U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 02 118 50159 Office: CALIFORNIA SERVICE CENTER Date: JUN 15 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for an Unskilled, Other Worker Pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii)

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

The petitioner was a glass fabricator. According to the petition, it seeks to employ the beneficiary permanently in the United States as a glass worker. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor. 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.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is April 27, 2001. The beneficiary's salary as stated on the labor certification is $10 per hour or $20,800 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence dated March 13, 2002 (RFE1), the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. RFE1 exacted the petitioner's original, signed federal income tax returns with schedules and attachments, as submitted, annual report, or audited financial statement from 2001 to the present.

The petitioner, based in San Diego, California, purports to be a limited liability company, namely, "Glasswerks SD, L.L.C." as stated on the Form I-140 petition, including the designation "L.L.C." In response to RFE1, the petitioner submitted a letter from its purported controller, [redacted], dated May 14, 2002. The letter appears on Glasswerks SD, L.L.C. letterhead, including the designation "L.L.C." [redacted] stated that the petitioner employed 25 full-time employees, was financially sound, had employed the beneficiary since January 1999, and did not anticipate any changes in its ability to pay the proffered wage until the beneficiary obtained lawful permanent residence. [redacted] attached a fragmentary payroll record, dated May 13, 2002. This extract stated the beneficiary's hourly rate at $11.00 per hour, but it disclosed no payer, hours worked, period, or total. The response to RFE1 included no federal income tax return. Subsequently, the petitioner submitted financial statements for 1996, 1997, 1998, 1999, and for the six-month period preceding June 30, 2001. These statements relate to "Glasswerks Group" and do not appear to be audited.

The director determined that the petitioner did not qualify for discretionary acceptance of its financial officer's statement, as an employer of more than 100. *See* 8 C.F.R. § 204.5(g)(2). The director found no credible evidence of the ability to pay the proffered wage, as specified in RFE1, and denied the petition on July 11, 2002.

On August 1, 2002, the director received the petitioner's appeal. A new letter from [redacted] dated July 26, 2002, and appearing on [redacted] letterhead, indicated that the petitioner is an affiliate of [redacted] and a subsidiary [redacted] asserted that [redacted] Corporation, comprised of the original owners of the Glasswerks Group, "recently" acquired [redacted] The petitioner also submitted audited financial statements of UGC (audited statements), as of December 31, 2000.

Neither letter from [redacted] states clearly, or documents, any connection between the petitioner, Glasswerks [redacted] Acquisition Corporation, and the "original owners." His second letter contradicts the status of the petitioner, because it states that it began business in January 1999 as one of four locations of Glasswerks LA, Inc. The I-140 indicates that the petitioner began business over 20 years before, in 1979.

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).

Upon review of the appeal, the director issued a new request for evidence, dated August 8, 2002 (RFE2). RFE2 specifically requested evidence of the business relationship between the petitioner, Glasswerks LA, Inc, and UGC. Again, RFE2 sought proof of the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner responded to RFE2 on October 21, 2002, submitting the petitioner's "Action by Written Consent of Members without a Meeting" (the dissolution). [redacted] the manager) and UGC (the Member) executed the dissolution of the petitioner on June 18, 2001 and filed it with the California Secretary of State, effective June 30, 2001. The dissolution stated that the petitioner ceased to exist on June 30, 2001, prior to the filing date of the petition, February 14, 2002.

The dissolution states:

> RESOLVED, FURTHER, that upon the [petitioner's] receipt of proper documentation that the Members have surrendered their certificates to [the petitioner] in complete satisfaction of their rights in and to the net assets of [the petitioner] on dissolution, that the holders of said membership interests shall receive all of the assets of [the petitioner], including proceeds resulting from the sale of [the petitioner's] assets, if any and any evidence of indebtedness acquired by reason of such sale, after satisfaction of [the petitioner's] indebtedness or assumption thereof by the members.

The response to RFE2 also included the petitioner's 2001 Form 1065, U.S. Return of Partnership Income, Short Year Final Return, for the tax year beginning January 1, 2001 and ending June 30, 2001, with Schedules K and K-1. The Forms K-1 reflect that [redacted] owned 99 percent of the petitioner and UGC owned one percent.

