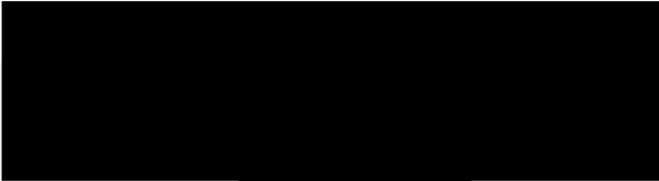


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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **JAN 29 2006**
SRC 06 252 51365

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

The petitioner is a cleaning firm. It seeks to employ the beneficiary permanently in the United States as a cleaning supervisor. 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.

On appeal, counsel submits additional evidence and contends that the petitioner has established its continuing ability to pay the certified wage.

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 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 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.16 per hour, which amounts to \$25,292.80 annually. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary does not claim to have worked for the petitioner.

_____ is the name of the petitioning employer given on the approved labor certification. _____ LLC is the name of the petitioner on the Immigrant Petition for Alien Worker (I-140). On Part 5 of the I-140, which was filed on August 22, 2006, the petitioner claims that it was established in July 2001 and claims to have a gross annual income of \$291,214, a net annual income of \$23,238, and currently employs seven workers.

It is noted that a limited liability company is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded

entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of the District of Columbia is considered as a sole proprietorship for tax purposes. The record shows that its articles of organization were filed with the District of Columbia on July 12, 2001. Its income is reported on Schedule C (Profit or Loss from Business) that is included as part of the member's individual income tax return.

In support of the petitioner's ability to pay the proffered wage, copies of the individual income tax returns of [REDACTED] for 2001, 2002, 2003, 2004 and 2005 have been provided. The following information is reflected on Schedule C, Profit or Loss from Business, relevant to the I-140 petitioner, [REDACTED]

| Year | 2001 | 2002 | 2003 | 2004 | 2005 |
|-------------------------|------------|-----------|-----------|-----------|-----------|
| Gross Receipts or Sales | \$16,128 | \$323,691 | \$311,308 | \$351,802 | \$291,214 |
| Gross Income | \$10,142 | \$315,628 | \$301,970 | \$341,869 | \$280,833 |
| Wages | \$17,610 | \$139,495 | \$110,355 | \$138,518 | \$101,456 |
| Total Expenses | \$29,884 | \$305,692 | \$282,756 | \$328,393 | \$257,595 |
| Net profit or (loss) | (\$19,742) | \$ 9,936 | \$ 19,214 | \$ 13,476 | \$ 23,238 |

The tax returns also showed that [REDACTED] filed as a single person with no dependents during the relevant period. Before deductions, his income included wages of \$73,150, taxable interest of \$464, and ordinary dividends of \$32. His adjusted gross income was reported on line 33 of the Form 1040 as \$44,695.

Only copies of the 2001 and 2005 tax returns were provided with the petition. Noting that although it had elected to be taxed as a sole proprietorship, but recognizing that the petitioner was a limited liability company and a separate legal entity, the director determined that the petitioner had failed to demonstrate its ability to pay the proffered wage and denied the petition on October 16, 2006. The director reviewed the petitioner's 2001 gross income of \$10,142 and net profit of -\$19,742 reported on Schedule C of [REDACTED]'s federal tax return. She concluded that the petitioner's net income of -\$19,742 was not sufficient to pay the proffered wage as of the year that the priority date was established. Thus it had not established its continuing ability to pay as required by the regulation at 8 C.F.R. § 204.5(g)(2). The director further observed that the petitioner may have not extended a bona fide job offer based on the representation of fifteen workers that the beneficiary was expected to supervise as represented on the labor certification submitted in 2001 as compared to the petitioner's claim that it employed only seven workers in 2006 when the I-140 was filed.

