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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN-06-142-51883 Office: NEBRASKA SERVICE CENTER Date: MAY 20 2009

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:

SELF-REPRESENTED

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 Director, Nebraska Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The previous decision of the director will be withdrawn but the petition remains denied.

The petitioner is an automotive parts manufacturer. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor (DOL) accompanied the petition. The director denied the petition because it is accompanied by a labor certification approved for another company and the petitioner failed to establish that it assumed all of the rights, duties, obligations and assets of the original employer.

The instant appeal was filed by [redacted] with a Form G-28, Notice of Entry of Appearance as Attorney or Representative (Form G-28), from the petitioner and the Form I-290B indicates that [redacted] is an attorney or representative and represents the petitioner. However, the State Bar of California official website indicates that Mr. is not eligible to practice law. *See* http://members.calbar.ca.gov/search/member_detail.aspx?x=81434 (accessed on March 24, 2009). Thus, the petitioner is considered self-represented in this matter.

As set forth in the director's decision on January 19, 2007, the issue in this case is whether the successor-in-interest relationship between the petitioner and the predecessor company has been established.

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 DOL for the proffered position.

The record shows that MC2 Custom Alloys, Inc. (MC2) filed a Form ETA 750 on behalf of the instant beneficiary on January 23, 2004 and the Form ETA 750 was certified on December 20,

2005. On April 13, 2006, the petitioner filed the instant petition on behalf of the beneficiary as a successor-in-interest to MC2 based on the labor certification approved for MC2. The petitioner claimed that it acquired MC2 on December 1, 2005 and submitted a copy of the purchase agreement. The director determined that the evidence in the record only establishes that the petitioner assumed MC2's assets instead of all of its rights, duties, obligation, and assets. Accordingly, the director denied the petition.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. On appeal the petitioner submits a brief, a letter dated March 19, 2007 from [redacted], Vice President and Chief Financial Officer of the petitioner (the petitioner March 19, 2007 letter), a letter dated March 15, 2007 from [redacted], Regional Sales Manager of the petitioner and former owner and president of MC2 [redacted] March 15, 2007 letter), a letter dated October 23, 2006 from copies of the petitioner's wage and tax register and pay record to the beneficiary. Other relevant evidence in the record includes a letter dated March 12, 2006 from the petitioner's parent company, action by unanimous written consent of the petitioner's Board of Directors on November 28, 2005, Purchase Agreement entered into on November 30, 2005 between First Capital Western Region (First Capital) and the petitioner, MC2's corporate tax return for 2004, and the beneficiary's Form W-2 for 2003 through 2005.

On appeal, the petitioner asserts that is qualifies as the successor-in-interest to MC2 because it purchased MC2, is engaged in the same business as MC2, assumed the obligation to employ and petition on behalf of the beneficiary, and the beneficiary performs the same duties at the petitioner.

The record contains a copy of a purchase agreement entered into on November 30, 2005 between the petitioner and First Capital. The agreement shows that MC2 defaulted on its outstanding obligations owed to First Capital and the sale and purchase occurred under the California Uniform Commercial Code. By the agreement the petitioner purchased MC2's business. The director acknowledged that the petitioner assumed all assets of MC2, but did not assume all of the rights, duties, and obligations citing *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

According to Black's Law Dictionary, 1473 (8th Ed, 2004), the definition of a successor in interest is "[o]ne who follows another in the ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." Similarly,

[1] 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).

the term "successor" with reference to corporations is defined therein as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation."

These definitions are consistent with the determination in *Matter of Dial Auto*. *Matter of Dial Auto* relates to a petition filed by a company as a successor-in-interest based on an approved labor certification for a predecessor company. The petitioning entity in *Dial Auto* operated a same type of business at the same location after the predecessor company ceased doing business. In order to determine whether the petitioner was a true successor to the predecessor company the petitioner was instructed to fully explain the manner by which the successor company took over the business of the predecessor and provide USCIS with a copy of the contract or agreement between the two entities. However, no response was submitted. The Commissioner held that if the petitioner's claim of having assumed all of the predecessor's rights, duties, obligations, etc., is found to be true, and it is determined that an actual successorship exists, the petition could be approved. The Commissioner determined that the successor-in-interest status was not established because the petitioner failed to adequately describe the transfer of business from the predecessor.

