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U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE:

[Redacted]
EAC 03 097 50015

Office: VERMONT SERVICE CENTER

Date: DEC 19 2005

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:

[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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the employment-based immigrant visa petition, and the matter is before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a food distributor. The petitioner seeks to classify the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3) as a manufacturer's representative. The director determined that the petitioner had not established it was a successor in interest to the original petitioner and it also had not demonstrated that it had the ability to pay the beneficiary the proffered wage as of the 1997 priority date and onward.

On appeal, counsel submits additional documentation with regard to petitioner's ability to pay the proffered wage. Counsel states that the petitioner is successor in interest to the original petitioner.

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 two issues to be addressed in these proceedings are first, whether the petitioner identified on the I-140 is a successor in interest or the original petitioner identified on the Form ETA 750, and second, whether the petitioner established its ability to pay the proffered wage as of the priority date and onward. Following an examination of whether the petitioner is the actual petitioner or the successor to the actual petitioner, the AAO will examine whether the petitioner has the ability to pay the proffered wage.

The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. Labor certifications are valid indefinitely unless invalidated by the Bureau, a consular officer, or a court for fraud or willful misrepresentation of material fact involving the labor certification application. The Department of Labor and the former Immigration and Naturalization Service (INS) agreed that the INS would make a determination regarding whether the employer listed in the labor certification and the employer filing the employment-based immigration petition are the same entity or a successor-in-interest to the original entity.¹ See, e.g., *Matter of United Investment Group*, Int. Dec. 2990 (Comm. 1985).

¹ See DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).

This status requires documentary evidence that the petitioner, the successor-in-interest to the original petitioner, has assumed all of the rights, duties, and obligations of the predecessor company. According to a Citizenship and Immigration Services (CIS) memo issued in December 1993, if the petitioner has been bought out, merged, or had a significant change in its ownership, the successor in interest must file a new I-140 petition.² 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 at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The instant petition was filed on January 9, 2003. On the petition, the petitioner is listed as [REDACTED] c. and the person signing the petition is [REDACTED]. The petitioner's address is listed on the I-140 petition as [REDACTED]. The priority date listed on Form ETA750 is April 16, 1997. The Form ETA 750 identifies the petitioner as [REDACTED] located at [REDACTED]. On the petition, the petitioner submitted a letter signed by Mr. [REDACTED] President, Vogel Vending, Inc., dated January 17, 2001. The letter stated that [REDACTED] had been in the vending business for the past fourteen years, and that he and [REDACTED] owned [REDACTED]. Mr. [REDACTED] stated that on April 3, 1998, he and [REDACTED] bought [REDACTED] a, Inc. Mr. [REDACTED] finally stated that the two companies shared an office in Somerville, Massachusetts. With the petitioner, the petitioner submitted a Form 1120 Federal Corporate income tax for [REDACTED] for tax year 1998.

On August 8, 2003, the director requested additional evidence pertinent to the entity petitioning for the beneficiary. The director stated that the petitioner submitted a tax return for [REDACTED], and that it appeared from Mr. [REDACTED] letter that Piggy's and Vogel are separate companies, thus making the Vogel Vending tax return the incorrect one to submit with the petition. The director asked the petitioner to explain about the actual petitioner, and to provide evidence of any change in Piggy's ownership. The director also noted that the I-140 petition did not have any of the following information on it: the petitioner's gross annual income, net annual income, date the business was established, and the number of employees. The director also requested that the petitioner submit the 1997, 1998, 1999, 2000, 2001, and 2002 U.S. federal income tax returns for the company identified as [REDACTED] Inc.

In response, counsel submitted copies of federal income tax returns for 1997, 1998, and 1999. Counsel stated that the 1997, 1998, and 1999 federal income tax returns were for the petitioner's former owner, while another 1998 tax return was for the subsequent owner of the petitioner. The businesses filing the income tax returns submitted to the record are as follows: in 1997, [REDACTED] in Chelsea, Massachusetts, with Employer Identification Number (EIN) [REDACTED] and a date of incorporation of November 22, 1988; in 1998, [REDACTED] at Somerville, Massachusetts with EIN [REDACTED] and a date of incorporation of March 26, 1998; and in 1999, [REDACTED] Somerville, Massachusetts, with the same EIN and incorporation date as the 1998 tax return. The second 1998 tax return submitted by counsel is for Vogel Inc. at the same address as Piggy's in Somerville, Massachusetts with EIN [REDACTED]. The incorporation date for Vogel Inc. was listed as September 2, 1986.

