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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PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAY 12 2006

SRC-03-042-55435

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, Chief
Administrative Appeals Office

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

The petitioner is a distributor and manufacturer for a bridal gown designer. It seeks to employ the beneficiary permanently in the United States as a dressmaker. 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 had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 13, 2001. The proffered wage as stated on the Form ETA 750 is $9.30 per hour, which amounts to $19,344 annually. On the Form ETA 750B, signed by the beneficiary on November 1, 2001, the beneficiary did not claim to have worked for the petitioner.

In support of the petition, the petitioner submitted no evidence pertaining to its continuing ability to pay the proffered wage beginning on the priority date. Because of that, the director issued a notice of intent to deny the petition on January 20, 2004. 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 for 2001 through 2003. The director also requested any W-2 forms issued by the petitioner to the beneficiary or bank statements.

In response, the petitioner submitted a letter from counsel stating that the petitioner's affiliates, DNE Group Ltd (DNE) and Demetrios, had sufficient profits to demonstrate the ability to pay the proffered wage. Counsel stated that the owners of those affiliates are the petitioner's owner's children. A letter from [redacted]) and dated February 22, 2004 was also submitted and stated that the petitioner's affiliates are "related taxpayer[s] under the Internal Revenue Code section 267 (a, b, c, d). . ." [redacted]'s financial analysis did not contain an accountant's certification concerning the type of review he made of the petitioner's financial status. He concluded that the petitioner and its affiliates, based on net profit, depreciation, and discretionary loans have

the continuing ability to pay the proffered wage beginning on the priority date. The petitioner submitted its corporate federal tax return for 2000 and corporate federal tax returns for DNE.

The director determined 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, on March 4, 2004, denied the petition because the petitioner failed to submit its 2001, 2002, or 2003 tax returns and there was no evidence that DNE and the petitioner are related or successors to each other.

On appeal, counsel asserts that the director overlooked a transfer of funds between the petitioner and DNE and DNE's 100% ownership of the petitioner's shares. Counsel also claims that the matter was also being "conducted" in federal circuit court and submitted a briefing schedule thereto. The petitioner submits a copy of a corporate resolution that DNE is a successor-in-interest to the petitioner since it acquired 100% of its shares on April 13, 2004; an affidavit, dated April 13, 2004, from counsel that he oversaw the transfer of 100% of DNE's shares to the petitioner; stock transfer certificates dated April 13, 2004 reflecting the transfer of 100 shares from the petitioner's owner to DNE; and a copy of a stock transfer ledger.

At the outset, an inquiry about the matter pending in federal circuit court revealed that it was an appeal of a denial of the beneficiary's adjustment of status application and not the instant petition. Additionally, that case was dismissed. Thus, the appeal is properly before the AAO.

Also at the outset, the financial analysis submitted by [redacted] was not clearly conducted pursuant to an audit. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they represent audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 establish that it employed and paid the beneficiary the full proffered wage in 2001, 2002, or 2003.

If the petitioner does not establish that it 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 petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to [redacted] assertion. 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). 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.

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> 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, which include cash-on-hand.[1] 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 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 out of those net current assets.

The petitioner has not demonstrated that it paid any wages to the beneficiary. It has failed to submit regulatory-prescribed evidence that illustrates its net income or net current assets for relevant years under analysis, which includes the priority date year, 2001, and subsequently, despite the director's request for such evidence. 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 during and subsequent to filing the petition. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS 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

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[1] 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.

evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Thus, the petitioner has not established that it has the continuing ability to pay the proffered wage beginning on the priority date through wages actually paid to the beneficiary, its net income, or its net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. On appeal, the record of proceeding demonstrates that on April 13, 2004 DNE acquired the petitioner. However, A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971)[2]. Ownership is also not the only issue when examining whether an unrelated business entity is a successor-in-interest to the petitioner. This status requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, which in this case, would be the petitioner. 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). In the instant case, no evidence was provided concerning the predecessor enterprise's (i.e., the petitioner's) ability to pay the proffered wage from the priority date until the date DNE acquired all of its shares. Since the petitioner has not shown its continuing ability to pay the proffered wage beginning on the priority date prior to its being purchased by the ostensible successor-in-interest, therefore, according to the holding in *Matter of Dial Auto Repair Shop, Inc.*, the petition cannot be approved and the AAO need not examine the successor-in-interest's contentions any further.

Prior to April 13, 2004, counsel's reliance on the assets of DNE is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). The record of proceeding reflects that the petitioner and DNE have separate employer identification numbers, are located in different states, and no evidence suggests a transfer of funds, "related taxpayer status" or other formal affiliate or business relationship prior to April 13, 2004.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2001 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.

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[2] Additionally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).