In the instant matter, the petitioner claims that it qualifies as the successor-in-interest to MC2 because it purchased MC2, operates the same type of business, and offers the same position to the beneficiary to perform the same duties in the same geographic location. The purchase agreement demonstrates that the petitioner purchased the Sale Assets of MC2 from First Capital. The Purchase Agreement Exhibit A set forth the Sale Assets as all inventory and all general intangibles. The agreement also expressly includes all books and records of MC2 with regard to the sale assets and all designs, technical information, drawings, software and firmware to the extent required by the petitioner to use, operate, exploit and enjoy the benefits of ownership in and to the sale assets. The petitioner also submits documentary evidence showing that it hired the beneficiary and other employees of MC2. The evidence in the record shows that the petitioner follows MC2 in the ownership or control of property of MC2's business, retains the same rights as MC2 with no change in substance and the petitioner's acquisition of MC2 results in it operating the business substantially in the same manner as MC2.

While *Matter of Dial Auto* requires that the petitioner establish that it assumes all of the rights, duties, obligations, etc., the AAO also notes that the Commissioner held that the petitioner may establish its successor-in-interest status with a full explanation of the manner by which the successor company took over the business of the predecessor and by providing USCIS with a copy of the contract or agreement between the two entities. In the instant case, the petitioner submitted the purchase agreement by which it legally took over MC2's business and pay records showing that it offers the same job opportunity to the beneficiary. Therefore, the AAO finds that the petitioner is the one who follows MC2 in the ownership or control of property of MC2's business and retains the same rights as the original owner, with no change in substance, and thus, has established that it assumed all of the rights, duties, obligations, etc. of MC2 and is a successor-in-interest to MC2. In view of the foregoing, the previous decision of the director will be withdrawn.

However, beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that the predecessor and the petitioner had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

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 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 DOL. *See* 8 C.F.R. § 204.5(d). Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date if the petitioner has established its successor-in-interest status to the predecessor. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482. In the instant petition, the petitioner became the successor-in-interest on December 1, 2005 and the priority date of the petition is January 23, 2004. The petitioner must therefore demonstrate that MC2 had the ability to pay the proffered wage in 2004 and 2005, and that the petitioner has the continuing ability to pay the proffered wage since December 1, 2006.

In the instant case, the proffered wage as stated on the Form ETA 750 is $17.62 per hour ($36,649.60 per year). On the Form ETA 750B signed by the beneficiary on January 8, 2004, the beneficiary claimed to have worked for the predecessor company since June 2003. On the petition, the petitioner noted that it was established in 2005, and currently employed 35 workers. The petitioner did not provide information about its gross annual income and net annual income.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner or its predecessor employed and paid the beneficiary during that period. If the petitioner or the predecessor 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 submitted the beneficiary's Form W-2 Wage and Tax Statement for 2004[2], 2005 and 2006, Form 1099-Misc

[2] The beneficiary's W-2 form for 2004 was issued by Employers Resource Management Co. (ERMC). The petitioner claimed that ERMC was the payroll company of MC2 and it paid the beneficiary on behalf of MC2. The record contains paystubs issued by ERMC which show that ERMC paid the beneficiary on behalf of MC2 as its payroll company. Therefore, the AAO considers the compensation to the beneficiary by ERMC for 2004 and partial year of 2005 as it was paid by MC2, the predecessor in this matter.

Miscellaneous Income for 2005[3], the petitioner's wage and tax register for 2006 and the beneficiary's paystubs from the petitioner for 2006 and 2007. These documents show that the beneficiary was paid $32,400 in 2004, $34,569.33[4] in 2005, $35,886.23[5] in 2006 and $1,500 biweekly in the first three months of 2007[6]. Although the petitioner established its ability to pay the proffered wage of $36,649.60 per year through the examination of wages already paid to the beneficiary at the rate of $1,500 biweekly in 2007, MC2 failed to established its ability to pay the proffered wage for 2004 through wages actually paid to the beneficiary, the predecessor and the petitioner together failed to demonstrate that they paid the beneficiary the relevant part of the proffered wage in 2005 respectively, and the petitioner failed to demonstrate that it paid the full proffered wage to the beneficiary in 2006. Therefore, the petitioner is still obligated to demonstrate that the predecessor company could pay the difference of $4,249.60 in 2004, and $410.76[7] in 2005 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets, and that the petitioner could pay the difference of $1,669.51[8] in 2005 and $763.37 in 2006 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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

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[3] The record contains two 1099 forms for the beneficiary: one was issued by the petitioner for 2005 and the other was issued by Advanced Metalforming Technologies, Inc. (AMTI). Although the petitioner claimed that AMTI is its parent company, the AAO finds no documentary evidence in the record of proceeding establishing the relationship between the petitioner and AMTI, and thus, cannot accept the 1099 form issued by AMTI as evidence of partial payment of the proffered wage in this matter.