² Memorandum from James A. Puleo, Acting Executive Associate Commissioner, INS Office of Operations, *Amendment of Labor Certifications in I-140 Petitions*, HQ 204.24-P. (December 10, 1993).

Counsel also submitted a second letter from Mr. [REDACTED] dated October 29, 2003 that stated he sold Piggy's Inc. on March 1, 2002 to [REDACTED] and [REDACTED].

On May 24, 2004, the director denied the petition. The director stated that based on the letter dated January 17, 2001 [REDACTED] and [REDACTED] had the same owners but were separate companies. The director then stated that as separate companies, the tax return for Vogel was the incorrect one to submit in support of the petition.

The director also stated that according to Mr. [REDACTED] letter, in early 1998, the business was sold³ and became Piggy's Inc. The director further stated that the letter dated October 29, 2003 from Mr. [REDACTED] appeared to establish that Piggy's Inc., the successor in interest business formerly known as [REDACTED] Co. Inc., was no longer owned by Mr. [REDACTED] when he signed and filed the I-140 petition in the name of Piggy's Inc. The director further stated that since Mr. [REDACTED] originally submitted a tax return for Vogel Vending with the petition, it appeared that he might have been intending to employ the beneficiary at his other business rather than with the successor in interest business he no longer owns, namely, Piggy's Inc. The director finally stated that if the intent of the petitioner was to have the beneficiary work for Vogel Vending rather than Piggy's Inc, Vogel Vending should have submitted a new labor certification.

On appeal, counsel states that the petitioner submits additional supporting documentation concerning the petitioner's continued ability to pay the proffered wage, as the successor in interest. Counsel submits the following documents:

A letter from the IRS that states the IRS has assigned an employer identification number of [REDACTED] to [REDACTED] o/o [REDACTED] President [REDACTED] Londonderry, New Hampshire. This letter is dated April 18, 2002.

A form letter from the State of New Hampshire Department of State, Corporation Division that states the certificate of incorporation is enclosed. The certificate of Incorporation identifies the new business as [REDACTED] and is dated March 27, 2002.

A form entitled Articles of Corporation filed March 27, 2002 that states the name of the corporation is [REDACTED] and that the registered agent is [REDACTED] The Londonderry, New Hampshire is noted as the business address for the agent. According to this document, the purpose of the corporation is to sell and distribute snack foods and products.

Forms W-2 for tax year 2003 issued by Piggy's Snacks, Inc. in Londonderry, New Hampshire. The forms are issued to [REDACTED] and the beneficiary. Based on his Form W-2, the beneficiary earned \$3,360 in 2003.

³ It is not clear to which business the director referred. Mr. [REDACTED] letter dated January 17, 2001 only stated that on April 3, 1998, [REDACTED] and [REDACTED] bought Piggy's Pizza, Inc. The record contains no documentation with regard to a sale of [REDACTED] or a change in its name.

Upon the review of the record, information with regard to four distinct businesses is on the record. These four businesses and their EINs are as follows: [REDACTED] EIN: [REDACTED] Piggy's Inc., EIN [REDACTED] Vogel Vending, EIN [REDACTED] and Piggy's Snacks, EIN [REDACTED] Mr. [REDACTED] who signed the I-140 petition, also stated in a letter that Vogel Vending had purchased Piggy's Pizza, Inc. The petitioner provided no documentation or further clarification as to whether Piggy's Pizza, Inc., is a fifth company, or a former or alternate name for one of the businesses identified above.

