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U.S. Citizenship
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JUL 25 2007

FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date:
SRC 06 030 50199

IN RE: Petitioner:
Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a gas and grocery store. It seeks to employ the beneficiary¹ permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$18.57 per hour, which equals \$38,652.60 per year. The prospective employer listed on the Form ETA 750 is

The Form I-140 petition in this matter was submitted on November 7, 2005. On the petition, the petitioner stated that it was established during 1998 and that it employs three workers. The petition states that the petitioner's gross annual income is \$878,000. The space reserved for the petitioner to report its net annual

¹ The beneficiary shown on the Form ETA 750 is not the beneficiary of the instant visa petition, who was substituted for the original beneficiary.

income was left blank. On the Form ETA 750, Part B, signed by the beneficiary on October 28, 2005, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in San Antonio, Texas.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.²

In the instant case the record contains (1) the 1998 and 1999 Form 1120S, U.S. Income Tax Returns for an S Corporation of [REDACTED] (2) the 2000, 2001, 2002, 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Returns for an S Corporation of [REDACTED], and (3) a letter dated March 21, 2006 from a CPA. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The tax returns of [REDACTED] show that it was a corporation, that it incorporated on September 14, 1993, and that it reported taxes pursuant to accrual convention accounting and the calendar year.

During 1998 [REDACTED] reported ordinary income of \$699. At the end of that year it had current assets of \$32,250 and current liabilities of \$1,551, which yields net current assets of \$30,699.

During 1999 [REDACTED] reported ordinary income of \$712. At the end of that year it had current assets of \$31,850 and current liabilities of \$439, which yields net current assets of \$31,411. That return does not indicate that it is the final return of [REDACTED]

The tax returns of [REDACTED] show that it is a corporation, that it incorporated on January 13, 1998, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

During 2000 [REDACTED] declared ordinary income of \$644. At the end of that year the petitioner had current assets of \$36,240 and current liabilities of \$0, which yields net current assets of \$36,240.

During 2001 [REDACTED] declared ordinary income of \$1,976. At the end of that year [REDACTED] Investments had current assets of \$29,116 and current liabilities of \$0, which yields net current assets of \$29,116.

During 2002 [REDACTED] declared ordinary income of \$577. At the end of that year [REDACTED] Investments had current assets of \$25,000 and current liabilities of \$0, which yields net current assets of \$25,000.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

During 2003 [REDACTED] declared ordinary income of \$248. At the end of that year [REDACTED] Investments reported current assets of \$0 and current liabilities of \$0, which yields net current assets of \$0.

During 2004 [REDACTED] declared ordinary income of \$49,225. At the end of that year [REDACTED] Investments had current assets of \$56,198 and current liabilities of \$20,575, which yields net current assets of \$35,623.

During 2005 [REDACTED] declared ordinary income of \$38,588. At the end of that year [REDACTED] Investments had current assets of \$67,035 and current liabilities of \$36,481, which yields net current assets of \$30,554.

The CPA's March 21, 2006 letter appeared to advocate adding the petitioner's Line 7 Compensation of Officers, its Line 21 Ordinary Income, and its "Net Covered Assets" and subtracting its "Covered Liabilities" to yield a sum that somehow reflects the petitioner's ability to pay the proffered wage during a given year. This office notes that the figures the accountant provided for the petitioner's "Net Covered Assets" and "Covered Liabilities" during the various years correspond to the amount of its end-of-year current assets and current liabilities during those same years.

The director denied the petition on February 2, 2006.

On appeal, counsel cited the petitioner's gross receipts, gross profit, and total assets as indices of its ability to pay the proffered wage during various years.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) for the proposition that CIS should consider the totality of the petitioner's circumstances and that a reasonable expectation of future profit is sufficient to show continuing ability to pay the proffered wage beginning on the priority date. Counsel stated, but provided no evidence to demonstrate, that the petitioner expects its business to increase.

Counsel indicated that a company's net profits are correctly computed by adding its taxable income, net current assets, and its compensation of officers. Counsel indicated that the petitioner's compensation of officers actually represents dividends and stated, "The objective of many small corporations (S corporations or C corporations) is to minimize the tax liabilities of the shareholders."

In a previous letter dated January 15, 2006 counsel argued that the petitioner's compensation of officers should be considered to be the petitioner's profit because the petitioner is a subchapter S corporation. Counsel did not further detail his reasoning.

