certification was issued to H [REDACTED], while the I-140 petition was filed by N [REDACTED]. The record indicates that [REDACTED] and [REDACTED] have two distinct EIN numbers during tax year 2004 and filed two distinct corporate tax returns which suggests the existence of two distinct companies. The Department of Labor (DOL) does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. However, the beneficiary is not permitted to substitute a petitioner. An exception to this rule is triggered if the employer/applicant is purchased, merges with another company or is otherwise under new ownership. The record does not establish the identity of the current petitioner as the successor in interest to the original applicant, HJ Yoon Cleaners.⁶ For this reason, the petition may be denied.

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, the petitioner, based on the beneficiary's W-2 form submitted to the record, has established that it employed and paid the beneficiary \$18,666.70 during tax year 2005, which is less than the proffered wage of \$26,000. The petitioner therefore did not establish that it paid the beneficiary the proffered wage as of the 2003 priority date and to the present time. Thus the petitioner has to establish its ability to pay the entire

⁵ The director's statement with regard to a successor in interest issue is given additional weight by the audited financial report submitted on appeal. The 2003 document notes under the heading "revenues" a sale of company assets that increased the revenue of H [REDACTED] in 2003 by \$70,767.

⁶ The AAO notes that the gross receipts noted on H [REDACTED]' tax return for 2004 support a significant decrease in the business activity of [REDACTED] in tax year 2004.

proffered wage in tax years 2003 and 2004, and the difference between the beneficiary's actual wages and the proffered wage in 2005.⁷

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, contrary to counsel's assertion, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. 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.

As stated previously, the record does not establish that the petitioner, [REDACTED], is the successor in interest to the applicant, [REDACTED]. The AAO will nevertheless examine the tax returns submitted to the record with regard to the ability to pay the proffered wage. With regard to tax year 2004, the AAO will examine both the [REDACTED]'s tax return for 2004 submitted to the record as well as the 2004 tax return for [REDACTED] c. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$26,000 per year from the priority date:

- In 2003, the Form 1120 for [REDACTED] stated a net income⁸ of -\$3,488.
- In 2004, the Form 1120 for [REDACTED] stated a net income of -\$3,856.

⁷ It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated October 5, 2005. At this time, the petitioner's 2005 income tax return would not have been available.

⁸The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

- In 2004, the Form 1120 for N [REDACTED] stated a net income of \$ 0 (zero).

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the 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.⁹ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The net current assets for [REDACTED] during 2003 were \$6,246.
- The net current assets for [REDACTED] during 2004 were -\$2,703.
- The net current assets for [REDACTED] during 2004 were \$2,911.

Therefore, for the years 2003 or 2004, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing 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. On appeal, counsel notes that the petitioner submitted audited financial statements for tax years 2003 and 2004 that indicated net income of \$88,344 in tax year 2003, and net income of \$30,054 in tax year 2004. Both of these sums are sufficient to pay the proffered wage of \$26,000. However, as previously discussed, the record does not establish the identity of the current petitioner as the successor in interest to the original applicant, [REDACTED]. The AAO notes that the audited statement for tax year 2003 submitted to the record was prepared for [REDACTED] while the 2004 audited financial statement was prepared for [REDACTED]. Without further clarification as to the petitioner's identity in tax years 2003 and 2004, the AAO does not find the audited financial statements submitted to the record to provide any additional weight to the evidence provided as to the petitioner's ability to pay the proffered wage in 2003 and continuing until the beneficiary obtains permanent lawful residency. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the

⁹According 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, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

The evidence submitted does not establish that the petitioner 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.