The record is not clear as to why counsel submits articles of incorporation for Piggy's Snacks, located in New Hampshire to the record. This business is not the current petitioner identified on the I-140, nor is it the petitioner that initially filed the ETA 750. The Form W-2 submitted on appeal which indicates the beneficiary worked for the New Hampshire business in 2003 is the only evidentiary link between the New Hampshire business and the beneficiary. In order to have any standing in the current proceedings, the New Hampshire business would have to establish that it is a successor in interest to the original petitioner, [REDACTED] c., identified on the Form ETA 750. Furthermore if counsel is attempting to establish such a status, the New Hampshire business should have submitted the instant I-140, as opposed to Piggy's Inc. of Massachusetts. Since neither the petitioner nor counsel have articulated any such identification of the New Hampshire business, the AAO will only examine whether the instant petitioner is the successor in interest of the original petitioner who filed the ETA 750, namely, [REDACTED]

The record is also not clear why the petitioner submitted a 1998 IRS Form 1120 for Vogel, Inc. It is also unclear why counsel refers to this business as the subsequent owner of the petitioner. Vogel, Inc. is not identified on either the Form ETA 750 or the I-140 petition as the original or subsequent petitioner. To the contrary, the petitioner and the tax returns submitted to the record establish that Vogel, Inc., is a separate company. Furthermore, although Mr. [REDACTED] asserted that Vogel, Inc. bought Piggy's Pizza in 1998, the petitioner would need to provide more substantive documentation with regard to any such claimed purchase. The assertions of counsel or by the petitioner 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). In addition, since the original petitioner on the Form ETA 750 is identified as [REDACTED], the record is not clear as to any impact the claimed purchase of Piggy's Pizza by Vogel Vending would have on the instant petition. Finally, the record contains no information or evidentiary documentation to establish the relationship between [REDACTED] Co., Inc., and Piggy's Inc.. Without more persuasive evidence, the AAO will not consider the Form 1120 for the Vogel, Inc., company in these proceedings.

The petitioner listed on the ETA Form 750, is [REDACTED], which appears to be a business distinct from Piggy's Inc. or Piggy's Snacks. Based on the ETA 750, the former petitioner in the instant petition is [REDACTED]. As stated previously, the current petitioner would have to establish its status as successor in interest to [REDACTED], Inc. as well as the ability of the predecessor petitioner, namely, [REDACTED] Inc. to pay the proffered wage as of the priority date, as well as establish its own ability to pay the proffered wage as of the date it acquired the previous petitioner.

As correctly noted by the director, Mr. [REDACTED] signed the I-140 petition that is presently being examined in these proceedings.⁴ Mr. [REDACTED] is identified in correspondence and tax returns submitted to the record as having no ownership interest in [REDACTED] as of the 1997 priority date, as having a 50 percent shareholder interest in Piggy's Inc. and a 50 percent shareholder interest in Vogel, Inc. as of 1998. Although the director in his decision stated that a letter written by Mr. [REDACTED] established that in early 1998 the business was sold and became Piggy's Inc., no documentation in the record reflects such a sale. As previously stated, this letter also did not refer to any business owned by Mr. [REDACTED] as being sold. The letter simply stated that on April 3, 1998, the owners of Vogel Vending, namely Mr. [REDACTED] and [REDACTED] bought Piggy's Pizza, Inc. This bare statement is not persuasive evidence that the petitioner in the instant petition, namely, Piggy's Inc., bought the original petitioner, [REDACTED] and assumed all rights, obligations and responsibilities of the original petitioner.

Based on Mr. [REDACTED] second letter submitted to the record and dated October 29, 2003, and the articles of incorporation submitted on appeal, Piggy's Inc. was sold on March 1, 2002 to [REDACTED] and [REDACTED] and a new business was incorporated in the state of New Hampshire at that time. As previously stated, these documents are not sufficiently probative to establish any successor in interest status for the New Hampshire business. However, based on the date of receipt of the instant petition by CIS, namely January 9, 2003, they do suggest that at the time of filing the I-140 petition, Mr. [REDACTED] no longer had any ownership interests in Piggy's Inc. As the director correctly noted, this raises the questions of why Mr. [REDACTED] and counsel chose to submit the instant I-140 petition with Piggy's Inc. as petitioner.

Without more probative documentation that establishes the sale, merger, or acquisition of the original petitioner, [REDACTED], to the instant petitioner, Piggy's Inc. and the assumption of all rights, duties, and obligations by Piggy, Inc., the petitioner has not established that it is a successor in interest to the petitioner that filed Form ETA 705. Therefore the director's decision shall stand, and the petitioner shall be denied.