On appeal, counsel asserts that [REDACTED] was operating his cleaning business as a sole proprietor when he filed the ETA 750 with the DOL and established the priority date of April 30, 2001. On July 12, 2001, he restructured the business as a limited liability company. Counsel states that the LLC assumed all of the assets and liabilities of the business as a successor-in-interest to the interests of [REDACTED] as an individual. Counsel also states that the LLC assumed all of the assets and liabilities which the beneficiary had in the cleaning business. He argues that the copies of various documents submitted on appeal show that [REDACTED] individually had the ability to pay the proffered wage in 2001 and that subsequent tax returns and the beneficiary's W-2s show that the LLC had the ability to pay the proffered wage in 2002, 2003, 2004, and 2005.

Counsel additionally maintains that the director erred in looking at the number of employees to be supervised as determinative of the bona fides of the job offer represented in the labor certification. Counsel explains that throughout the years that ETA 750 was pending, the number of workers fluctuated, and that as many as 22 workers had been employed by the petitioner. Counsel contends that the fact that there are now fewer employees

to be supervised does not detract from the fact that this is a bona fide job opportunity for a cleaning supervisor who would be responsible for performing the duties as described on the ETA 750.

Counsel submitted payroll and tax documents on appeal indicating that the beneficiary was hired in September 2001 by the LLC and that as many as 21 other workers were reported on a copy of the petitioner's quarterly wage report covering the quarter ending December 31, 2001. The modest amount of wages paid to each of the listed workers shown on this report suggests that they were all part-time employees. It is noted that the Wage and Tax Statements (W-2s) submitted by counsel on appeal, also reflect that the petitioner paid the beneficiary the following compensation:

| Year | Earnings | Amount needed to cover proffered wage Of \$25,292.80 |
|------|-------------|---|
| 2001 | \$5,801.92 | (\$19,490.88) |
| 2002 | \$31,919.02 | |
| 2003 | \$19,653.28 | (\$5,639.52) |
| 2004 | \$29,015.08 | |
| 2005 | \$21,160.46 | (\$4,132.34) |

The regulation at 8 C.F.R. § 204.5(g)(2) provides that a petitioner must establish its continuing ability to pay the certified wage at the time the priority date is established. In this case that date is April 30, 2001. The regulation at 20 C.F.R. § 656.30 also provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by CIS, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.¹ If the employer/employee relationship changes, the validity of the approved labor certification may be affected; thus, if the employer filing the preference petition cannot be considered a successor-in-interest to the employer in the labor certification, the job opportunity as described in the approved certification no longer exists because the original employer no longer exists. *See Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985). In *Matter of United Investment Group*, the original employer was a partnership, which had several changes in partners between the original filing of the labor certification application and the filing of the I-140. Although one partner had remained constant throughout the changes, it was found that the changes in partners represented a series of different employers, and the validity of the labor certification expired. Conversely, if a successorship-in-interest has occurred, 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. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

As noted above the I-140 petitioner is a limited liability company which, according to a copy of the certificate filed with the District of Columbia, was formed on July 12, 2001. An LLC is an artificial entity and is separate from its members. As mentioned above, it may have attributes of other business entities such as a partnership or sole proprietorship because of the manner in which it is taxed, but it also affords its members of certain advantages generally associated with a corporation such as limitation on the member's personal liability for the

¹ See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

debts of the LLC. Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. Property interests may be acquired by the LLC and the title acquired vests in the LLC. *See HB Management, LLC v. Brooks*, 2005 WL 225993 (D.C. Super. Ct.); *see also McKinney's Limited Liability Company Law* § 609(a) (members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations). Further, CIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft* 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

In the instant case, the employer who filed the ETA 750 was [REDACTED] as an individual. According to counsel, it is claimed that he operated the cleaning business as a sole proprietorship until he formed the LLC on July 12, 2001. Therefore, until the change in ownership occurred on that date, the ability to pay the proffered wage must be demonstrated by the cash or cash equivalent assets held individually by [REDACTED]. Subsequent to July 12, 2001, it is the obligation of the I-140 petitioner as an LLC to demonstrate its continuing ability to pay the proffered wage based on its own assets if it is established that a successorship-in-interest occurred.

