U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

Identifying data deleted to **prevent** clearly unwarranted **invasion** of personal privacy

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 21 2007

EAC 04 119 51802

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 Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded for further consideration and entry of a new decision.

The petitioner is a meat factory. It seeks to employ the beneficiary permanently in the United States as a kettle cook. As required by statute, a Form ETA 750 Application for Alien Labor Certification approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that the beneficiary had two years qualifying experience in the proffered position as required by the Form ETA 750 as certified. Therefore, the director denied the petition.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The central issues in this case are whether the petitioner has properly demonstrated that the beneficiary has the two years of qualifying experience required for the proffered position according to the Form ETA 750 as certified, whether the entity that filed the petition is a successor-in-interest to the entity that filed the Form ETA 750 which accompanied the petition, and whether the petitioner has demonstrated the continuing ability to pay the proffered wage from the priority date onwards.

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 granting 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.

A successor-in-interest must submit proof of the relevant change in ownership and of how the change in ownership occurred. It must also demonstrate that it assumed all of the rights, duties, obligations, and assets of the original employer and that it continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the April 23, 2001 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 23, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour for a forty-hour workweek, or $31,200 per year.

The Form I-140 petition in this matter was submitted on March 16, 2004. On the petition, the petitioner stated that it was established during 1989[1] and that it employs four workers. The petition states that the petitioner's gross annual income is $160,669 and that its net annual income is $36,320. On the Form ETA 750, Part B, signed by the beneficiary on March 28, 2001, the beneficiary did not claim to have worked for the petitioner.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.

The record contains the following evidence: (1) an experience letter from [redacted] and Beef Processing Factory, Port Said, Egypt, which indicates that the beneficiary worked for this meat factory from 1985 through 1997; (2) a Certificate of Incorporation for Elbasha International Inc. filed June 25, 2001; (3) a Certificate of Incorporation for [redacted] filed April 25, 1989; (4) the Form 1120, U.S. Corporation Income Tax Return, for 2001 for [redacted]; (5) the Form 1120 for 2002 for [redacted]; (4) the Form 941, Employer's Quarterly Federal Tax Return, for [redacted]. for each quarter of 2003; and (5) an unaudited 2003 financial statement for [redacted] The record does not contain any other evidence relevant to whether the beneficiary had the qualifying experience as of the priority date, whether the petitioner is a successor-in-interest to the entity which filed the Form ETA 750, and whether the petitioner had the continuing ability to pay the proffered wage from the priority date onwards.

According to the Form ETA 750 as certified the beneficiary must have two years of experience in the proffered position and fluency in Arabic. There are no educational requirements for the position. The duties of the proffered position are to prepare and cook various cold meat products in Arabic or Halal style, including but not limited to pastrami, salami, bologna, frozen and dry sausage, hot god, lain mortadella,

[1] It is noted that the petitioner's certificate of incorporation in the record indicates that it was established during 2001.

mortadella with pistachio, mortadella with green olive and to supervise two employees working as choppers and stuffers.

This office finds that as the petitioner has adequately documented for the record that the beneficiary was born in Egypt and attended primary and secondary school in Egypt, the petitioner has demonstrated that the beneficiary is fluent in Arabic.

The regulation at 8 C.F.R. § 204.5(l)(3) provides in relevant part:

> (ii) *Other documentation*—
>
> > (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.

The experience letter from [redacted] certifies that the beneficiary worked as a chief cook and supervisor at the company. Specifically, he held a supervisory role in the manufacturing of pastrami, salami, bologna, frozen and dry sausage, hot dog, plain mortadella, mortadella with pistachio, and mortadella with green olive, using Halal meat. [redacted] employed the beneficiary over twelve years from March 1985 through December 1997. This office notes that counsel apparently erred when responding to the director's request for evidence in 2004. That is, on August 4, 2004, the director specifically requested that the petitioner submit proof that the beneficiary had the relevant qualifying experience and submit its 2001 tax return or audited financial statement as proof of its ability to pay the proffered wage. In response, counsel timely submitted various tax returns, quarterly wage statements and financial statements for 2001 through 2003 which are referred to above. However, instead of the beneficiary's experience letter with certified translation, counsel submitted the beneficiary's birth certificate with certified translation. This office finds the error harmless in that copies of this experience letter had already been submitted into the record by counsel, appa rently during 2003 and earlier, in an effort to document for the record that the beneficiary had an application pending with CIS. These copies were not submitted in connection with the instant petition, but were nonetheless part of the record. Also, counsel submitted an additional copy of the experience letter from [redacted] on appeal. Finally, the information on the experience letter is consistent with the information which the beneficiary initially provided on the Form 750B under penalty of perjury on March 28, 2001. As such, this office finds no reason within the record to question the authenticity of the experience letter.

