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

U.S. Citizenship and Immigration Services

identifying data deleted to prevent unwarranted invasion of personal privacy

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: NOV 10 2005

EAC 00 285 51385

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]

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

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

The petitioner is a commercial construction corporation. It seeks to employ the beneficiary permanently in the United States as an artisan-mosaic tiles and stones. 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 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. The director denied the petition accordingly.

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, 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 May 17, 1995. The proffered wage as stated on the Form ETA 750 is $26.61 per hour ($55,348.80 per year). The Form ETA 750 states that the position requires two years experience.

Because the Director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the Director requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Director requested the petitioner's 1995, 1999, and 2000 U.S. federal income tax returns, or, petitioner's annual reports for those years with audited or reviewed financial statements. The Director also requested the beneficiary's W-2 Wage and Tax Statements for those same years if he was employed by petitioner.

In response to the request for evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted a letter from the [redacted] the beneficiary's Form 1040

federal tax returns for the years 1999 and 2000; the beneficiary's Form 1099-MISC from [redacted] the beneficiary's Form W-2 Wage and Tax Statement for 1999 from [redacted]; and, the [redacted] U.S. Internal Revenue Service (IRS) Form 1120S tax returns for years 1995 and 1999.

The director denied the petition on May 17, 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.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage, and that it has paid the beneficiary wages from 1995 to the date of preparation of the appeal. Counsel submits the beneficiary's personal tax returns from 1995 to present.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

There are no wage or compensation payments made by [redacted] to the beneficiary in the record of proceeding. As stated above, the petitioner, [redacted] is the employer in the certified Form ETA 750 maintaining an address at c/o [redacted] and, [redacted] Its federal "Employer Identification Number" (EIN) is [redacted]

There are Forms W-2 Wage and Tax Statements in the record of proceeding from [redacted] evidencing wage payments to the beneficiary. Turin Construction Corp.'s EIN number is [redacted]

There is a Form 1099-MISC "Miscellaneous Income" compensation statement showing additional payment to the beneficiary in the record of proceeding from [redacted] EIN number is [redacted]

There is no explanation made by counsel of the relationships between the abovementioned entities. Without evidence that the corporations mentioned above, and [redacted] are not the responsible parties, the AAO must assume from the wage and compensation paid by them to the beneficiary, that during the period examined, every entity except [redacted] was at times the beneficiary's employer.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003)

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[1] Counsel in his correspondence refers to [redacted] also known as [redacted] as the petitioner. The evidence in the record of proceeding demonstrates that they are two separate legal entities.

stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In the event that one or more of the entities mentioned became the successor-in-interest to [redacted] in order for a "successor in interest" determination to be made, the following documentation would be necessary: a new I-140 petition; a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer.

An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981).

Since none of these necessary requirements have been met, for purposes of determining the ability to pay the proffered wage on and after the priority date, the AAO will look exclusively to the income and assets of [redacted] to demonstrate the ability to pay the proffered wage.

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 employed and paid the beneficiary.

No tax returns were submitted from [redacted]

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the three years prior to filing the petition. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the U.S. Internal Revenue Service and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Even without the information requested, the corporate tax returns that were submitted do not state sufficient taxable income to pay the proffered wage. The 1995 return submitted stated tax able income of $20,597.00. The 1999 corporate return stated a tax loss of <$100,369.00>[2].

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[2] The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

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.