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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 16 2005
WAC 03 149 50587

IN RE: Petitioner:
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:

[redacted]

[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 sustained.

The petitioner, [redacted], is an electronics manufacturer. It seeks to employ the beneficiary permanently in the United States as an electronics engineer. 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 was a successor in interest to the employer that applied for the underlying labor certification, or that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

This office notes that the petitioner has emerged following a confusing array of corporate mergers and transfers among affiliates similarly named, both foreign and domestic, before and after the priority date in these proceedings. A brief introductory history of the petitioner's corporate history is therefore in order[1] and follows.

The petitioner, [redacted] (IRS tax/ID [redacted], is a U.S. corporation organized in Delaware and, since June 1, 2001, the U.S. operating subsidiary of the parent corporation, [redacted]., (IRS Tax/ID [redacted] also a Delaware corporation. The petitioner, which came into existence on May 17, 2001, under a different name, filed the visa preference petition herein on April 15, 2003.

Before the petition's filing, employer [redacted] aka [redacted] (Canadian tax/ID [redacted] filed the Form ETA 750 with the Department of Labor, specifically on August 23, 2001, which thereby became the priority date in these petition proceedings. This appeal hinges upon the petitioner establishing that itself as having become a successor in interest to [redacted] aka [redacted] (Canadian tax/ID [redacted] the applicant for the labor certification. It also hinges upon the petitioner establishing that it is both a United States employer and a successor in interest of [redacted] aka [redacted] (Canadian tax/ID [redacted] formerly and possibly currently a Canadian company, since only a U.S. employer can file employer-based visa-preference petitions.

On the priority date, August 23, 2001, [redacted] aka [redacted] (Canadian tax/ID [redacted] was a Canadian corporation. On October 18, 2001, [redacted] (IRS Tax/ID [redacted]) came into existence when it was incorporated in Delaware. On December 17, 2001, [redacted] (IRS Tax/ID [redacted] became the wholly owned subsidiary of [redacted] aka [redacted] (Canadian Tax/ID [redacted]. On February 13, 2002, through a corporate reorganization [redacted] aka [redacted] Canadian

[1] The petitioner's corporate counsel supplied the information based upon the corporate records of the petitioner and its affiliates, disavowing the accuracy or completeness of the information.
[2] Given their similarity, the names of the entities involved appear in **boldface**.

Tax/ID [redacted] changed its domicile from Nova Scotia to Delaware, and [redacted] (IRS Tax/ID [redacted]) became the parent company, thereby succeeding to the interests of [redacted] (Canadian tax/ID [redacted].

The final action occurred when [redacted] (Tax/ID [redacted]) organized in California, merged with a previous U.S. operating subsidiary of [redacted] aka [redacted] (Canadian tax/ID [redacted]) after which the petitioner was incorporated and, on December 17, 2001 assumed the role U.S. operating subsidiary. On June 11, 2001, the California corporation became the wholly owned subsidiary of the petitioner [redacted] (IRS tax/ID [redacted]).

From this explanation, the petitioner asserts that it has demonstrated that it succeeded to the interests and obligations of [redacted] aka [redacted] (Canadian tax/ID [redacted]) at all times relevant to the petition.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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 August 23, 2001. The proffered wage as stated on the Form ETA 750 is $85,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have begun work for [redacted]

[redacted] ak[redacted] Canadian tax/I[redacted] the petitioner's claimed affiliate, as of May of 1999.

On the petition, the petitioner claimed to have been established on 2002[3], to have a gross annual income of $133 million, and to currently employ 164 workers. In support of the petition, the petitioner submitted:

- A Form G-28;
- The petitioner's March 3, 2003 letter in support of the petition;
- An approved ETA 750 labor certification application;
- A credentials evaluation report on the beneficiary dated April 16, 1998;
- Copies of multiple Form H-1B visas valid for December 22, 1997, through January 10, 2005, the last notification dated July 15, 2002, issued to[redacted] f Alviso, California; and
- The annual financial report for 2002 of[redacted] (IRS Tax/[redacted]

On July 31, 2003, the director found the evidence submitted insufficient either to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or to establish that it was the successor in interest to the employer that applied for the labor certification. Accordingly, the director issued a request for evidence (RFE) pertinent to those shortcomings. Specifically, the director asked the petitioner to document that:

- [redacted] the petitioner, is the successor in interest to[redacted] the former company that obtained the labor certification, and has accordingly assumed all rights, duties obligation and assets of the former company while continuing in the same line of business[4];
- The petitioner's submitted financial statements for fiscal 2001 and 2002 are audited; and,
- The petitioner issued Form W-2 Wage and Tax Statements to the beneficiary for 2001 and 2002.

