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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 05 2007
WAC 04 246 52414

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, Chief
Administrative Appeals Office

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

The petitioner is a wholesaler of women's apparel. The instant petitioner maintains that it is the successor in interest to the original petitioner that submitted the Form ETA 750 to the Department of Labor. It seeks to employ the beneficiary permanently in the United States as a computer system operator. 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 the original petitioner had the ability to pay the proffered wage as of the 2001 priority date of the visa petition, and continuing until the acquisition of its assets by the current petitioner on February 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 denial, the single issue in this case is whether or not the original petitioner had the ability to pay the proffered wage as of the April 20, 2001 priority date and continuing until the current petitioner obtained the assets of the original petitioner in February 2004.

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 CFR § 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).

With regard to petitions in which a subsequent petitioner claims to be a successor in interest to the original petitioner, 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 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).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$23.44 per hour (\$48,755.20 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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. On appeal counsel submits the following evidence:

A letter dated August 8, 2005 from [REDACTED] claims that he was formerly employed by Central ENO Corporation, the original petitioner, as corporate accountant. Mr. [REDACTED] states that the average number of employees per month employed at the original petitioner from 2002 to its sale in 2004 to the instant petitioner in February 2004 was one hundred and seventy-seven employees;

A letter dated August 9, 2005 from [REDACTED] who states he was the former Chief Financial Officer for original petitioner, from September 2002 to June 2004. In his letter, Mr. [REDACTED] states that the original petitioner, at the peak of its success and prior to filing for bankruptcy, employed more than 400 employees nationwide. Mr. [REDACTED] stated that since the original petitioner did not generate enough sales to cover its accounts payable, it began to receive legal claims at the end of 2003. It settled some legal claims with its vendors out of court by selling some of its best performing stores to vendors including the current petitioner, [REDACTED]. Mr. [REDACTED] states that in April 2004, Central ENO Corporation filed for Chapter 11 protection against creditors with twelve stores remaining. Mr. [REDACTED] also notes that following June 2004, the original petitioner filed for Chapter 7 bankruptcy protection. Mr. [REDACTED] also states that the payment of payroll was the first priority for expenses during this period of time. He describes the general financial condition, success, and closing of the original petitioner;

Copies of the state of California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports for tax year 2002 and 2003, for the original ETA 750 petitioner, namely Central ENO Corporation.²

Copy of an interoffice memorandum written by William R. Yates, Former Citizenship and Immigration Services (CIS) Associate Director for Operations;³

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).

² These DE-6 Forms establish that the original petitioner had over 100 employees during these two tax years.

³ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

First pages of a Hanmi Bank business checking account for Central ENO Corporation from January 2002 to January 2004.

Relevant evidence in the record includes:

A Purchase and Sale of the Assets of the Businesses document, executed February 16, 2004 by Central ENO Corporation, the original Form ETA petitioner, and the current petitioner;

Copies of Forms DE-6 filed by the original petitioner for the first quarter of 2004 and by the current petitioner for the second, third and fourth quarter of 2004;⁴

A DE-6 Form from the current petitioner for the first quarter of 2005 that contained names and salaries for 98 employees;

Copies of checks paid by the current petitioner to either vendors or individuals in February 2004;
Copies of the current petitioner's seller's permits for six businesses;

The current petitioner's Form 1120 for tax year 2004;

Copies of the original petitioner's Forms 1120 for tax years 2001, 2002, and 2003; and

Checking account bank statements from Hanmi Bank for the current petitioner for months January to June 2004.

The record shows that both the original petitioner and the current petitioner are structured as C corporations. On the I-140 petition, the current petitioner claimed to have been established on February 2, 2004, to have a gross annual income for January through March of 2004 of \$581,240, and an undetermined net annual income, and to employ 66 workers. On the Form ETA 750B, signed by the beneficiary on April 19, 2001, the beneficiary did not claim to have worked for the original petitioner.⁵

On appeal, counsel asserts that the original petitioner employed 100 or more workers as of the priority date of the petition and continued to employ 100 or more employees until it sold its business and assets to the current petitioner, a successor in interest. Counsel cites 8 C.F.R. § 204.5(g)(2), the regulation that addresses the establishment of the petitioner's ability to pay the proffered wage. Counsel notes that this regulation states that in a case where the prospective United State 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

⁴ The first DE-6 Form indicates the original petitioner had over 100 employees each month of the first quarter while the DE-6 Form for the second quarter indicates the current petitioner had less than 100 employees in April 2004, and less than 100 employees in all months of the third quarter of 2004. The DE-6 Form for the last quarter of 2004 indicated the current petitioner had 95, 99, and 104 employees for the respective three months.

