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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 29 2004
SRC-02-240-50691

IN RE: Petitioner: [redacted]
Beneficiary:

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, Director
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 engaged in the business of stone construction. It seeks to employ the beneficiary permanently in the United States as a concrete finisher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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. Additionally, the director determined that Silgrin Corporation is not a successor-in-interest to the petitioning entity.

On appeal, counsel submits a brief statement.

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 March 9, 2001. The visa petition was submitted to Citizenship and Immigration Services (CIS) on August 6, 2002. The proffered wage as stated on the Form ETA 750 is $12.72 per hour, which amounts to $26,457.60 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established on August 23, 2000 and to have a gross annual income of $190,082. In support of the petition, the petitioner submitted its 2001 U.S. Income Tax Return for an S Corporation.

The director issued a notice of intent to deny the petition on June 30, 2003. The director noted that the visa petition was filed by [redacted] an attorney charged with conspiracy to commit immigration fraud by making false representations in multiple visa petitions filed with CIS, by knowingly accepting visas procured by fraud, and by harboring illegal aliens for profit. In addition, [redacted] was charged with eleven counts of making materially false, fictitious statements to CIS and seven counts of harboring an illegal alien for profit at his law office. [redacted]s in custody at the time the director issued her intent to deny the petition[1]. Because of

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[redacted] was subsequently disbarred from the practice of law by the Supreme Court of Florida based upon a criminal conviction for conspiracy to commit offenses against the United States, making false statements, and

's pending criminal matters, the director issued a lengthy list of questions for the petitioner to verify its existence and the legitimacy and honesty of the visa petition. Because the director's lengthy notice of intent to deny is incorporated into the record of proceeding, it will not be recited in this decision.

In response, the petitioner's new counsel stated that he personally investigated the petitioner's case and is confident of its legitimacy. Counsel's letter is dated July 28, 2003, and he states that) purchased the petitioner in the middle of last year. Counsel submits a purchase agreement reflecting that did purchase the petitioning entity on March 13, 2002. Counsel also submitted affidavits from the beneficiary, and other witnesses, attesting to the sale of the petitioning entity to Mr. the authenticity of the visa sponsorship[2], and the beneficiary's employment experience[3]. The director did not make any additional adverse findings concerning the authenticity of the visa petition and sponsorship or the beneficiary's qualifications, and the AAO concurs. Thus, the documentation submitted on this issue will not be discussed further.

The remaining issues for discussion, however, is whether or not a company called Silgrin Incorporated (Silgrin) is the successor-in-interest to the petitioning entity and whether the petitioning entity and Silgrin, if determined to be a successor-in-interest to the petitioning entity, both had the continuing ability to pay the proffered wage as of the date of the priority date.

With respect to the successor-in-interest issue, in response to the director's notice of intent to deny the petition, counsel submitted the following documentation: (1) Silgrin's certificate of incorporation dated March 19, 2002; (2) Silgrin's articles of incorporation, reflecting that Silgrin incorporated on March 19, 2002, is authorized to have 100 shares of common stock at any one time, and that s its director, president, and treasurer; (3) a Standard Asset Purchase Contract and Receipt reflecting that olely purchased all rights, assets, and liabilities of the petitioning entity on March 13, 2002; and (4) invoices in the petitioning entity's name using Silgrin's address[4] from 2002 through 2003.

With respect to the continuing ability to pay the proffered wage issue, in response to the director's notice of intent to deny the petition, counsel submitted the following documentation: (1) Silgrin's unaudited Profit & Loss statement for January through May 2003 and unaudited Balance Sheet as of May 31, 2003; (2) evidence Silgrin sought an extension on filing its federal corporate tax return for 2003; (3) Silgrin's 2002 Form 1120, U.S. Corporation income Tax Return; (4) bank records for Silgrin Corp for May 2002, and for Silgrin Corp "d/b/a" the petitioning entity from July 2002 through March 2003; and (5) another copy of the petitioning entity's 2001 U.S. Income Tax Return for an S Corporation.

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harboring aliens. He was immediately suspended by the Executive Office for Immigration Review on November 4, 2004 which also removes his representative capacity from CIS and the AAO.

[2] The petitioning entity's articles of incorporation, sales invoices, and supporting document submitted with the ETA to the Department of Labor were submitted in addition to tax returns and affidavits.

[3] The record of proceeding contains a letter from a previous employer, also listed on the beneficiary's ETA 750B, attesting to his two years of experience as a marble cutter and polisher. There also affidavits from his work acquaintances attesting to his employment experience.

[4] These invoices include www.bestwithgranite.com as its contact information. The AAO attempted to visit this website but a Google search "couldn't find" the website.

