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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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Bt

FILE: [REDACTED]
SRC 06 258 51715

Office: TEXAS SERVICE CENTER

Date: NOV 03 2008

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 manufacturer of fine jewelry. It seeks to employ the beneficiary permanently in the United States as a stone setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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, nor had the petitioner established that it was a successor-in-interest. 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 November 15, 2006 denial, the issues in this case are whether or not the petitioner is a successor-in-interest and 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 either 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 DOL. *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 DOL 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 January 31, 2001. The proffered wage as stated on the Form ETA 750 is \$14.40 per hour (\$29,952.00 per year). The Form ETA 750 states that the position requires three years of experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, a letter dated September 26, 2006 from ██████████ Chief Financial Officer, a copy of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005, 2004, and 2003. Other relevant evidence in the record includes the Formation of, and Purchase of Interests In, ██████████ copies of IRS Forms 1065, U.S. Return of Partnership Income, for 2002, 2003, and 2004, for ██████████ and a letter dated August 6, 2001 from ██████████, President of the ██████████. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner is identified as a corporation in part 1 of the petition, although it listed the Employer Identification Number (EIN) of a limited liability company (LLC). The AAO will consider the petitioner to be the corporation. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 43 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on September 28, 2001, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the "District Director" did not take into consideration all of the facts submitted into evidence concerning "██████████" as an existing entity and that it earns sufficient income.

In this case, the labor certification was issued to ██████████. The Form I-140 petition was filed by ██████████. It appears that the ██████████ is offering the beneficiary the job, not ██████████. The AAO observes that ██████████ lists salaries on its tax returns, while ██████████ does not. The corporation does not appear to be the employer. The regulation at 8 C.F.R. § 204.5(l)(1) states that any "employer" may file a Form I-140 seeking 3rd preference classification. As it does not appear that the petitioner is the employer, the Form I-140 was improperly filed. Furthermore, the response to the RFE implies the petitioner is the LLC, but the petitioner cannot make material changes to a Form I-140 that has already been filed. *Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). *See also* James Puleo, Acting Executive Associate Commissioner, Amendment of Labor Certifications in I-140 Petitioner, HQ 204.24-P (December 10, 1993), which says that where the corporation changes names or a successor-in-interest takes over, a new petition must be filed.

Even if we were to consider ██████████ to be the petitioner, the record contains no evidence that ██████████ qualifies as a successor-in-interest to ██████████. The DOL does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/petitioner. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to

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 petitioner was asked for corporate returns in the Request for Evidence (RFE) and failed to submit them. The AAO, therefore, does not have to consider the corporate tax returns on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The successor-in-interest must submit proof of the change of 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*, 19 I&N Dec. 481 (Comm. 1986). 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. The record includes a Membership Interest Purchase Agreement stating that [REDACTED] is contributing the Contributed Assets to the Company in exchange for a 41% membership interest in the Company. The Contribution Agreement states that except for the Contributed Assets, [REDACTED] has not transferred to the [REDACTED], and is retaining, all other assets of [REDACTED] Corp. According to section 3.13, [REDACTED] has not transferred, and [REDACTED] has not assumed and shall not have any liability for, any liabilities of [REDACTED] of any kind, character or description whatsoever, other than the employment agreements listed on Schedule 2 of the Contribution Agreement. As the LLC has not assumed the liabilities or obligations of the corporation beyond two employment contracts, the petitioner has not established that the petitioner in this matter is the successor-in-interest to the original employer. Counsel has failed, therefore, to demonstrate that the petition may be approved.

Even assuming that [REDACTED] is the successor-in-interest to [REDACTED], the petitioner failed to provide any evidence that it had the ability to pay the proffered wage at the priority date.

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

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 has not established that it employed and paid the beneficiary the full proffered wage in 2002 or subsequently.

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 supported by federal caselaw. *See 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 Chang*, 719 F. Supp. at 537.

The tax returns for [REDACTED] are only relevant if the corporation is the petitioner. In this case, the corporation improperly filed the Form I-140, therefore its tax returns are irrelevant. Furthermore, as previously noted, *Matter of Soriano* precludes the AAO from reviewing the tax returns for the corporation submitted on appeal.

As stated above, we consider the petitioner to be [REDACTED], the company listed on the petition. The director specifically requested the petitioner's tax returns in his request for additional evidence. The petitioner's response did not include that evidence. Rather, the petitioner submits its tax returns for the first time on appeal.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. at 764; see also *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

The tax returns for the LLC are not relevant to the petitioner's ability to pay the proffered wage. CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). In light of the above, we find that the record before the director did not establish the petitioning corporation's ability to pay the proffered wage.

If the petitioner argues that the LLC is the employer and the petitioner, then the LLC should be able to show its ability to pay. The record before the director closed on October 25, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due. The petitioner's tax returns for [REDACTED] demonstrate its net income for 2002, 2003, and 2004 as shown in the table below.

In 2002, the petitioner's Form 1065 stated net income of \$79,828.00.²

In 2003, the petitioner's Form 1065 stated net income of \$439,643.00.

In 2004, the petitioner's Form 1065 stated net income of \$1,885,342.00.

Therefore, for the years 2002, 2003, and 2004, the petitioner did have sufficient net income to pay the proffered wage of \$29,952.00 per year. The AAO notes that counsel did not submit a tax return for the petitioner [REDACTED] for 2005. As such, the petitioner has not demonstrated that it had sufficient net income to pay the proffered wage for 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets.³ As there is no tax return for 2005, CIS is unable to review the petitioner's net current assets for that year.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, 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, except for 2002, 2003, and 2004.

² For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional income and deductions in 2002, 2003 and 2004 and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

³ The AAO notes that the Director erred in her analysis of calculating whether the petitioner had the ability to pay the proffered wage by subtracting the petitioner's year-end current liabilities from its year-end current assets and then adding that figure to the petitioner's net income. The Director's error does not affect the outcome of this appeal.

On appeal, counsel did not address why he failed to submit a tax return for 2005 for [REDACTED]. Regardless, as stated above, the petitioner has not established that [REDACTED] is the successor-in-interest to the entity that filed the labor certification.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. 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.