Based on a review of the record, it may not be concluded that a successorship-in-interest has been established. Other than counsel's explanation submitted on appeal, the record does not contain evidence that the cleaning business existed as a business owned and operated by [REDACTED] individually prior to the formation of the LLC in July 2001 as well as any documentation showing the assets and liabilities of the sole proprietorship or that they were assumed by the LLC. 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). Besides reporting the LLC income on Schedule C, [REDACTED]'s tax 2001 return reflects that he derived income as a federal employee and from investments including a separate corporate franchise that he operated as [REDACTED] of Washington D.C. None of the copies of quarterly wage reports or employer quarterly federal tax returns (Form 941) were submitted for the first two quarters of 2001 or any time prior to that period. It remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. *See 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.).

This also relates to the *bona fides* of the job offer as reflected on the submission of the ETA 750 to the DOL. Although the AAO concurs with counsel's assertion that the number of employees to be supervised represented on the ETA 750 as compared to the I-140 should not, in this case be determinative as to whether the job offer is *bona fide* as of the priority date of April 30, 2001, as noted above, the record contains no evidence documenting the operation of this cleaning business by [REDACTED] individually prior to the July 12, 2001 formation of the LLC as claimed on appeal.

Although not necessary to the decision in this case, it is noted that when a successorship-in-interest has been demonstrated, in analyzing whether a petitioner's ability to pay the proffered wage during a given period has been established, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered

wage can be covered by the petitioner's net income or net current assets² for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

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 (or net current assets if shown) as 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). 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.

In the instant case, assuming that a successorship-in-interest had been established, it is noted that the record including the 2001 individual tax return of [REDACTED] suggests that sufficient cash or cash equivalent assets were available to cover of that part of his obligation to pay the proffered wage prior to the formation of the LLC. As set forth above, the petitioner's ability to pay the proffered wage would be established in 2002 and 2004 as shown by the compensation paid to the beneficiary because it exceeded the proposed wage offer of \$25,292.80. Ability to pay would also be considered to have been demonstrated for 2003 and 2005. The LLC's net income of \$19,214 in 2003 and \$23,238 in 2005 was sufficient to cover the certified salary in those years in that the respective shortfalls of \$5,639.62 in 2003 and \$4,132.34 in 2005 resulting from a comparison of the actual wages paid to the beneficiary and the proffered wage could be met.

The ability to pay the proffered wage in 2001 is not demonstrated. For 2001, the petitioning LLC's net income as reported on Schedule C of [REDACTED]'s tax return was -\$19,742. This represented its income for approximately six months from July through December 2001. Even if the proffered wage is viewed as a six month obligation of approximately \$9,745, the LLC's net income of -\$19,742 could not cover this amount. None of the various copies of financial documents representing cash or cash equivalent assets such as the bank statements provided on appeal demonstrate that they were held by the LLC rather than [REDACTED] individually. The ability to pay the proposed wage offer was not been demonstrated for this period of time.

² Besides net income, CIS will generally consider *net current assets* as a measure of a petitioner's liquidity during a given period and as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between a petitioner's current assets and current liabilities that may be reflected on an audited financial statement or on a balance sheet submitted as part of a federal tax return of a corporation or partnership. As this petitioner is taxed as a sole proprietorship, its current assets and liabilities are not separately reported.

In this case, the I-140 petitioner failed to demonstrate that it may be considered as a successor-in-interest to a cleaning business operated as [REDACTED]'s sole proprietorship prior to the LLC formation on July 12, 2001, nor did it establish its ability to pay the proffered wage in 2001. The regulation at 8 C.F.R. § 204.5(g)(2) requires that the financial ability to pay the proffered wage be established as of the priority date and *continues* until the beneficiary obtains lawful permanent residence. It is not concluded that the petitioner established its continuing financial ability to pay the proffered salary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

This office notes that a petition which fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Beyond the decision of the director, it is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Here, the beneficiary's initial involvement in the ownership of the petitioning cleaning business as suggested on appeal raises an additional issue of whether a *bona fide* job offer was available to U.S. workers.

Although this appeal has been decided on other grounds, the observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted, in order to determine whether any family or business relationship between the petitioner and the beneficiary represents an impediment to the adjudication of any future employment-based petitions filed by this petitioner on behalf of this beneficiary.

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.