Also, in response to RFE2, the petitioner submitted a third letter from [redacted] dated October 10, 2002 and appearing once again on the petitioner's letterhead complete with the designation "L.L.C." In this letter, Mr. [redacted] speaks of the petitioner as a "division" of [redacted] averred that:

1- S.D. Glass Fabricator [redacted] was operating as a L.L.C. until June 30, 2001.
2- The L.L.C. was 99% owned by [redacted]
3- 1% of the L.L.C. was owned by United Glass Corp.
4- Glasswerks L.A. was 100% owned by [UGC].

5- July 1, 2001 [redacted] became a division as opposed to L.L.C., all Ownership remained the same.
6- During 2001 [redacted] continued to operate as a division of Glasswerks L.A., Inc. which is totally owned by UGC.

Finally, the petitioner submitted an audited report with a consolidating balance sheet, a consolidating income statement, and a consolidated statement of cash flow (2000 statements). Columns in the 2000 statements represented components of UGC, and one of them bore the title "Glasswerks."

Notes to the audited report and 2000 statements, at page 8, explained that:

> On August 1, 1999, [UGC] acquired 11 operating companies in transactions accounted for as purchases (the "Acquisitions"). The acquired companies ("operating companies") are as follows:
>
> [redacted]
>
> • [and eight (8) others not pertinent to this discussion].

The audited report, 2000 statements, and notes still do not mention the petitioner. They do not establish its status, manner of inception, liquidation, or membership in [redacted]

As of January 1, 2001, Schedule L of Form 1065 reflected current assets of $781,745, current liabilities of $457,306, and a difference, the net current assets, of $324,439. The petitioner could make no such showing thereafter, since it was liquidated.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. *See* 8 C.F.R. § 204.5(g)(2). *See also* 8 C.F.R. §§ 103.2(b)(1) and (12).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during a given 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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] Current assets and liabilities are shown on Schedules L and balance sheets. If a company's end-of-year 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 record does not establish that the petitioner was able to pay the proffered wage as of April 24, 2001. The record contains no evidence that the petitioner employed the beneficiary during 2001 before it was dissolved. Further, according to its 2001 tax return, the petitioner showed a net loss of $50,221 for the first six months of 2001. As it was dissolved on June 30, 2001, its 2001 tax return, Schedule L, does not reflect the petitioner's net current assets as of that date. The unaudited financial statements for "[redacted] as of June 30, 2001 are unaudited. By specifying "audited" financial statements, 8 C.F.R. § 204.5(g)(2) makes clear that unaudited statements have little evidentiary value. Moreover, it is not clear whether "Glasswerks Group" includes any entities that have a legal obligation to pay the beneficiary's 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).

Regardless, the petitioner must demonstrate its continued ability to pay the proffered wage. Even assuming we found that either [redacted] r UGC was a successor in interest, the record contains no evidence of either corporation's ability to pay the proffered wage after the priority date. As stated above, the financial statements for 2000 are not relevant. Moreover, the petitioner would still need to demonstrate its own ability to pay the proffered wage as of the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Beyond the decision of the director, the record does not establish that the entity identified as the petitioner existed at the time the petition was filed. We note that not until the appeal did the petitioner concede that it had dissolved. 20 C.F.R. § 274a.1(g) provides:

> The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.

Matter of United Investment Group, 19 I&N 248 (Comm. 1984), provides that in the case of a partnership petitioner, "the actual partnership which existed when the job offer was made and certified must continue, and not a separately entered partnership between other parties and not a newly constituted partnership between some of the parties of the previous partnership, either using the same or a new trade name." While the instant petition involves different facts, we find the reasoning applicable. The petitioner did not exist at the time it filed the petition. Neither counsel, the individual signing the petition, nor Mr. Torres revealed that the limited liability

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[1] 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.

company purportedly filing the petition had been dissolved several months prior to the filing of the petition until the appellate stage. Rather, [redacted] continued to use the letterhead of a dissolved company, complete with the "L.L.C." designation, in his response to the director's inquiry. 8 C.F.R. § 204.5(l) provides that "any United States employer" may file a petition on behalf of an unskilled worker. As the limited liability company that filed the petition did not exist when it purportedly filed the petition, we cannot conclude that the petitioner was a proper employer. Thus, it had no ability to file a petition in behalf of the beneficiary. In light of the dissolution of the petitioner prior to filing the petition and the failure of its purported successor to file the instant petition as the successor, we need not even consider whether either Glasswerks LA, Inc. or UGC is a proper successor in interest. The petition was improperly filed by a nonexistent 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.