[4] $21,415.44 is shown on the W-2 form issued by the predecessor's payroll company, $11,769.27 is shown on the W-2 form issued by the predecessor company itself and $1,384.62 shown on the 1099 form issued by the petitioner.

[5] It is shown on the W-2 form issued by the petitioner.

[6] The beneficiary's paystubs for periods of January 22, 2007 to February 4, 2007, February 5, 2007 to February 18, 2007, and February 19, 2007 to March 4, 2007 show that the petitioner paid the beneficiary at the level of $1,500 biweekly and paid $7,500 year-to-date as of March 4, 2007.

[7] While USCIS usually does not prorate the proffered wage for the portion of the year that occurred after the priority date, we will prorate the proffered wage in this matter since the record contains evidence that the proffered wage payment obligation was divided between the predecessor and the petitioner at a specific point. The predecessor was obligated to pay the proffered wage until November 30, 2005, and thus, the predecessor's prorated proffered wage would be $33,595.47 for the eleven months in 2005. The predecessor and its payroll company paid the beneficiary $33,184.71 in 2005. *See Footnote 4 above.* Therefore, the petitioner is still obligated to demonstrate that the predecessor could pay the difference of $410.76 between wages actually paid to the beneficiary and the prorated proffered wage in 2005 with its net income or net current assets.

[8] Similarly, the petitioner was obligated to pay the proffered wage for December of 2005 since it became the successor-in-interest to MC2 on December 1, 2005. The prorated proffered wage for December 2005 was $3,054.13, however, the petitioner actually paid the beneficiary $1,384.62 in 2005. *See Footnote 4 above.* Therefore, the petitioner is still obligated to demonstrate that it could pay the difference of $1,669.51 between wages actually paid to the beneficiary and the prorated proffered wage for 2005 with its net income or net current assets.

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 total income and wage expense is misplaced. Showing that the petitioner's total income 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 USCIS, 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. On appeal counsel asserts that depreciation should be considered as a factor in determining the petitioner's ability to pay the proffered wage in 2006. Counsel's reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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. [USCIS] 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 Chang* at 537

The record contains copies of the predecessor company's Form 1120S, U.S. Income Tax Return for an S Corporation, for 2004. According to the tax returns, the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The predecessor's 2004 tax return stated a net income[9] of ($5,760,749). The above information shows that the predecessor did not have sufficient net income in 2004 to pay the difference of $4,249.60 between wages actually paid

[9] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21."
Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S (2004), *available at* http://www.irs.gov/pub/irs-prior/i1120s--2004.pdf.

to the beneficiary and the proffered wage that year and therefore, it failed to establish its ability to pay the proffered wage through wages actually paid to the beneficiary and its net income.

If the demonstrated net income of the petitioner available during that period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS 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, USCIS 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.[10] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and 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 company's tax return shows that it had net current assets of ($4,765,324) in 2004. The predecessor did not have sufficient net current assets to pay the difference of $4,249.60 between wages actually paid to the beneficiary and the proffered wage for 2004. Therefore, the petitioner failed to establish the predecessor's ability to pay the proffered wage for 2004 with its net current assets.

The petitioner submitted the predecessor company's financial statements as of December 31, 2005 and the petitioner's financial statements for January – August 2006 as evidence to establish their ability to pay the proffered wage for 2005 and 2006. However, the petitioner'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 are 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.

The record does not contain any regulatory prescribed evidence such as annual reports, tax returns or audited financial statements for 2005 and 2006 for the predecessor and the petitioner respectively. Without these documents, the AAO cannot determine whether the predecessor had sufficient net income or net current assets to pay the difference between wages actually paid to the beneficiary and the prorated proffered wage for 2005 and whether the petitioner had sufficient net

[10] 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.

income or net current assets to pay the differences between wages actually paid to the beneficiary and the prorated proffered wage for 2005 and 2006 respectively.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that the predecessor and the petitioner had the continuing ability to pay the beneficiary the proffered wage for 2004 through 2006 through an examination of wages paid to the beneficiary and their net income or net current assets.

In view of the foregoing, the previous decision of the director will be withdrawn. 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). Accordingly, the petition will be denied for the above stated reason that the petitioner failed to establish that the predecessor company had the ability to pay the proffered wage from the priority date to the date the successorship was established and that the petitioner had the continuing ability to pay the proffered wage from the date of successorship to 2006 with regulatory prescribed evidence. 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 director's decision is withdrawn. The petition remains denied.