U.S. Department of Homeland Security
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Washington, DC 20529

B-6

U.S. Citizenship and Immigration Services

[redacted]

File: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 2 4 2004

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 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
For Administrative Appeals Office

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a gas station. It seeks to employ the beneficiary permanently in the United States as a manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies 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 a brief and additional evidence.

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.

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. 8 C.F.R. 204.5(d). Here, the Form ETA 750 was accepted for processing on July 27, 2001. The proffered wage as stated on the Form ETA 750 is $21.19 per hour, which equals $44,075.20 per year. The ETA 750, Part B states that the beneficiary began to work for the petitioner during September 2000.

The petition indicates that the petitioner employs four workers. With the petition, counsel submitted a copy of the petitioner's 2001 Form 1120S U.S. Income Tax Return for an S Corporation. That return, marked as the petitioner's final return, shows that the petitioner reports taxes based on the calendar year and declared ordinary income of $3,914 during 2001. The corresponding Schedule L shows that at the end of that year the petitioner had no current assets and no current liabilities, which yields net current assets of $0. Counsel also submitted a sworn affidavit from the beneficiary, dated August 14, 2002, stating that he began work for the petitioner during June of 2001 and has been paid $2,500 per month in cash.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Director, Nebraska Service Center, on December 16, 2002, requested additional evidence pertinent to that ability. The director noted that the petitioner's 2001 tax return shows that it paid total salaries of only $17,407, which appears to be inconsistent with paying the beneficiary $2,500 per month and employing a total of four workers.[1] The director further noted that, even if CIS accepts as

[1] This office agrees that declaring a total wage expense of $17,407 during 2001 and claiming to employ four workers would apparently contradict the claim of paying the beneficiary $2,500 per month. This contradiction would exist whether the

a fact that the petitioner has been paying the beneficiary $2,500 per month, that wage, plus the petitioner's 2001 ordinary income, plus the amount of the petitioner's 2001 depreciation deduction, would equal less than the proffered wage.

In addition to the general request that the petitioner provide evidence of its continuing ability to pay the proffered wage beginning on the priority date, the director specifically requested that the petitioner submit a legible copy of the 2001 Form W-2 Wage and Tax Statement showing wages the petitioner paid to the beneficiary.

In response, counsel submitted the 2002 profit and loss statement and balance sheet of Adam Petroleum, Inc. Although the accountant's report did not accompany those financial statements, the statements indicate that they were produced pursuant to a compilation.[2] Counsel also submitted a copy of that corporation's February 2003 checking account statement.

Counsel submitted a copy of the petitioner's 2000 Form 1120S U.S. Income Tax Return for an S Corporation. That return shows that the petitioner declared ordinary income of $6,875 during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets. This office notes, however, that because the priority date is July 27, 2001, evidence pertinent to the petitioner's finances during 2000 are not directly relevant to any issue in this case.

Counsel submitted a letter, dated March 10, 2003, in which she stated that Adam Petroleum, Inc. "has assumed responsibility for the petitioner's business." Counsel asserts that the evidence submitted shows that the original petitioner was able to pay the proffered wage from the priority date until it sold the company, and that Adam Petroleum has been able to pay the proffered wage since acquiring the petitioner. Counsel also cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the beneficiary's ability to generate income should be considered in the determination of the ability to pay the proffered wage. Finally, counsel argued that, because the priority date was July 27, 2001, the amount of the proffered wage the petitioner must show the ability to pay during 2001 should be pro-rated.

Counsel submitted a document, dated March 6, 2003 and entitled "Annual Report of Adam Petroleum, Inc. The first paragraph of that document states that it is made to the shareholders of Adam Petroleum. The body of the document states that during 2002 Adam Petroleum earned a net income of $38,000 on sales of approximately $1.5 million. Haider Bazzi signed that document as the president of Adam Petroleum.

The evidence submitted in response to the December 16, 2002 Request for Evidence did not include a W-2 form showing wages the petitioner paid to the beneficiary, as the director requested. No explanation was given for this omission.

On March 19, 2003, the Director, Nebraska Service Center issued another Request for Evidence. The director stated that although counsel asserted that Adam Petroleum is the original petitioner's successor-in-interest it had submitted no evidence to establish that assertion as fact. The director requested that the petitioner provide documentation showing "how the change of ownership occurred (buyout, merger, etc.), and that the successor

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beneficiary began to work for the petitioner during September 2000, as the beneficiary stated under penalty of perjury in the Form ETA 750 Part B, or during June 2001, as the beneficiary stated in the sworn affidavit of August 14, 2002.

[2] A declaration at the bottom of each page of those financial statements reads, "See Accompanying Accountant's Compilation Report."

