U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 15 2006

WAC-03-065-53240

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition[1] was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting and drywall contracting company. It seeks to employ the beneficiary permanently in the United States as a drywall application supervisor. 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 submitted documentation does not show that the petitioner is a successor in interest to the original employer listed on the original labor certification, therefore, the labor certification cannot be reaffirmed and given further consideration. The director denied the petition accordingly.

Counsel files an appeal without a brief and/or additional evidence.[2]

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(l)(3)(i) states in pertinent part:

> ... Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program ...

The instant case is not an application for Schedule A designation, nor an application that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an individual labor certification from the Department of Labor (DOL) for the proffered position.

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

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[1] An I-140 immigrant petition for the identical beneficiary based on the same labor certification was previously filed by an employer named Builder's Choice Paint & Drywall, Inc. on January 29, 2002 but denied by the director of California Service Center on August 5, 2002. No appeal was filed from the denial.

[2] On the Form I-290B counsel checked box that "I am sending a brief and/or evidence to the AA[O] within 30 days". The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). However, in response to the AAO's fax inquiry counsel confirmed that he did not file a brief or evidence in support of the appeal as he indicated on Form I-290B. The AAO will evaluate the decision of the director, based on the evidence submitted prior to the director's decision.

> 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. *See* 8 CFR § 204.5(d). 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 filed by Builder's Choice Paint & Drywall, Inc. and accepted on April 9, 2001. The proffered wage as stated on the Form ETA 750 is $53,710 per year. The Form ETA 750 states that the position requires four (4) years experience in the job offered. On the petition, the petitioner claimed to have been established on September 28, 1999, to have a gross annual income of $600,000, to have a net annual income of $250,000, and to currently employ 25 workers. The petitioner did not provide its federal employer identification number.

On April 15, 2003, because the petitioner did not submit the evidence to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and nor the petitioner submit any evidence to establish that the petitioner is a successor in interest to Builder's Choice Paint & Drywall, Inc. (Builder's Choice), the director issued a request for additional evidence (RFE). In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested this evidence from April 9, 2001 to the present and evidence to show that the petitioner is a successor in interest to Builder's Choice, such as documentation to show how the change of ownership occurred and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer.

In response, counsel submitted Form 1120, U.S. Corporation Income Tax Return filed by Builder's Choice for 2001 and a letter dated July 7, 2003 of [redacted] with Articles of Incorporation for Builder's Choice, the corporate indemnification between Builder's Choice and the petitioner, and the account transactions reports of the petitioner. The director denied the petition on December 20, 2004, finding that the evidence submitted with the petition and in response to the RFE did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the petitioner is the successor in interest to the employer who originally filed the labor certification application.

On appeal, counsel asserts that the petitioner has adequately demonstrated that it has assumed all the rights, duties, obligations and assets of Builder's Choice and demonstrated its ability to pay the proffered wage with evidence already submitted.

Counsel submitted a letter from [redacted] states in his letter that "[the petitioner] has retained certain employees that used to work for Builder's Choice. [The petitioner] and Builder's Choice also maintained the same business locations. [The petitioner] assumed Builder's Choice's customer lists and is able, to any extent permitted, to utilize those customer lists in the acquisition of business." [redacted] submitted a Corporate Indemnification Agreement on July 26, 1999 to the Nevada State

Contractor's Board relating to Builder's Choice, wherein [the petitioner] agreed to indemnify creditor's[sic] of Builder's Choice. However, the corporate indemnification agreement submitted does not establish that the petitioner qualifies as a successor-in-interest to Builder's Choice. 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 and that the petitioner agrees to indemnify certain debts or expenses does not establish that the petitioner is a successor-in-interest. If the petitioner had assumed all of the rights, duties, and obligations of Builder's Choice with that agreement on or about July 26, 1999, the petitioner instead of Builder's Choice as the employer should have filed the labor certification application, which was filed April 9, 2001. Counsel failed to document how and when the change of ownership occurred and that the petitioner has assumed or will assume all rights, duties, obligations, and assets of Builder's Choice.

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. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, Builder's Choice filed the labor certification application on April 9, 2001 and the petitioner filed the instant petition based on the approved labor certification on December 13, 2002. Therefore, even if the petitioner had established its status as a successor-in-interest to the predecessor, it must establish that Builder's Choice had the financial ability to pay the proffered wage from the priority date, April 9, 2001 to the date assumed by the petitioner.

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 did not submit any documents to show that Builder's Choice Paint & Drywall, Inc. or the petitioner employed and paid the beneficiary any amount of compensation during these years. Therefore, the petitioner has not established that either the predecessor or the successor-in-interest employed and paid the beneficiary the full proffered wage during the period from the priority date through the present.

If the petitioner does not establish that either the predecessor or the petitioner employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the predecessor's or 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record of proceeding contains a copy of Form 1120, U.S. Corporation Income Tax Return filed by Builder's Choice for 2001. The record before the director closed on July 8, 2003 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's or the predecessor's federal tax return for 2002 should have been available. However, despite the director's specific request in his RFE, the petitioner did not submit its or Builder's Choice's tax return for 2002. Therefore the petitioner failed to establish that the predecessor or the instant petitioner had the ability to pay the proffered wage to the beneficiary in 2002.

In addition, Builder's Choice's tax return demonstrates that its net income[3] for 2001 was $6,337. Therefore, for 2001, the year of the priority date, the predecessor did not have sufficient net income to pay the proffered wage of $53,710.

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 total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, 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 current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The predecessor's net current assets during the year of 2002 were $(9,459). The predecessor had insufficient net current assets to pay the proffered wage in 2002.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that the predecessor had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. The petitioner did not submit any regulatory-prescribed evidence to establish its

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[3] Taxable income before net operating loss deduction and special deductions as reported on Line 28.

[4] 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.

continuing ability to pay the proffered wage from the date of filing the instant petition or becoming the successor-in-interest to the predecessor.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In addition, as the director states in his decision, the Form ETA 750 indicates that the position proffered by the petitioner is an Estimator/Project Manager and approved by the DOL in the position of Drywall Application Supervisor. However, the record of proceeding shows that the petitioner was incorporated in the State of Nevada on February 2, 1999 and the beneficiary is the president of the petitioner. As a result, it does not appear that the beneficiary is or will be performing the duties as stated in the Form ETA 750 and where the petitioner is owned by the beneficiary, it is not a *bona fide* offer.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.