In response, the petitioner submitted:

- An October 7, 2003 letter from the petitioner[redacted] (IRS tax/ID [redacted] to explain how the petitioner became the successor in interest of the prior employer;
- A supplement as requested to the beneficiary's credentials evaluation;
- More documents to show the beneficiary had the graphics training to qualify for the proffered position;
- The 2003 annual financial report for[redacted] (IRS Tax/ID[redacted]; and,

[3] This claim appears based upon the above-described corporate reorganization of February 13, 2002.
[4] The director identified a "discrepancy," stating that on the Form ETA 750, "the petitioner's IRS Tax Number is[redacted] while the petition lists it as[redacted]

- Form W-2s issued to the beneficiary for 2001 and 2002 by the [redacted] (Tax/ID [redacted] wholly owned by the petitioner [redacted] (IRS tax/ID [redacted]) since June 11, 2001.

On November 17, 2003, the director denied the petition because the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, or that the petitioner was the successor in interest to the employer that had signed the Form ETA 750.

On December 9, 2003, on filing the appeal, counsel [redacted], asserted the director erred in finding that the petitioner had not established itself as a successor in interest or as able to pay the proffered wage, and asked for 60 more days beyond the date of his filing the appeal to supply more evidence.[5]

On February 9, 2004, new counsel[6] submitted further documentation showing:

- The petitioner's ownership history from the petitioner's corporate counsel;
- SEC Form 10K documentation on the ownership history of [redacted] (IRS Tax/ID [redacted]
- A February 9, 2004 letter from the chief financial officer of [redacted] (IRS tax/ID [redacted], the petitioner, with employer's quarterly tax reports attached, stating that it currently employs 185 people and that its gross revenues for fiscal 2003 were $194.3 million;
- The beneficiary's Form W-2 for 2003 from the petitioner [redacted] (IRS tax/[redacted] showing wages paid of $124,008.67; and
- Form 1120 Corporate tax returns for 2001 for [redacted] (IRS tax/ID [redacted] showing a minimum alternate taxable income of $10.5 million, and an unknown income for 2002, with pending requests to the Internal Revenue Service for transcripts of the company's Form 1120 tax returns.[7]

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. In the instant case, the petitioner has established that [redacted] employed and paid the beneficiary the full proffered wage in 2001 and 2002. Further, the petitioner's chief financial officer certified that the petitioner employed more than 100 workers. *See*, 8 C.F.R. § 204.5(g)(2).

The question remains whether counsel has sufficiently documented that the petitioner has succeeded to the interests of the beneficiary's prior employer.

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[5] Counsel has indicated he no longer intends to submit more evidence.

[6] Substitute counsel [redacted] filed a Form G-28 signed February 6, 2004, along with the listed documentation, submitted on February 9, 2004.

[7] The tax return for 2001 was filed before issuance of the petitioner's employer taxpayer ID number.

The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. The company claiming to be successor 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. It is further obliged to show that its predecessor had the ability to pay the proffered wage beginning with 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).

The director stated that the petitioner's proof only established that [redacted] (IRS Tax/ID [redacted] succeeded to the interests of [redacted] aka [redacted] (Canadian tax/ID [redacted] but not that the petitioner [redacted] (IRS tax/ID [redacted] succeeded to the interests [redacted] aka [redacted] Canadian tax/ID [redacted]

Counsel has now submitted documents showing a series of mergers, share transfers, liquidations, and name changes among U.S. and Canadian parent and subsidiary companies to show how the petitioner succeeded to the interest of the initial applicant on the Form ETA 750.

This appeal hinges on whether the petitioner can establish that it succeeds, through the name changes, mergers and transfers, to the interests and obligations of the company that obtained certification of the proffered position on the Form ETA 750 application. As the director correctly noted, the petitioner must also establish the U.S. domicile of the petitioning company and its successors.

This office finds, based upon the documentation in the record and submitted on appeal that the petitioner [redacted] (IRS tax/ID [redacted] succeeded to the interests [redacted] Canadian tax/ID [redacted] the applicant on the Form ETA 750.

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 met that burden. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.