The second issue raised by the director was whether the petitioner had the ability to pay the proffered wage as of the 1997 priority date and to the present. Because of the petitioner's failure to establish that it is a successor in interest to Piggy's Holding and Liquidation, Inc., the AAO cannot give any weight to the tax information contained on the tax returns submitted to the record except that of Piggy's Holding and Liquidating Co. Inc. The AAO, therefore, will only examine the 1997 tax return submitted to record for Piggy's Holding and Liquidating Co., Inc., which counsel identifies as the original petitioner.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 16, 1997. The proffered wage as stated on the Form ETA 750 is \$12.85 per hour, which amounts to \$26,728 annually.

⁴ Although the I-140 petition is not dated by counsel or Mr. [REDACTED] it was received by CIS on January 9, 2003.

With the petition, the petitioner submitted Form 1120 for the tax year 1998 for Vogel, Inc. As previously stated, the tax return for Vogel, Inc. will not be considered in these proceedings.

Because the evidence submitted was viewed as insufficient to establish the petitioner's ability to pay the proffered wage, on August 8, 2003, the director requested further evidence. The director specifically requested the 1997, 1998, 1999, 2000, 2001 and 2002 federal income tax returns with all schedules and attachments for Piggy's Inc. The director also stated that if the petitioner employed the beneficiary in the years 1997 to 2002, that the petitioner should submit copies of the beneficiary's Form W-2 Wage and Tax Statement or Form 1099-MISC to establish how the petitioner had paid the beneficiary.

In response, the petitioner submitted IRS Form 1120, federal corporate income tax return, for the year 1997 for Piggy's Holding & Liquidating Co. Inc, and Forms 1120 for the years 1998 and 1999 for Piggy's Inc.

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 May 24, 2004, denied the petition. The director stated that neither the tax returns for Piggy's Holding & Liquidating Co., Inc, nor for Piggy's Inc. established the petitioner's ability to pay the proffered wage as of the priority date and to the present. With regard to the 1997 tax return from Piggy's Holding & Liquidating Co. Inc., the director stated that both the petitioner's net income and net current assets were less than the proffered salary. With regard to Piggy's Inc., the director then stated that the tax returns for both 1998 and 1999 indicated that the petitioner's net income and net current assets were less than the proffered wage. The director also noted that the petitioner had not submitted its federal tax returns for the years 2000 to 2002 as requested.

On appeal, counsel submits a 2003 W-2 Form for the beneficiary issued to him by Piggy's Snacks, Inc, Londonderry, New Hampshire. This document established that the beneficiary was paid \$3,360 in 2003.

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. Although the beneficiary indicated on ETA Form 750 that he had worked fulltime for Piggy's Holding & Liquidation Co., Inc., he did not indicate the period of time that he was employed. On appeal, counsel submits a Form W-2 that establishes another company not identified as the petitioner or a successor in interest to the petitioner employed the beneficiary in 2003. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 1997 and onward.

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 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, now CIS, should have considered income before expenses were paid rather than net income. On the IRS Form 1120, taxable or net income is the sum shown on line 28, taxable income before NOL deduction and special deductions. With regard to the 1997 tax return for Piggy's Holding & Liquidating Co., Inc. the petitioner's net income is -\$89,301. This figure is not sufficient to establish the petitioner's ability to pay the proffered wage of \$26,728.

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. In addition, 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.⁵ 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 1997 tax return for [REDACTED] reflects the following information:

1997	
Taxable income	\$ -89,301
Current Assets	\$ 28,377
Current Liabilities	\$ 20,047
Net current assets	\$ 9,330

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1997. In 1997, as previously illustrated, the original petitioner shows a taxable income of -\$89,301, and net current assets of \$9,330 and has not, therefore, demonstrated the ability to pay the proffered wage. Without more persuasive evidence, the petitioner has not demonstrated that the original petitioner had any other funds available to pay the proffered wage in 1997. The petitioner has not, therefore, shown the ability of the original petitioner to pay the proffered wage during the salient portion of 1997.

⁵ 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.

As stated previously, the petitioner has not established that it is a successor in interest to the original petitioner. The petitioner also had not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

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.