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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 30 2005
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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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. The petitioner began operations on December 16, 2002.[1] It asserts it is the successor-in-interest of another entity in the same business location. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The Alien Employment Certification is in the name of the former company. The petitioner states it has assumed that company's obligations under the Alien Employment Certification. 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, that it had not proved that it was the successor-in-interest to the prior business owner who was the applicant on the Alien Employment Certification. The director denied the petition accordingly.

On appeal, the 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.

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 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 U.S. Department of Labor. 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 U.S. Department of Labor 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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is $12.50 per hour ($26,000.00 per year). The Form ETA 750 states that the position requires two years experience.

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[1] The date of incorporation is December 18, 2002.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, an employer's support letter for the beneficiary, copies of documentation concerning the beneficiary's qualifications as well as other documents.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and it had not proved that it was the successor in interest to the prior business owner who was the applicant on the Alien Employment Certification. The Nebraska Service Center on July 29, 2003, requested evidence pertinent to those issues.

The Service Center specifically requested:

> Please submit documentary evidence of your successor interest of ... [the former business]. Your mere statement is not sufficient.
>
> Please submit evidence that ... [the former business] had the financial ability to pay the offered annual wage to the beneficiary of over $25,000 from April 12, 2001, until your incorporation on December 16 [sic 18], 2002. The evidence must include a copy of the ... [the former business'] federal tax returns, annual reports, or audited financial statement for each of the years 2001 and 2002. This evidence may also be supplemented by other evidence of its financial wherewithal.
>
> Please submit evidence of your financial ability to pay the offered wage since December of 2002, such as copies of your bank statements and Form 941's.

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted copies of petitioner's IRS Form 941 Employer's Quarterly Federal Tax Return, and, attachments for Form UI-3/40 for the first three quarters of 2003; share certificates for the petitioner; the former business entity's Internal Revenue Service (IRS) Form 1120 tax returns for years 2001 and 2002; and, the prior business' IRS Form 941 Employer's Quarterly Federal Tax Return for 2002.[2]

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of $26,000.00 per year from the priority date.

- In 2002, the Form 1120 stated taxable income[3] of $4,983.00.
- In 2001, the Form 1120 stated taxable income of $16,547.00.

The director denied the petition on March 23, 2004, finding 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, that the evidence submitted did not demonstrate that it was the successor in interest to the prior business owner who was the applicant on the Alien Employment Certification.

On appeal, counsel asserts:

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[2] The beneficiary is not listed as an employee in 2002 on the form.

[3] Form 1120, Line 28.

1. The petitioner is entitled to use the labor certification in that the petitioner is both the successor interest of ... [the prior business] and the new employer as well as the beneficiary is the same or similar occupation classification, and the adjustment is pending more than 180 days (more than one year) (see INA §§204(j), 212(a)(A)(iv).[4]

2. The current petitioner has the ability to pay the proffered wage (see Form 1120S copy).

3. The beneficiary has not started working with the former employer. The total earning (profits) is more than $25,000.00 (16,547 + 8,000 + 3,000) when start working. He will be paid full ($25,000) (with work authorization).

With the appeal, counsel submits petitioner's tax return:

In 2003, the Form 1120S stated taxable income[5] of $47,860.00.

The record contains insufficient evidence that the petitioner qualifies as a successor-in-interest to the prior business owner company. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. 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. In addition, 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. 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).

Reviewing the record of proceedings, the petitioner submitted share certificates of the petitioner, a letter dated March 11, 2003, in which the petitioner states that "... [It] is willing to assume the rights, duties, obligations

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[4] Counsel is requesting that the petition be processed pursuant to the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). This office is aware that AC21 rendered certain valid (defined as "approved" or, in limited instances "approvable") employment-based immigrant visa petitions "portable" for purposes of the beneficiaries' adjustment of status. *See* Memorandum of William R. Yates, Associate Director for Operations, United States Citizenship and Immigration Services, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313)* (May 12, 2004). That is, under certain circumstances, a beneficiary of a valid petition may substitute an employer and continue unabated the process of obtaining lawful permanent residence status rather than beginning anew. However, the AAO will not apply the terms of AC21 to the instant appeal for two reasons: First, AC21 is about the beneficiary's eligibility for adjustment of status. The question of the beneficiary's eligibility of adjustment of status, whether under the terms of AC21 or not, properly lies with the CIS official with jurisdiction over the beneficiary's application for adjustment of status. Moreover, the beneficiary of a visa petition has no standing in these proceedings. *See* 8 C.F.R. 8 § 103.3 (a)(1)(iii)(B). Second, since AC21 portability benefits are predicated on the beneficiary having a valid (approved or approvable) visa petition, the AAO's adjudication of the petition necessarily must consider *only* the petition on its initial merits without consideration of the amount of time a concurrently filed application for adjustment of status has been pending or the fact that the beneficiary has changed employers during the pendency of the adjustment application or its appeal.

[5] IRS Form 1120S, Line 21.

of the original employer [and prior business owner] and continue to operate the same type of business in the same location." There is also another similar letter from petitioner dated January 27, 2003, and, an affidavit dated October 15, 2003. While the petitioner asserted that it would assume the obligations to employ the beneficiary under the Alien Employment Certification, it did not demonstrate that it was the successor to the prior business owner in that location. No bill of sale, sales, merger or assignment agreement for the business was submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. 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. No evidence was submitted to show that the petitioner or the prior business owner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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*, 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. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. *See also Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

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, CIS will review the petitioner's assets. The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, the prior owner did not have taxable income to sufficient pay the proffered wage at any time between the years 2001 through 2002 for which the prior owner's tax returns are offered for evidence.

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 prior business owner's) current assets and current liabilities.[6] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's 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 is expected to be able to pay the proffered wage.

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[6] 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.

Examining the two Form 1120 U.S. Income Tax Returns of the prior business owner submitted by petitioner, Schedule L found in each of those returns indicates the following.

- In 2002, the prior business owner's Form 1120 return's Schedule "L" was blank.
- In 2001, the prior business owner's Form 1120 return stated current assets of $22,042.00 and $4,251.00 in current liabilities. Therefore, the prior business owner's had a $17,791.00 in net current assets for 2001. Since the proffered wage was $26,000.00 per year, this sum is less than the proffered wage.

Therefore, for the tax years 2001 and 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established through the prior business owner that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

Examining the one Form 1120S U.S. Income Tax Return submitted by petitioner, Schedule L found in that return indicates the following.

- In 2003, the Form 1120S return stated current assets of $38,333.00 and $4,027.00 in current liabilities. Therefore, the petitioner had a $34,306.00 in net current assets for 2003. Since the proffered wage was $26,000.00 per year, this sum is more than the proffered wage.

Therefore, for the tax year 2003, the petitioner had established that it had the ability to pay the beneficiary the proffered wage through an examination of its current assets.

Counsel's assertions cannot be concluded to outweigh the evidence presented in the two corporate tax returns as submitted by petitioner for the prior business owner that by any test demonstrates that prior business owner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Also as stated above, the petitioner has not established by probative evidence such as a bill of sale, sales agreement, merger or assignment agreement for the business, or its assets, that it is the successor-in-interest to the prior business owner.

The evidence submitted does not establish that the petitioner or the prior business owner had the continuing ability to pay the proffered wage beginning on the priority date through 2001 and 2002, or that petitioner is the successor-in-interest to the prior business owner.

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.