Although counsel's argument is not entirely clear, he seems to be implying that the petitioner characterized some of its profits as compensation of officers rather than as ordinary income to avoid corporate taxation. This is clearly not so, as subchapter S corporations are not taxed at the corporate level.³

³ In fact, a difference exists between levies on amounts paid as Compensation of Officers and those paid as a distribution of ordinary income, but it works counter to counsel's argument. Amounts paid as Compensation of Officers are treated as wages. They are reported on Form W-2 Wage and Tax Statements and are subject to

Counsel further asserted that the petitioner's compensation of officers should be considered a fund available to it with which it could have paid additional wages during the salient years. Counsel provided no evidence, however, to support the supposition that the petitioner's officers were able and willing to forego compensation, in whole or in part, to pay the proffered wage. The compensation that the petitioner paid to its officers has not, therefore, been shown to have been available to pay wages.

The accountant urged that the petitioner's profit should be added to its end-of-year current assets in determining its ability to pay additional wages. However, any computation, in any context, in which profit and current assets or net current assets are added together is inappropriate.

The petitioner's end-of-year net current assets include its end-of-year cash on hand. Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net income. Of its net income, some is retained as cash. Adding the petitioner's Schedule L Cash to its net income would be duplicative, at least in part.

Counsel's reliance on the petitioner's gross receipts and gross profit as an index of its ability to pay the proffered wage during various years is misplaced.

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁴ or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. 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 CIS should have considered income before expenses were paid rather than net income.

Gross profits are a company's gross receipts minus returns, allowances and the cost of goods sold, but before subtracting operating expenses such as rent, insurance, mortgage expense, repairs, maintenance, supplies, and

FICA and Medicare. Distributions of ordinary income, on the other hand, are not subject to FICA and Medicare. The owner of an S-corporation effectively pays both the employer's and the employee's share of those contributions, which are approximately 15% of the wages paid, on the amounts declared as Compensation of Officers, but not on the amounts declared or distributed as ordinary income. An S-corporation will typically declare as much as possible of its funds as Ordinary Income, rather than Compensation of Officers, to avoid this levy.

⁴ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

⁵ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

utilities. This office sees no justification for considering the petitioner's income after the subtraction of some expenses, but not all, as a fund available to pay additional wages.

Counsel's citation of *Matter of Sonogawa, Id.*, is unconvincing. Counsel is correct that, pursuant to the holding in that case, a petitioner may show its continuing ability to pay the proffered wage beginning on the priority date, notwithstanding that it suffered losses or declared low profits during a given year, if the totality of its circumstances demonstrates that it would have been able to pay the proffered wage.

Sonogawa, however, relates to petitions filed during uncharacteristically unprofitable or difficult years and only within a framework of significantly more profitable or successful years. During the year in which the petition was filed in that case the petitioning entity changed business locations and paid rent on both the old and new locations for five months. The petitioner also suffered large moving costs and a period of time during which it was unable to do regular business.

In *Sonogawa*, the Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on that petitioner's sound business reputation and outstanding reputation as a couturière.

Counsel is correct that, if losses or low profits are uncharacteristic, occur within a framework of profitable or successful years, and are demonstrably unlikely to recur, then those losses or low profits may be overlooked in determining the ability to pay the proffered wage. Here, the record contains no evidence that the petitioner or its predecessor ever posted a large profit. No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1998 through 2005 were uncharacteristically unprofitable years for the instant petitioner and its predecessor. Assuming that the petitioner's business will flourish, with or without hiring the beneficiary, is speculative.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁶ shown on lines 16(d) through 18(d). 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.

The proffered wage is \$38,652.60 per year. The priority date is January 13, 1998. Alishan Investments Inc. filed the instant visa petition relying on a labor certification issued to [REDACTED]. Under these circumstances the substituted petitioner is obliged to show, *inter alia*, that its predecessor had the ability to pay the proffered wage beginning on the priority date and continuing throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

During 1998 [REDACTED] reported Schedule K, Line 23 Income of \$18,699. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$30,699. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds

⁶ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

at the disposal of [REDACTED] during 1998 with which it could have paid the proffered wage. The evidence does not demonstrate that [REDACTED] c. was able to pay the proffered wage during 1998.

During 1999 [REDACTED] reported Schedule K, Line 23 Income of \$712. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$31,411. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds at the disposal of [REDACTED] during 1999 with which it could have paid the proffered wage. The evidence does not demonstrate that [REDACTED] was able to pay the proffered wage during 1999.

During 2000 [REDACTED] reported Schedule K, Line 23 Income of \$644. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$36,240. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds at the disposal of [REDACTED] during 2000 with which it could have paid the proffered wage. The evidence does not demonstrate that [REDACTED] was able to pay the proffered wage during 2000.