Thus, the petitioner has sufficiently documented that the beneficiary is fluent in Arabic and has the qualifying experience for the proffered position as set out on the Form ETA 750 as certified. Consequently, the director's basis for denial as set out in his decision dated March 16, 2005 has been overcome on appeal.

The record, however, suggests additional issues that were not addressed in the director's denial. 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). The record does not establish that the petitioner [redacted] is a successor-in-interest to [redacted], the entity which filed the Form ETA 750 that accompanied the petition. Counsel does assert that [redacted] **is a successor-in-interest to** [redacted] Yet, counsel did not properly document this for the record. The unsupported assertions of counsel are not evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). A successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It 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. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). Without evidence of a successor-in-interest relationship, the petitioner [redacted] may not utilize the Form ETA 750 filed by [redacted] and CIS may not accept the petition.

Further, in order to maintain the original priority date, once a successor-in-interest relationship is established, the successor must demonstrate that the predecessor had the ability to pay the proffered wage from the priority date until the date that the petitioner succeeded it, and that the successor had the ability to pay the wage from that date onwards. *See Id.* Also, concerning the petitioner's ability to pay the proffered wage, the [redacted] financial statement submitted into the record plainly states that it is an unaudited report. Even if the petitioner were able to document that it is a successor-in-interest to [redacted] Inc., such that CIS might accept its petition and review its financial documents, any 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. 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.

The tax return for [redacted] in the record indicates that it is a corporation, that it incorporated on April 25, 1989, and that it reports taxes pursuant to the calendar year. The tax return for [redacted] in the record reflects that it is a corporation and that it reports taxes pursuant to the calendar year. The Certificate of Incorporation for [redacted] indicates that it incorporated on June 25, 2001.

Before CIS may consider these tax returns, the petitioner must sufficiently document that it is the successor-in-interest to [redacted] If the petitioner is able to do so, the information on these tax returns may be considered. Currently, the petitioner's tax returns for subsequent years, 2003, 2004, 2005, 2006 should be available. The director may choose to request that the petitioner submit these forms or audited financial statements for these tax years as additional proof of its continuing ability to pay the wage from the priority date onwards. Further, statements made by the beneficiary and documented for the record indicate that [redacted] employed the beneficiary during the relevant period of analysis. The director may also choose to request that the petitioner provide documentation such as copies of the beneficiary's Form W-2, Wage and Tax Statement, issued by the petitioner or by [redacted] as further proof of its ability to pay the proffered wage, should the petitioner demonstrate that it is a successor-in-interest to [redacted]

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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 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. (Reg. Comm.1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 not documented for the record that it employed and paid the beneficiary during the relevant period of analysis. However, when questioned by a U.S. Immigration Officer on April 22, 2003, the beneficiary indicated that he was at that time employed by [redacted]. and that he had been since March 2002. Should the petitioner document for the record that it is a successor-in-interest to [redacted] the director may determine that documentation of the beneficiary's employment and salary at [redacted] are relevant to the analysis of the petitioner's ability to pay the wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is not sufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly in excess of the proffered wage, is not sufficient. 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 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, the petitioner's year-end cash and those assets expected to be consumed

or converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On the Schedule L attached to the Form 1120, the petitioner's current assets are found at lines 1(d) through 6(d). Year-end current liabilities are shown on lines 16(d) through 18(d) of the Schedule L. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due.

According to the Form ETA 750 for [redacted] as certified, the proffered wage is $31,200 per year. The priority date is April 23, 2001.

As noted above, the petitioner has not documented for the record that it is the successor-in-interest to [redacted], the entity that filed the Form ETA 750 which accompanied the instant petition. Before any of the financial documents in the record may be considered, indeed before CIS may accept the petition, the petitioner must demonstrate that it is the successor-in-interest to Feletto Food Products, Inc.

In view of the foregoing, the previous decision of the director will be withdrawn. The matter will be remanded so that the director may require that the petitioner clarify whether it is the successor-in-interest to [redacted] and, if so, may require that the petitioner demonstrate that its predecessor had the ability to pay the proffered wage from the priority date until succeeded by the petitioner, and that the petitioner has the ability to pay the proffered wage from that date onwards. The director may also request any other evidence that he deems relevant to an issue material to the approvability of the instant visa petition. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.