[petitioner] will assume all rights, duties, obligations, and assets of the original [petitioner]." The director also requested evidence of the successor petitioner's ability to pay the proffered wage. In accordance with 8 C.F.R. § 204.5(g)(2), the director stated that evidence of the successor petitioner's ability to pay the proffered wage must include the successor petitioner's "annual reports, U.S. tax returns, or audited financial statements. [Emphasis in the original.]

In response, counsel submitted a letter, dated February 20, 2003, from who states that he is president of both original petitioner, and the successor petitioner. Mr. tates that ' has assumed the complete business and assets of ' the original petitioner. Later in the same letter, states that "Adam Petroleum, Inc. hereby assumes all immigration-related liabilities of also states that he is the sole stockholder of both corporations.

Counsel also submitted her own letter, dated June 10, 2003. In that letter, counsel stated that the had "assumed all the immigration related rights, duties and obligations of [the original petitioner]."

The director determined that the evidence submitted did not establish that the original petitioner's successor-in-interest. The director found that the evidence pertinent to the finances of is therefore irrelevant and that the evidence submitted did not show that the original petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On August 20, 2003 the director denied the petition.

On appeal, counsel asserts that the February 20, 2003 statement shows that is the original petitioner's successor-in-interest and that the financial documents of should, therefore, be considered in the determination of ability to pay the proffered wage. Counsel further states that the beneficiary's affidavit should be considered sufficient evidence of its assertion that the petitioner has been paying the beneficiary $2,500 per month. Finally, counsel reasserts the arguments previously presented.

In a brief filed to supplement that appeal, counsel again states that has assumed the business and assets of the original petitioner. Counsel again asserts that the evidence submitted shows that the successor petitioner is, in fact, the original petitioner's successor-in-interest and has the ability to pay the proffered wage. Counsel cited a non-precedent decision of the AAO[3] for the proposition that, in addition to its income, the petitioner's depreciation deduction, cash-on-hand, and total assets should be considered in determining the ability to pay the proffered wage and for the proposition that bank balances in excess of the proffered wage show the ability to pay the proffered wage.

Counsel faults the director's statement that the petitioner submitted no evidence to demonstrate the relationship between the original petitioner and the successor petitioner. Counsel notes that the president, in the February 20, 2003 letter, states that ' has assumed the complete business assets of as well as its immigration related liabilities."

As was mentioned above, the beneficiary stated, in Part B of the Form ETA 750, that he began working for the petitioner during September 2000. In the sworn affidavit of August 14, 2002, however, the beneficiary stated that

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[3] This office reminds counsel that inclusion of a decision in Immigration Reporter does not indicate that it is a precedent decision.

he began working for the petitioner during June 2001. Although those statements are directly contradictory, counsel has not provided any explanation for the discrepancy.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

Especially under these circumstances, counsel's reliance on the compiled financial statements is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that three types of documentation are the preferred evidence to demonstrate a petitioner's ability to pay a proffered wage. Those three types of evidence are copies of annual reports, federal tax returns, and audited financial statements. The financial statements make clear that they were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. In this case, where the petitioner has submitted contradictory evidence, they are especially unconvincing.

Counsel's citation of non-precedent decisions is of no effect. Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding.

Counsel cited *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989) for the proposition that the ability of the beneficiary to generate additional income for the petitioner should also have been considered.

Although a portion of the decision in *Masonry Masters* urges consideration of the ability of the beneficiary to generate income for the petitioner, that portion is clearly dictum, as the decision was based on other grounds. The court's suggestion appears in the context of a criticism of the failure of CIS to specify the formula it used in determining the petitioner's ability, or inability, to pay the proffered wage.

Further still, while the decision in *Masonry Masters* urges the Service to consider the income that the beneficiary would generate, it does not urge CIS to assume that the beneficiary would generate income and to guess at the amount. The petitioner has submitted no evidence that the petitioner would generate any amount of additional income, and absent any such evidence, CIS will make no such assumption.

Finally, in citing *Masonry Masters*, counsel implies that, had the petitioner been able to employ the beneficiary during 2001, the petitioner would have enjoyed greater profits. According to one of the alternative employment histories submitted by the beneficiary, the petitioner employed him during part of 2001. According to the other, contradictory employment history, the petitioner employed the beneficiary during all of 2001. In light of either assertion, but especially the latter, counsel's argument is unpersuasive.

Counsel's reliance on the bank statement submitted is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.[4] Third, no evidence was submitted to demonstrate that the funds

[4] This is especially true in this case, where the petitioner has provided only one single month's bank statement.

reported on the petitioner's bank statements somehow reflect additional available funds not reflected on its tax returns.