Counsel, in his accompanying letter to the petitioner's response to the director's notice of intent to deny the petition, states the following concerning Silgrin's ability to pay the proffered wage:

> [Silgrin] has the ability to pay the offered wage since there is over $25,000 in income so far for year 2003 and for the 2002 return only reflects ½ the year since purchased the business when ½ of 2002 was completed; there was still over $18,000 in net income plus over $6,000 in outside services that will no longer be needed once [the beneficiary] is on the payroll; we will no longer need to subcontract services out. Also, please see the bank statements reflecting positive cash flows each month. Once again 2002 tax return only reflects the last half of the year and there still sufficient profits [sic].

No documentation concerning the petitioning entity's 2002 reported corporate tax income for the ½ of the year preceding its sale to Silgrin is in the record of proceeding.

If is a successor-in-interest to the petitioning entity, both entities much show an ability to pay the proffered wage. The tax returns reflect the following information for the following years for each entity:

For the petitioning entity:

	2001
Net income[5]	$43,694
Current Assets	$3,553
Current Liabilities	$1,527
Net current liabilities	$2,026

For Silgrin:

	2002
Net income[6]	$18,372
Current Assets	$13,684
Current Liabilities	$12
Net current liabilities	$13,672

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on September 22, 2003, denied the petition. The director determined that did not purchase the petitioning entity and only did. Thus, the director did not find clear and convincing evidence that is a successor-in-interest to the petitioning entity. Even if is a successor-in-interest to the petitioning entity, however, the director did not find that had the ability to pay the proffered wage as of the priority date since it was not in existence in 2001.

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[5] Ordinary income (loss) from trade or business activities as reported on Line 21.

[6] Taxable income before net operating loss deduction and special deductions as reported on Line 28.

On appeal, counsel asserts that is a successor-in-interest to the petitioning entity because are the "one in the same since he is the owner of Silgrin." In the alternative, counsel asserts that the portability provisions govern this case since "the I-140 & I-485 were pending more than 180 days before the sale of [the petitioning entity," entitling the beneficiary to "take new employment in the same job duties with a new employer."

At the outset, the unaudited financial statements that counsel submitted in response to the director's notice of intent to deny the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioning entity's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioning entity's ability to pay the proffered wage. Thus, unaudited Profit & Loss statement for January through May 2003 and unaudited Balance Sheet as of May 31, 2003 will not be considered.

Assuming, *arguendo*, that could establish that it is a successor-in-interest to the petitioning entity, counsel's reliance on the balances in 's bank accounts 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 petitioning entity's or successor-in-interest's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," 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 its status. 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 bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining a petitioning entity's or successor-in-interest's net current assets.

In determining a petitioning entity's or successor-in-interest's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner and/or successor-in-interest employed and paid the beneficiary during that period. If the petitioner and/or successor-in-interest 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 and/or successor-in-interest's ability to pay the proffered wage. In the instant case, neither the petitioner nor Silgrin, if it could establish that it is a successor-in-interest to the petitioning entity, established that it employed and paid the beneficiary the full proffered wage in 2001 or 2002.

If the petitioner and/or successor-in-interest 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 and/or successor-in-interest's federal income tax returns, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioning entity'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). Showing that the petitioner's and/or successor-in-interest's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner and/or successor-in-interest 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 a petitioning entity's net income figure, as stated on the petitioning entity's corporate income tax returns, rather than the

petitioning entity'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 petitioner's net income of $43,694 in 2001 is sufficient to cover the proffered annual wage of $26,457.60. Thus, the petitioner has established its ability to pay the proffered wage out its net income in 2001. The petitioner did not submit evidence of its ability to pay the proffered wage in 2002. The petitioning entity was sold in March 2002 and presumably would have reported taxable income for those months of operation. if it were properly a successor-in-interest to the petitioning entity, only reported net income of $18,372 in 2002, which is less than the proffered wage and does not demonstrate an ability to pay the proffered wage in 2002. Even if a pro-rata analysis was prepared for half of 2002's obligations, as counsel urges, no determination can be made that the purported predecessor to showed a continuing ability to pay the proffered wage while it controlled sponsorship of the visa petition in 2002. Thus, an ability to pay the proffered wage out of net income has not been demonstrated in 2002.

