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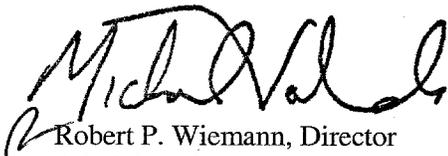
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:

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, Director
Administrative Appeals Office

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

The petitioner provides property management services and buys and sells residential and commercial properties. It seeks to employ the beneficiary permanently in the United States as a property manager. 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 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 31, 1996. The proffered wage as stated on the Form ETA 750 is \$2,097.33 per month, which amounts to \$25,167.96 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1994¹.

On the petition, the petitioner claimed to have been established in 1988, to have a gross annual income of approximately \$19 million, and to currently employ three workers. In support of the petition, the petitioner submitted its corporate tax returns for 1998 and 1999, bank statements, and copies of 1099 forms and the beneficiary's individual income tax returns for 1998, 1999, 2000, and 2001. 1099 forms issued to the beneficiary from the petitioner in 2000 and 2001 reflected that he earned wages in the amounts of \$179,242 and \$141,115 in those years, respectively.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 22, 2003, the director requested additional evidence pertinent to that ability. 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

¹ The ETA 750A was filed by Colonial Home Loan Corporation, which was amended before certification as D&H Properties.

demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically sought evidence from 1997 through 2002, specifically signed and completed tax returns, and noted that the tax returns previously submitted were unsigned.

In response, the petitioner submitted its Forms 1120 Corporate tax returns for the years 1996 to 2001². The tax returns reflect the following information for the following years:

	<u>1996</u>	<u>1997</u>	<u>1998</u>	<u>1999</u>
Net income ³	-\$800	-\$1	\$2,335	-\$26,217
Current Assets	\$718,103	\$704,776	\$2,281,664	\$2,882,931
Current Liabilities	\$936,075	\$4,293,601	\$2,749,178	\$3,025,227
Net current assets	-\$217,972	-\$3,588,825	-\$467,514	-\$142,296
	<u>2000</u>	<u>2001</u>		
Net income ⁴	-\$4,058	-\$17,320		
Current Assets	\$2,263,997	\$1,687,710		
Current Liabilities	\$2,861,258	\$1,887,154		
Net current assets	-\$597,261	-\$199,444		

Counsel and the beneficiary, through a notarized and sworn declaration, stated that the beneficiary was not on the petitioner's payroll but received compensation on 1099 forms for services rendered to the petitioner. Copies of 1099 forms reflect that the petitioner paid the beneficiary the following amounts in 1996, 1997, 1998, 1999, 2000, 2001, and 2002, respectively: \$142,732; \$165,225; \$21,130; \$200,877.65; \$179,242; \$141,115; and \$108,580⁵.

Because the director still deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 9, 2003, the director again requested additional evidence. The director sought evidence that the petitioner had a qualifying relationship with Colonial Home Loan Corporation.

In response, counsel submitted a letter stating that the petitioner "was established in 1993 under the name COLONIAL HOME LOAN CORPORATION[.]" and "reorganized/restructured its operations, one of which is the change of name from COLONIAL HOME LOAN CORPORATION to [the petitioner]." (Emphasis in original). Counsel also stated the following, in pertinent part:

Upon changing the name, the Employer's Identification Number [(EIN)] was also changed for tax purposes. The change occurred is [sic] only in terms of the name of the business, but not the ownership per se. Even if the company operates in a different name, there exists a substantial continuity of the same business operations; use of the same plant/office (address is [REDACTED] continuity of the work force . . . ; similarity of jobs and working conditions; similarity of supervisory personnel;

² Tax returns for 1996, 1997, and 1998 are in the name of Colonial Home Loan, Inc.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

⁴ See note 3, *supra*.

⁵ 1099 forms issued in 1996, 1997, and 1998 are in the name of Colonial Home Loan, Inc.

similarity in machinery, equipment and production methods; and similarity of products and services. Since COLONIAL HOME LOAN CORPORATION and [the petitioner] refer to only one and the same company, all the rights, duties, assets and obligations, which include this [petition] are continued and/or assumed.

(Emphasis in original). The petitioner submitted copies of its articles of incorporation of Colonial Home Loan Corporation in 1993 and of the petitioner's business as "DHP Investments" in 1998. A Police Commission Permit and City of Los Angeles Tax Registration Certificate were also submitted in the names of "DHP Investments Corp" and [REDACTED] respectively. No documentation pertaining to an acquisition agreement or doing business as state documentation was submitted. The petitioner also submitted copies of a picture of a business directory showing that the petitioner occupied suite 112.

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 November 22, 2003, denied the petition, stating that the petitioner failed to provide sufficient evidence from 1996 onwards.

On appeal, counsel reasserts prior arguments and resubmits previously submitted evidence.

At the outset, the record contains insufficient evidence that the petitioner qualifies as a successor-in-interest to Colonial Home Loan Corporation⁶. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. 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 petition, Colonial Home Loan Corporation and the petitioner do not share EIN numbers and no documentation, such as an merger or acquisition agreement, evidence of continuous ownership, assignment documents, doing business as certificates, or other document that could corroborate counsel's assertions that the petitioner is a successor-in-interest to Colonial Home Loan Corporation have been provided. While counsel made many assertions about the continuing relationship between the two corporate identities, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The evidence is simply insufficient to prove the fact asserted that there is a relationship between these entities. These two entities could share office space. The articles of incorporation merely show the incorporation of Colonial Home Loan Corporation and the petitioner, not a relationship between the two.

Although the ETA 750A was certified after the purported transition and was amended to reflect the petitioner's name as the petitioning entity, since the priority date is in 1996, when the petitioning entity was purportedly Colonial Home

⁶ 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).

Loan Corporation, it must show Colonial Home Loan Corporation's ability to pay the proffered wage from the time it was the *de facto* sponsoring entity (i.e., from the priority date to 1998) in addition to the petitioner's continuing ability to pay the proffered wage (i.e., from 1999 onwards). It is noted that Colonial Home Loan Corporation was owned by two individuals, [REDACTED] but the petitioner is owned by just [REDACTED]. Assuming, *arguendo*, that these entities could establish a relationship, the remainder of this decision will evaluate both entity's continuing ability to pay the proffered wage beginning on the priority date.

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 established that Colonial Home Loan Corporation and the petitioner employed and paid the beneficiary the following wages in 1996 through 2002: \$142,732; \$165,225; \$21,130; \$200,877.65; \$179,242; \$141,115; and \$108,580. Thus, the petitioner would have established its continuing ability to pay the proffered wage in every year but 1998 since the wages paid in the other years were greater than the proffered wage. The petitioner would have to illustrate that it could pay the difference between wages actually paid to the beneficiary and the proffered wage in 1998, which results in \$4,037.96.

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. 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.

The petitioner's net income in 1998 was \$2,335 and thus it could not demonstrate its ability to pay the proffered wage in that year out of its net income.

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.⁷ 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's net current assets during the year in question, 1998, however, were negative. As such, the petitioner could not demonstrate its ability to pay the proffered wage in that year out of its net current assets in that year.

The petitioner has failed to establish that it is a successor-in-interest to Colonial Home Loan Corporation and that it had the ability to pay the proffered wage in 1998 out of wages actually paid to the beneficiary, its net income, or its net current assets. The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage 1998. 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.

⁷ 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.