⁵ The subsequent I-485 petition filed by the beneficiary and contained in the record indicates that the beneficiary worked for the original petitioner from April 2002 to February 2004, although the record contains no further documentation of such employment.

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 CIS. Counsel also notes that the wages paid by the original petitioner from 2001 to 2003, namely \$2,091,023, \$3,258,418, and \$3,799,508, should have been considered by the director as sufficient evidence that the company employed 100 or more employees during the given years, in view of the petitioner's business activities, namely retail chain store sales of wearing apparel. Counsel also states that in response to the director's request for further evidence, the current petitioner had advised the director that it had acquired the over 100 employees listed on the original petitioner's final DE-6 report.

Referring to the Yates memo, counsel states that although this memorandum provides that CIS adjudicators are not required to accept, or request a financial statement from U.S. employers who employ 100 or more workers to establish its ability to pay, the evidence that the original petitioner employed 100 or more workers during tax years 2002 and 2003 may be considered probative evidence of its ability to pay the proffered wage in tax years 2002 and 2003. Counsel also states that the original petitioner maintained sufficient balances in its banking accounts to pay the proffered wage during 2002 and 2003, even though the original petitioner operated the business at negative income during 2002 and 2003. Counsel also cites to two unpublished AAO decisions that referred to the monthly bank statements of petitioners in which the closing monthly balances showed sufficient cash available 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). Furthermore, as stated previously, in petitions involving petitioners who claim to be successors in interest to original petitioners who filed the accompanying Form ETA 750, the current petitioner must establish that the job offer made by the original petitioner was realistic as of the 2001 priority date and to the time when the current petitioner assumed all rights, duties and obligations of the original petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

On appeal, counsel submits statements from the original petitioner's officers who state that the original petitioner employed over 100 employees during tax years 2002 to 2004. Counsel states that this fact which is established by the submission of the original petitioner's DE-6 forms for the years in question, is probative of the original petitioner's ability to pay the proffered wage. Counsel's argument is not persuasive for two reasons. First, the priority date established by the submission of the Form ETA 750 to the Department of Labor is April 30, 2001. The petitioner has to establish that the original petitioner had the ability to pay the proffered wage as of April 20, 2001 to February 2004, not from tax years 2002 to 2004. Second, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part, that the evidence submitted to establish a petitioner's ability to pay the proffered wage "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." The submission of additional evidence such as profit/loss statements, bank account records or personnel records is not regulatorily mandated. Furthermore, the acceptance of such documents by CIS is discretionary.

Furthermore, the statements by the original petitioner's former accountant and chief financial officer also suggest the extended downsizing of the original petitioner and its ultimate demise as a business through sales of its assets to creditors and its filing for bankruptcy proceedings. The fact that the original petitioner employed more than 100 employees and paid their wages until the sale of its assets in February 2004 would not supplant or eliminate the examination of the original petitioner's federal income tax returns or Forms 1120 for the years 2001, 2002, 2003 and up to the sale of the original petitioner's assets in February 2004.

The statements of the former accountant and chief financial officer, in fact, explain the precipitous decline in the original petitioner's assets during these years, and in fact support the information contained in the petitioner's Forms 1120, submitted to the record with the initial petition. Their statements support the CIS examination of the original petitioner's federal income tax returns to establish its ability to pay the proffered wage as of the 2001 priority date to the sale of the original petitioner's assets. In these proceedings, the AAO will examine the original petitioner's federal tax returns as well as the current petitioner's 2004 Form 1120 further in these proceedings.

