U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

MAR 1 4 2007

File: [redacted] Office: TEXAS SERVICE CENTER Date:
SRC 04 217 52487

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)

IN 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 Acting Director (Director), Texas Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software applications development and information technology consulting services company. It seeks to employ the beneficiary permanently in the United States as a software engineer.[1] As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's June 13, 2005 denial, the director determined that the petitioner, One Associates, Inc., had not established that it was the successor-in-interest to the applicant on the Form ETA 750, One, Inc. The director also 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.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.[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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[2] On appeal, counsel indicated that he would submit a brief and/or evidence to the AAO within 30 days and stated that the petitioner is appealing the director's denial "on the grounds that (i) One Associates, Inc. IS the Successor In Interest of One Inc. and (ii) One Inc. has the financial ability to pay the proffered wages before it went bankrupt and thereafter One Associates Inc. had the financial ability to pay the proffered wages and continues to have such ability." Counsel dated the appeal July 13, 2005. As of this date, more than 19 months later, the AAO has received nothing further. The AAO sent a fax to counsel on February 1, 2007 informing counsel that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five days to respond. On February 1, 2007, counsel responded to the AAO by fax and indicated that he did not file a brief or evidence in support of this appeal.

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 DOL. *See* 8 C.F.R. § 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 DOL 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 September 1, 2000. The proffered wage as stated on the Form ETA 750 is $75,000.00 per year.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3] Counsel submits no evidence on appeal. Relevant evidence in the record includes a paycheck dated July 15, 2003 issued by Paranet to the beneficiary, an affidavit dated April 25, 2002 from [redacted] regarding the successor-in-interest status of the petitioner, Vivare, Inc. and One, Inc., an affidavit dated April 5, 2002 from [redacted] regarding the successor-in-interest status of the petitioner and Vivare, Inc., the petitioner's assumed name certificates, an accounts receivable list for Vivare, Inc. dated March 22, 2002, an Assignment and Collection Agreement ("Assignment and Collection Agreement") dated January 28, 2002 between [redacted] as an Assignee for the benefit of the creditors of One, Inc. and One Community, Inc., Vivare, Inc. and LaSalle Bank National Association, a First Amendment to the Assignment and Collection Agreement dated January 31, 2002, a Second Amendment to the Assignment and Collection Agreement dated March 8, 2002, a Trust Agreement and Assignment for the Benefit of Creditors dated January 29, 2002 between One, Inc. and [redacted] as Trustee-Assignee, IRS Forms 941, Employer's Quarterly Federal Tax Returns, for the petitioner for the first quarter of 2005 and the last quarter of 2004, IRS Form 941, Employer's Quarterly Federal Tax Return, for Vivare, Inc. for the last quarter of 2004, IRS Form 941, Employer's Quarterly Federal Tax Return, for Paranet for the last quarter of 2004, the petitioner's payroll lists for the first, second and third quarters of 2002, the petitioner's payroll register dated October 31, 2002, IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for Vivare, Inc. for 2003, the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003, the petitioner's financial statement for the first half of 2004, a balance sheet for Vivare, Inc. dated August 19, 2004, payroll lists for Vivare, Inc. for the first, second and third quarters of 2002, a payroll register for Vivare, Inc. dated October 31, 2002, and a consolidated financial statement for One, Inc. for calendar year 2000. The record does not contain any other evidence relevant to the petitioner's successor-in-interest status and its ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of $5,000,000.00, and to currently employ over 30 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on June 14, 2004, the beneficiary did not claim to have worked for the petitioner.

[3] 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 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 this case, the labor certification was issued to One, Inc. The I-140 petition was filed by One Associates, Inc. One, Inc. and One Associates, Inc. are separate companies with separate tax identification numbers.[4] The DOL does not issue a Form ETA 750 labor certification to a potential employee/beneficiary, but to a potential employer/applicant. Under certain circumstances, the petitioner may substitute a beneficiary. The beneficiary is not permitted, however, to substitute a petitioner. An exception to this rule is triggered if the petitioner is purchased, merges with another company, or is otherwise under new ownership. The 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 Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). As noted by the Director in her decision, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer.[5] The petitioner submitted no new

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[4] 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) 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."

[5] The Director determined that the evidence submitted shows that One, Inc. went bankrupt in 2002 but not that the petitioner took over the company as successor-in-interest. We agree. The evidence establishes that One, Inc. went bankrupt and transferred its assets to a trustee in trust for the benefit of its creditors on January 29, 2002. Certain consulting contracts and accounts receivable were transferred by the bankruptcy trustee to Vivare, Inc. pursuant to the Assignment and Collection Agreement, as amended. Counsel asserts that the petitioner is the successor-in-interest to Vivare, Inc. and that Vivare, Inc. is a successor-in-interest to One, Inc. However, the evidence does not establish that the petitioner assumed *all* of the rights, duties, obligations, and assets of either One, Inc. or Vivare, Inc. and that it continues to operate the same type of business as either One, Inc. or Vivare, Inc. Further, counsel's assertion that the petitioner and Vivare, Inc. are under common ownership does not establish a successor-in-interest relationship between the entities. This office notes that the 2003 federal income tax return for Vivare, Inc. shows that it has six shareholders, while the 2003 federal income tax return for the petitioner shows that it has two shareholders. Therefore, as determined by the director, the petitioner has not established that it is the successor-in-interest to One, Inc. The Director also determined that the evidence does not support the petitioner's claim that One, Inc. had the ability to pay the beneficiary's salary from the priority date in 2000 forward. We agree. The petitioner submitted the audited consolidated financial statement for One, Inc. and its subsidiary for calendar year 2000. With regard to the petitioner's ability to pay the proffered 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, Citizenship and Immigration Services (CIS) will next 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.*

evidence on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence submitted does not establish that the petitioner 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.

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). 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 statement of operations shows that One, Inc. had a net loss in 2000, and the balance sheet shows that the current liabilities of One, Inc. exceeded its current assets in 2000. Further, the petitioner provided no financial documentation evidencing the ability of One, Inc. to pay the proffered wage in 2001, 2002, 2003 or 2004. The petitioner provided no financial documentation evidencing its ability to pay the proffered wage in 2002 or 2004. In 2003, the petitioner's IRS Form 1120 states a net income of $86,443.00, which is sufficient to pay the proffered wage. Therefore, even if the petitioner had established that it was the successor-in-interest to One, Inc., the petitioner has not established that One, Inc. had the ability to pay the proffered wage from the priority date until January 2002, or that One Associates, Inc. had the ability to pay the proffered wage from January 2002 and continuing until the beneficiary obtains permanent residence, except for 2003.