During 2001 [REDACTED] reported ordinary income of \$1,976. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$29,116. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds at the disposal of [REDACTED] during 2001 with which it could have paid the proffered wage. The evidence does not demonstrate that A [REDACTED] was able to pay the proffered wage during 2001.

During 2002 [REDACTED] reported ordinary income of \$577. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$25,000. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds at the disposal of [REDACTED] during 2002 with which it could have paid the proffered wage. The evidence does not demonstrate that A [REDACTED] was able to pay the proffered wage during 2002.

During 2003 [REDACTED] reported ordinary income of \$248. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$0. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net **current assets during that** year. The record contains no reliable evidence of any other funds at the disposal of [REDACTED] during 2003 with which it could have paid the proffered wage. The evidence does not demonstrate that [REDACTED] was able to pay the proffered wage during 2003.

During 2004 [REDACTED] reported ordinary income of \$49,225. That amount is sufficient to pay the proffered wage. The evidence demonstrates that [REDACTED] was able to pay the proffered wage during 2004.

During 2005 [REDACTED] reported ordinary income of \$32,931. That amount is insufficient to pay the proffered wage. At the end of that year it had net current assets of \$30,554. That amount is insufficient to pay the proffered wage. The record contains no reliable evidence of any other funds at the

disposal of [REDACTED] during 2005 with which it could have paid the proffered wage. The evidence does not demonstrate that [REDACTED] was able to pay the proffered wage during 2005.

The petition in this matter was submitted on November 7, 2005. On that date the petitioner's 2006 tax return was unavailable. On November 15, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The evidence does not demonstrate that [REDACTED] had the ability to pay the proffered wage during 1998 and 1999. The evidence does not demonstrate that [REDACTED] had the ability to pay the proffered wage during 2000, 2001, 2002, 2003, and 2005. Therefore, the evidence does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

As was noted above, the original applicant that filed the Form ETA 750 labor certification application upon which the instant visa petition relies was [REDACTED]. The petitioner that filed the Form I-140 visa petition in this matter is [REDACTED].

In order for one entity to rely upon a labor certification approved for use by another entity, that second entity, the petitioner in this case, must demonstrate that it is a true successor of the original employer within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). That is; it must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it 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. See *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981).

In the instant case, the record makes clear that the instant petitioner, A [REDACTED], is operating the same type of business at the same location that the original employer, [REDACTED], did when it filed the Form ETA 750 labor certification application. That does not, however, fulfill all of the requirements of *Matter of Dial Auto Repair Shop, Inc.*

The record contains a letter from the petitioner's president dated January 15, 2006, in which he stated,

[REDACTED], who had filed the Labor Certification petition originally in 1998, was bought by A [REDACTED] in the year 2000. With the acquisition and as successors of [sic] interest the [REDACTED] [sic] assumed the duties, rights[,] obligations and assets of F [REDACTED]. The [REDACTED] t, therefore, as the new employer have [sic] now undertaken all the responsibilities concerning the employment of the beneficiary . . . and are offering him the same wages, the same job, and working conditions as stated in the original labor certification.

The record contains no documents demonstrating how the acquisition took place, whether by arms-length transaction or bankruptcy; purchase of the corporation or of its assets, etc., as required by *Matter of Dial Auto Repair Shop, Inc.*⁷ Further, although the petitioner's president alleges that it acquired all of the rights, duties, obligations, and assets [REDACTED] no other evidence was submitted to demonstrate that fact.⁸ In fact, [REDACTED] 1999 tax return does not indicate that it is the corporation's final return, as it should have if the corporation did not intend to file another Form 1120S during 2000. This implies that the corporation continued to exist after it sold some interest in its gas and grocery store business, and that it may still have retained some interests. Absent additional evidence, [REDACTED] has not demonstrated that it is the true successor of [REDACTED] within the meaning of *Matter of Dial Auto Repair Shop, Inc.*, and the petition should have been denied on this additional basis.

Because the decision of denial did not discuss this issue and the petitioner has not been accorded the opportunity to address it, today's decision does not rely on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address this issue.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

⁷ In addition, the petitioner's president stated that [REDACTED] during 2000, but did not provide the date of that transaction. Unless the transaction occurred on January 1, the petitioner was obliged to show that [REDACTED] was able to pay the proffered wage during the portion of 2000 prior to the sale.

⁸ If the transfer of interests was pursuant to a contract between the two corporations. for the purchase of assets, for instance, then that contract might have contained sufficient evidence to demonstrate that [REDACTED] acquired [REDACTED], how it acquired [REDACTED], and precisely what interests it acquired.