Nevertheless, the petitioner's and/or successor-in-interest's net income is not the only statistic that can be used to demonstrate a petitioner's and/or successor-in-interest's ability to pay a proffered wage. If the net income the petitioner and/or successor-in-interest 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 and/or successor-in-interest's assets. The petitioner's and/or successor-in-interest's total assets include depreciable assets that the petitioner and/or successor-in-interest 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 and/or successor-in-interest's total assets must be balanced by the petitioner's and/or successor-in-interest's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's and/or successor-in-interest'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 and/or successor-in-interest's current assets and current liabilities.[7] 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner and/or successor-in-interest is expected to be able to pay the proffered wage out of those net current assets. if properly a successor-in-interest to the petitioning entity, reported net current assets of only $13,672 during 2002. No evidence was submitted from the petitioning entity of its net current assets in 2002. Even if a pro-rata analysis was prepared for half of 2002's obligations, as counsel urges, no determination can be made that the purported predecessor to showed a continuing ability to pay the proffered wage while it controlled sponsorship of the visa petition in 2002. Thus, an ability to pay the proffered wage out of net current assets has not been demonstrated in 2002.

The record of proceeding does not contain sufficient evidence that qualifies as a successor-in-interest to the petitioning entity. This status requires documentary evidence that Silgrin has assumed all of the rights, duties,

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

and obligations of the predecessor company. Even if Silgrin were doing business at the same location as the predecessor, this would not establish that would be a successor-in-interest. While appears to be using the petitioning entity's name to transact business deals and its banking, nowhere is it documented that transferred all assets and liabilities from himself to after transferring all assets and liabilities from the petitioning entity to himself. There have been two business transactions, and this could insulate from any transactions that occurred in between the sale of the petitioning entity to incorporation of Contrary to counsel's assertions, there is no evidence that owns only that he is its director, president, and treasurer. There is no evidence concerning 's stock ownership in the record of proceeding. Regardless, would still carry the burden of proving that it assumed all of the assets, liabilities, and obligations of the petitioning entity, which it has failed to do. The AAO concurs with the director's findings that the record of proceeding does not present clear and convincing evidence of successorship to the petitioning entity and thus, the AAO does not find that Silgrin is a successor-in-interest to the petitioning entity.

In any event, even if were determined to be a successor-in-interest to as noted above, 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). In the instant petition, has not demonstrated an ability to pay the proffered wage out of either its net income or net current assets or any other viable source of funds. Counsel's assertions in response to the director's notice of intent to deny the petition do not overcome this determination. First of all, 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). Second of all, counsel failed to submit the petitioning entity's 2002 corporate tax returns to illustrate its ability to pay the proffered wage during its half-year operations prior to the sale to Silgrin. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, as noted twice above, even if a pro-rata analysis was prepared for Silgrin's half of 2002's obligations, no determination can be made that the purported predecessor to Silgrin showed a continuing ability to pay the proffered wage while it controlled sponsorship of the visa petition in 2002.

Additionally, contrary to counsel's assertions, Silgrin did not report any "Cost of labor" expenses on its 2002 tax return, thereby failing to prove counsel's assertion that it has to rely upon subcontracted labor that would be dispensed with upon permanent employment of the beneficiary. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Thus, counsel has not presented clear and convincing evidence that Silgrin, if determined to be a successor-in-interest to the petitioning entity, would decrease labor costs by employment of the beneficiary.

Finally, counsel asserts that the portability provisions of the American Competitiveness in the 21st Century Act (AC21), Pub.L.No. 106-313, apply to this petition. AC21 amended the Act enabling qualified beneficiaries to

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[8] For example, hypothetically, could have purchased the petitioning entity cheaply because it went out of business or was in bankruptcy proceedings and dispensed with associative liabilities prior to incorporating and continuing business affairs using the petitioning entity's name. In such a scenario, Silgrin would not adopt all obligations and liabilities of the petitioning entity.

retain eligibility for an employment-based preference visa if they met certain eligibility requirements in the instance of lengthy adjudications and changed circumstances during a petition's pendency. In this case, there is no approved employment-based visa and thus the portability provisions do not apply. Regardless of the AC21 issue, neither the petitioner nor , if a successor-in-interest, can establish its continuing ability to pay the proffered wage and has failed to establish tha s a successor-in-interest to the petitioning entity, and the petition will be denied on those grounds.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income sufficient to cover the proffered wage. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001.

In 2002, the petitioner did not present evidence of its ability to pay the proffered wage. purportedly a successor-in-interest, shows a net income of only $18,372, net current assets of only $13,672 and has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner an if a successor-in-interest, have not demonstrated that any other funds were available to pay the proffered wage. The petitioner and if a successor-in-interest, have not, therefore, shown the ability to pay the proffered wage during 2002.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage in 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The record of proceeding does not contain sufficient evidence that Silgrin is a successor-in-interest to the petitioning entity.

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.