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

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: APR 0 6 2009

EAC-04-168-52353

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a construction and woodworking company. It seeks to employ the beneficiary permanently in the United States as a cabinet maker. 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). 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. The AAO affirmed the director's decision.

On motion, 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $17.50 per hour ($36,400.00 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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, U.S.

Citizenship and Immigration Services (USCIS) 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. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 record does not contains copies of W-2 Wage and Tax Statements or any other documentation showing wages paid to the beneficiary by the petitioner. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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, USCIS 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. 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). The record shows that the petitioner was organized as a C corporation in 2001 and 2002. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner's tax returns demonstrate its net income for 2001 and 2002 as shown below.[1]

- In 2001, the Form 1120 stated net income of $4,987.00.
- In 2002, the Form 1120 stated net income of $3,541.00.

The petitioner did not have sufficient net income to pay the proffered wage in 2001 or 2002.

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[1] In support of this motion, the petitioner submitted a copy of its Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003. However, the 2003 tax return had been specifically requested by the director in a Request for Evidence issued on September 22, 2004. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] 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 petitioner's tax returns demonstrate its end-of-year net current assets for the years 2001 and 2002 as shown below.

- In 2001, the Form 1120 stated net current assets of $7,007.00.
- In 2002, the Form 1120 stated net current assets of $11,994.00.00.

The petitioner did not have sufficient net current assets to pay the proffered wage in 2001 or 2002.

Counsel asserted on appeal that the "Center Director overlooked the Record and misinterpret[ed] the employer's tax return as the owner of the company have more [sic] than sufficient compensation each year." As noted by the AAO on appeal, the documentation in the record establishes that [redacted] is the petitioner's sole shareholder. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The AAO noted that there was no statement from [redacted] that he would be willing to forego some or all of his compensation to pay the proffered wage. The AAO further noted that the amount required for the proffered wage would leave [redacted] with only minimal income. In support of this motion, the petitioner has submitted an affidavit from [redacted]. In the affidavit, [redacted] states that he "would have paid [the beneficiary] at an annual rate of $36,400.00 out of the amount listed as Compensation of Officers in the Company's Form 1120." Although the affidavit establishes the willingness of [redacted] to forego a portion of his income, it does not establish his ability to do so. As noted by the AAO previously, if [redacted] paid the proffered wage out of his officer compensation, he would be left with only minimal income. In support of this motion, counsel asserts that the AAO's concern in this regard is "misplaced" because "the Compensation of Officers does not necessarily reflect the full and comprehend [sic] income resources for the owner." However, the record does not contain any evidence of other sources of income for [redacted] or assets held by [redacted] 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)).

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[2] 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The AAO also noted in its decision that the petitioner listed on the ETA 750 is [redacted], while the petitioner listed on the Form I-140 is [redacted] (Formerly [redacted]). The petitioner had submitted evidence that Luxor [redacted] had dissolved and that [redacted]. operates under the assumed name [redacted] The AAO noted that, since [redacted] Inc. had dissolved, the petitioner may need to demonstrate that [redacted] is a successor-in-interest to [redacted]

A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The job offer is tied to the petitioning employer. A new petitioner can only assert continued processing under the same labor certification based on limited circumstances, such as in the case of a successor-in-interest, that [redacted] had assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In addition, in order to maintain the original priority date, the petitioner must demonstrate that the predecessor entity had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership in 2002.

In support of the motion, the petitioner has submitted a Certificate of Assumed Name of [redacted]; a Certificate of Incorporator's Action of [redacted]; the Certificate of Incorporation of [redacted]; a letter from the IRS assigning an Employer Identification Number to [redacted] and an Approval of Election to be Treated as a New York S Corporation from the New York State Department of Taxation and Finance addressed to [redacted]. These documents again show that [redacted]. was dissolved and that [redacted]. operates under the assumed name [redacted] In addition, the petitioner has submitted copies of correspondence, purchase orders, certificate of liability insurance, invoices, a New York Fire Control Corporation inspection certificate, a Notice to Employees regarding unemployment insurance, and a business license issued by the City of New York Department of Consumer Affairs. These documents generally show that [redacted]. is "doing business as" [redacted] and that it has the same mailing address as the predecessor entity, [redacted]

The record does not contain documentation establishing that [redacted] "has assumed all of the rights, duties, and obligations of the predecessor company" pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 481. Therefore, the petitioner has failed to provide evidence that it is the successor-in-interest to the original employer.

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 motion to reopen is granted and the decision of the AAO dated February 1, 2007 is affirmed. The petition is denied.