Counsel also refers to two AAO decisions that discuss the use of petitioners' bank statements in establishing two petitioners' ability to pay the proffered wage, counsel does not provide any published citations. 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). Furthermore, regardless of whether the analysis of bank statements to establish the petitioner's ability to pay the proffered wage was allowed in these two decisions, the AAO does not use this analysis in its deliberations.

On appeal, counsel also submits the original petitioner's business checking account balances as evidence of the original petitioner's ability to pay the proffered wage. 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. Finally, as stated previously, the priority date for the instant petition is April 20, 2001, and thus, the current petitioner has to establish that the original petitioner had the ability to pay the proffered wage as of the April 20, 2001 date, through the remainder of tax year 2001, and then up to the February 2004 sale of its assets to the current petitioner.

In determining either the original petitioner's or the current 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, although the beneficiary in his I-485 petition stated that he had worked for the original petitioner from 2002 to 2004, and for the current petitioner from February 2004 to the present, the record only establish wages paid to the beneficiary during the first quarter of tax year 2005. Based on the DE-6 form submitted to the record, the current petitioner paid the beneficiary \$10,384 during the first quarter of 2005. However, the petitioner submitted no evidentiary documentation to further substantiate the beneficiary's employment at any other period of time. Thus, the petitioner has not

established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date. The petitioner, thus has to establish that both it and the original petitioner had the ability to pay the entire proffered wage as of the 2001 priority date through 2004, and the difference between the beneficiary's actual wages and the proffered wage in the first quarter of 2005.⁶

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). 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 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$48,755.20 per year from the priority date:

- In 2001, the original petitioner's Form 1120 stated a net income⁷ of \$124,824.
- In 2002, the original petitioner's Form 1120 stated a net income of -\$980,998.
- In 2003, the original petitioner's Form 1120 stated a net income of -\$2,522,589.
- In 2004, the current petitioner's Form 1120 stated a net income of \$36,274.⁸

⁶ The petitioner responded to the director's request for further evidence on June 13, 2005, when the petitioner's 2005 tax return was not available. There is no 2005 federal income tax return in the record. Thus, the AAO will not examine whether the petitioner had sufficient net income or net current assets to pay the proffered wage in tax year 2005.

⁷ Taxable income before net operating loss deduction and special deductions, as reported on Line 28 of the Form 1120.

Therefore, as of the priority date April 20, 2001 and to the end of tax year 2001, the original petitioner did have sufficient net income to pay the proffered wage. However, in tax years 2002 to 2004, neither the original petitioner nor the current petitioner had 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 original petitioner's net current assets during 2002 were -\$1,107,018.
- The original petitioner's net current assets during 2003 were -\$3,976,484.
- The current petitioner's net current assets during 2004 were \$1,020,269.¹⁰

Therefore, for the years 2002 and 2003, the original petitioner did not have sufficient net current assets to pay the proffered wage. The current petitioner has established that it had sufficient net current assets from its purchase of some of the petitioner's assets in February 2004 to the end of 2004 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 except for tax years 2001 and ten months of 2004.

⁸ In 2004, the record does not contain any information as to the original petitioner's net income for January 2004 to February 26, 2004. Therefore the original petitioner's ability to pay the proffered wage during this time based on net income cannot be established.

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

¹⁰ Again, the record does not contain any information with regard to the original petitioner's ability to pay the proffered wage during January 2004 to February 26, 2004. The record only contains information as to the current petitioner's net current assets in 2004. Based on the letter from Mr. Kim placed in the record, the original petitioner at this period of time was selling off its assets, although still paying its diminished number of employees.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date, namely by examining the original petitioner's bank accounts. Counsel also states that the fact that the original petitioner employed over 100 employees in the years 2002 and 2003 is sufficient to establish the original petitioner's ability to pay the proffered wage. As stated previously, the employment of over 100 employees during the two years in question does not trump the fact that the original petitioner was undergoing a downsizing of its business and a sell-off its assets to creditors. 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 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 original petitioner had the continuing ability to pay the proffered wage beginning on the 2001 priority date and to the date of the sale of its partial assets in February 2004. Thus the director's decision will be affirmed. The petition will be denied.

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.