U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: LIN 02 173 50005 Office: NEBRASKA SERVICE CENTER Date: OCT 05 2005

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 meat market and grocery store. It seeks to employ the beneficiary permanently in the United States as a store manager. 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, and, that it had not established that the beneficiary has the requisite experience as stated on the labor certification petition. 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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 February 8, 2001. The proffered wage as stated on the Form ETA 750 is $16.83 per hour ($35,008.40 per year). The Form ETA 750 states that the position requires four years experience.

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, consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

* * *

> The IRS [U.S. Internal Revenue Service] tax number which you reported in Part 1 of your petition does not match that given on your 2001 federal tax return. Please explain this discrepancy.
>
> Please submit a complete copy of your 2002 tax return as evidence of your continued ability to pay the offered wage.
>
> Please submit copies of Form W-2's [federal Wage and Tax Statements] which you issued to the beneficiary for 2001 and 2002 and a copy of his most recent pay stub.

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 La Ranchera Market & Restaurant Inc. Internal Revenue Service (IRS) Form 1120S tax return for 2002 for, W-2 statements for the beneficiary for the years 2001and 2002, and state tax form TC-20S.

Consistent with the requirements of 8 C.F.R. 204.5 § (l)(3)(ii), the Service Center requested that evidence of the beneficiary's experience be in the form of a description of the training received or the experience of the alien. The Service Center specifically requested:

> Please submit documentation, with English translation if applicable, that the beneficiary has completed at least three years of high school.
>
> Please submit evidence that as of February 8, 2001, the beneficiary had at least four years of experience as a store manager, as a super market manager, or as a meat market manager. Evidence must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.
>
> Please submit evidence that the beneficiary, prior to February 8, 2001, had computer knowledge of Quickbook, Excel, and Word.

In response to the above Request for Evidence concerning the beneficiary's prior employment, education, and, the requisite four years work experience as a store manager, counsel submitted the following copies of

documents: school course and grade transcript, certificate of professional test for the meat industry, an occupation and employment verification letter from [redacted] verification from [redacted] Markets that the beneficiary, prior to February 8, 2001, had computer knowledge of Quickbook, Excel. And Word.

The director denied the petition on May 7, 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 the beneficiary has the requisite four years of salient work experience.

On appeal, counsel submits a brief and he asserts in pertinent part on the issue of the requisite four years of salient work experience as a store manager, as a super market manager, or as a meat market manager. " ... according to his recommendation letter, the Beneficiary worked for seven years as a store manager of a store called OXXO."

The employment verification letter from [redacted] DE C.V. is dated May 20, 2004. It states that the beneficiary worked as a store manager for one of the OXXO stores from May 1991 until December 1998. Since the beneficiary was born on April 20, 1974, the start date of OXXO employment would mean he became a store manager when he was 17 years old and worked for OXXO until he was 24, from 1991 through 1998. There is no detail in the letter that gives a description of the training received or the experience of the alien as a store manager as required by regulation. The beneficiary also attended high school full time from 1991 through 1994. The beneficiary would have been 20 years old when he graduated high school. This job verification does not appear credible, and, it does not conform to regulation and provide sufficient detail to provide substantiation to the petitioner's assertions that the beneficiary had the required occupation al experience prior to entering the United States.

There is an occupation and employment verification letter from [redacted] dated January 15, 2004, that he first employed the beneficiary "...in my first location [redacted] ...in Provo, Utah in December of 1998 as a store manager in training..." According to The U.S. Citizenship and Immigration Services computer database, the beneficiary was apprehended attempting to enter the United States illegally by way of the Los Angeles Port of Entry on May 17, 1999, and he was returned to Mexico. This job verification does not appear credible.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states>

> Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The evidence submitted does not demonstrate credibly that the beneficiary had the requisite four years of experience as a store manager, as a super market manager, or as a meat market manager.

The second issue relates to the fact in this case that both the petitioner in the I-140 petition and the employer in the Form ETA 750 are identified as Ranch Markets Inc., with a certain U.S. federal employer identification number (FEIN) whereas all the evidence submitted for petitioner in this case has been in the name of La Ranchera Market & Restaurant Inc. with a different FEIN number. This matter is important as the court in *Sitar v.*

Ashcroft, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated on the issue of legal responsibility to pay the proffered wage, "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."

The AAO notes that there is coincidence between the name of the owner and physical location of the meat market and grocery store, which are the same, but there is no evidence of a change in ownership of the business except, of course for the difference in names.

[redacted] and [redacted] are companies with different FEIN numbers. Counsel gives an explanation of the history of the evolution of the business organizations but not a clear explanation for the use of multiple FEIN numbers for what counsel asserts is one business enterprise. According to counsel's brief there are three FEIN numbers, [redacted] and [redacted] CIS uses the FEIN numbers to specifically identify business entities requiring that number in the immigration petition as the United States Internal Revenue Service requires it on the tax return. Suffice it to say, counsel admits that " ... the petition has always used two [F]EIN numbers for its accounting purposes" which admittedly confuses an already clouded question of organizational identity. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel states that all the above-mentioned FEIN numbers belong to [redacted] which, of course, begs the question of the relationship between the petitioner, [redacted] and [redacted] The petitioner has not provided substantiation for counsel's assertions. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Petitioner has not produced Utah State incorporation articles or charters or foreign business registrations, good standing certificates, corporate or organization minutes, share certificates, or evidence of merger, successor ship, dissolution or reorganization, assignment and assumption agreements or fictitious name registration necessary to show that [redacted] is now [redacted] or tha[redacted] trades in that name

The record contains no evidence that [redacted] or [redacted] qualifies as a successor-in-interest to [redacted] 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. Moreover, 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). No evidence has been submitted for Ranch Markets Inc.'s ability to pay the proffered wage.

Notwithstanding above, in determining the petitioner's ability to pay the proffered wage during a given period, evidence was submitted to show that [redacted] employed the beneficiary from 2001 through 2003. In 2001 [redacted] paid the beneficiary $22,160.00, in 2002 it paid wages in the amount of $27,262.14, and in 2003, it paid wages in the amount of $27,262.14.

Since the proffered wage is $35,008.40 per year, the [redacted] did not pay the beneficiary the proffered wage.[1]

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.

The tax returns submitted in this case demonstrated the following financial information concerning the La Ranchera Market & Restaurant Inc. ability to pay the proffered wage of $35,008.40 per year from the priority date April 9, 2001:

- In 2003, the Form 1120S stated taxable income[2] of $30,503.00.
- In 2002, the Form 1120S stated taxable income of $41,029.00.
- In 2001, the Form 1120S stated taxable income of $182,077.00.

Therefore in 2001 and 2002, [redacted] had the ability to pay the proffered wage, but no evidence was submitted for the petitioner [redacted]

Since there was no evidence of the taxable income of the petitioner presented for years 2001 through 2003, and no documentary evidence submitted to show the relationship between the petitioner and employer identified on the certified Alien Employment Application, the petitioner has not come forward with sufficient evidence to make a determination of whether or not on the priority date the *petitioner* had the ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, that is the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite four years of experience. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

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.

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[1] By the above exposition, the AAO is not conceding that [redacted] is the party of interest here or that it has standing in this matter.

[2] IRS Form 1120S, Line 21.

ORDER: The appeal is dismissed.