Counsel's assertion that the proffered wage during 2001 should be pro-rated is unconvincing. The petitioner must show the ability to pay the proffered wage beginning on the priority date.

The proffered wage is $44,075.21. The priority date is July 27, 2001. As of the priority date, 207 days of that 365-day year had elapsed and 158 days remained. If the proffered wage were prorated, the petitioner would need to show the ability to pay only 158/365th of the proffered wage, or $19,079.13.

In that event, however, the petitioner would have to show that it earned $19,079.13 during that portion of 2001 after the priority date.[5] No evidence of the amount the petitioner earned from the priority date to the end of 2001 was submitted in this case.

In order to establish that it is a successor-in-interest, the successor petitioner 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. The successor-in-interest petitioner is obliged to show 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-at-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 Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In this case, the successor petitioner has not submitted sufficient any proof of the form of the change in the original petitioner's ownership. It has not established that it assumed all of the rights, duties, obligations, and assets of the original employer. Issues pertinent to ability to pay the proffered wage are addressed in detail below.

Counsel is correct that the director erred in stating that the no evidence was submitted pertinent to the relationship between the original petitioner and Adam Petroleum. The director should, instead, have stated that the evidence submitted pertinent to that point is woefully insufficient.

In his letter of February 20, 2003, [redacted] stated that "[redacted] has assumed the complete business and assets of [redacted]" the original petitioner. Later in the same letter, [redacted] stated that "[redacted] hereby assumes all immigration-related liabilities of [redacted]." Neither statement, even if believed, explains, as required by *See Matter of Dial Repair Shop*, how [redacted] acquired the original petitioner. Neither statement, even if believed, states unequivocally that [redacted] assumed all of the rights, duties, obligations,[6] and assets of the original petitioner.

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[5] The petitioner might show this inferentially, by prorating the petitioner's earnings for the year through a calculation similar to that applied above to the proffered wage. The petitioner might also show its earnings during that period more directly, with an audited profit and loss statement limited to that period.

[6] A company may acquire the assets of another company, in whole or in part, without assuming its debts and obligations. Without demonstrating the method by which Adam Petroleum acquired its interest in the original petitioner, the the petitioner cannot demonstrate the duties assumed in this instance.

Even if the statements of [redacted] were interpreted as stating that, in acquiring the original petitioner, Adam Petroleum assumed all of its rights, duties, obligations, and assets, the issue of the credibility of that evidence would remain. [redacted] statement is the only evidence pertinent to that point and is unsupported by contracts or other agreements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In this case, the successor petitioner has not submitted evidence of the form of the change in the original petitioner's ownership. It has not established that it assumed all of the rights, duties, obligations, and assets of the original employer. It has not established, therefore, that it is the original petitioner's successor-in-interest. Issues pertinent to ability to pay the proffered wage are addressed in detail below.

This office will not consider the amount of the petitioner's depreciation deduction in the determination of the petitioner's ability to pay the proffered wage, notwithstanding that the director appeared to sanction that approach. A depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1080 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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, that evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during that period. In the instant case the unsupported statements of the beneficiary and the petitioner's owner president are the only evidence that the petitioner has ever employed the beneficiary. The petitioner did not establish that it employed the beneficiary.

If the petitioner does not establish that it paid the beneficiary an amount equal to or greater than the proffered wage during that period, the AAO 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 both CIS and 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*, the court held that the Service 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. *Supra* at 1084. The

court specifically rejected the argument that the INS, 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 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, the AAO will review the petitioner's net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

The proffered wage is $44,075.20 per year. During 2001, the petitioner declared ordinary income of $3,914. That amount is insufficient to pay the proffered wage. The petitioner ended that year without net current assets. The petitioner was unable, therefore, to pay the proffered wage out of its net current assets. The petitioner has not demonstrated that any other funds were available to it with which it might have paid the proffered wage during 2001. The petitioner has not demonstrated the ability to pay the proffered wage during 2001.

Because it failed to demonstrate the ability to pay the proffered wage during 2001, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, this office notes that the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation indicated that it was the petitioner's final return. Such a notation generally indicates that the taxpaying corporation has ceased to do business. Obviously, this office would be unsympathetic to a petition from an extinct corporation alleging that it is unable to locate suitable employees. Other explanations exist for the Final Return notation. It might be triggered by a change in ownership or by the petitioner's election to reorganize as a different type of business association, e.g. partnership, sole proprietorship, or C corporation. Such a reorganization or change in ownership would raise the issue of whether the succeeding entity is a true successor-at-interest within the meaning of *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981). In any event, checking the box indicating "Final Return" raises issues that would require resolution before the petition could be considered approvable. Because of today's decision pertinent to the petitioner's ability to pay the proffered wage, however, those issues need not be resolved in the instant case.

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.