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U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 073 51909 Office: CALIFORNIA SERVICE CENTER Date: JUN 17 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:



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 visa petition on August 20, 2002, and the AAO subsequently denied the appeal on December 5, 2003. The matter is now before the he Administrative Appeals Office (AAO) as a motion to reconsider, and/or reopen. The motion to reopen is granted. The appeal will be dismissed.

The petitioner is a furniture manufacturer. It seeks to employ the beneficiary permanently in the United States as a wood carver. 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 was a successor in interest to Siesta Manufacturing Company, Inc., the petitioner that originally submitted the Form ETA 750, and denied the petition accordingly.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted more complete documentation of the 1997 purchase of the original petitioner, and of the cancellation and subsequent resubmission of the original Form ETA 750. This evidence is viewed as sufficient to reopen the proceedings.

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 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).

In addition, successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. According to a legacy INS 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 In addition, in order to maintain the original priority date, a successor-in-

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

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). In the instant petition, it appears that there was no previous I-140 petition filed by the original petitioner, although the original petitioner did file a Form ETA 750 prior to its sale to Blumenthal Distributing, Inc.

interest must demonstrate 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, "Siesta Manufacturing Co., Inc." filed an Application for Alien Employment Certification, Form ETA 750, with the Department of Labor (DOL). The petitioner identified on the I-140 petition is Innovative Office Concepts, Inc. With the initial petition the petitioner submitted the first and last page of an Asset Purchase Agreement between Siesta Manufacturing Company, Inc., and Blumenthal Distributing, Inc, with an effective date of May 30, 1997, a date prior to the priority. The asset purchased by Blumenthal Distributing, Inc. is identified on the first page of the document as a furniture manufacturing plant located at [REDACTED] California.

The director determined that the evidence submitted did not establish that the petitioner, Innovative Office Concepts, Inc., was a successor in interest to Siesta Manufacturing Company, Inc., and the director requested that the petitioner submit legal documentation to show that the I-140 petitioner, Innovative Office Concepts, Inc., is the successor in interest to the employer indicated on the Form ETA 740, namely, Siesta Manufacturing Company, Inc.

In response, the petitioner resubmitted the first and last page of the Asset Purchase Agreement, and a letter dated May 20, 2002, from [REDACTED] identified as president, Innovative Seating [REDACTED]. [REDACTED] stated that Siesta Manufacturing Company, Inc., was purchased effective July 1, 1997, and that on June 18, 1997, the petitioner's fictitious name filing, Innovative Office Concepts, Inc., was filed with the Secretary of State for the state of California. [REDACTED] stated that Innovative Office Concepts, Inc., is the same company as Siesta Manufacturing Company, Inc. and that on July 1, 1997, the company came under new ownership and a new name. The petitioner also submitted a cover sheet from the Secretary of State for the state of California that states the following: "That the annexed transcript has been compared with the corporate record on file in this office, of which it purports to be a copy, and that same is full, true and correct." The cover letter is dated June 19, 1997. Upon review of the record, there is no fictitious filing document attached to the Secretary of State's cover sheet and statement.

On August 20, 2002, the director denied the petition. The director determined that the submitted documentation did not show that the petitioner was a successor in interest to the original employer listed on the original labor certification. The director also stated that the submitted labor certification could not be reaffirmed and could not be given further consideration. The director denied the petitioner due to the lack of an appropriate labor certification filed with the petition.

On appeal, counsel resubmitted the letter from [REDACTED] May 20, 2002, the first page of the Asset Purchase Agreement, an uncertified Form ETA 750, Parts A & B, dated November 2, 2001, and authorization by [REDACTED] for the previous counsel to act as his agent in placing a job order and advertisement of the position of wood carver. This document is also dated November 2, 2001. Counsel stated that the director did not take into consideration that Innovative Office Concepts, Inc., which counsel described as a new corporation, is the parent company of the former Siesta Manufacturing Company, Inc. Counsel also stated that [REDACTED] is the owner of both entities. Counsel also submitted a letter from Mr. Blumenthal, dated August 23, 2000. The letter is addressed to "Dear Valued Customer", and states that effective September 1, 2000, Innovative Office

Concepts, Inc., will be known as “DBA: Innovative Seating, formally [sic] Siesta. The company name is the only change that has been made.” The address for Innovative Seating is [REDACTED] 91773. Counsel provided no further documentation to support her assertions.

On December 5, 2003, the AAO dismissed the appeal and denied the petition. The AAO noted that the petitioner, Innovative Office Concepts, Inc., is not mentioned in either the May 1997 Asset Purchase Agreement or the state of California Secretary of State’s letter dated June 19, 1997. The AAO concurred with the director and noted that there were no documents contained in the record that specifically demonstrated the manner by which the petitioner acquired the original employer named on the labor certification, namely, Siesta Manufacturing Company, Inc. The AAO further noted that there is no evidence in the record corroborating the name change indicated by [REDACTED] in his letter dated May 20, 2002. The AAO also noted that the evidence failed to clarify why the petitioner filed the ETA 750 in July 1998 under its former name. The AAO concluded that the petitioner had not established that it had assumed the rights, duties, obligations, and assets of the original employer on the labor certification as its successor-in-interest. The AAO dismissed the appeal, and denied the petition.

On motion, counsel submits an assessment notice from the Employment Development Department (EDD) of the state of California dated June 15, 1998. In this assessment notice, the EDD office asked the new employer to provide a signed statement indicating that the business had not ceased operation at anytime; that the business had not relocated; that no layoff of any workers occurred as a result of the sale; that no layoff was anticipated; and that the new employer assumes full responsibility for accuracy of all information contained on the ETA 750 form and any supporting documents. The DOL also asked when the business was sold, and to provide evidence that the business had been sold to [REDACTED] and [REDACTED].³ In its response, the petitioner, identified as Siesta Manufacturing Company, Inc., [REDACTED] California, stated replied affirmatively to the EDD questions, stated that the business was sold on July 1, 1997, and indicated that a copy of the new business license was attached to the petitioner’s response to the EDD enquiry. Also provided by the current counsel was a letter dated September 27, 1999 from the California Employment Development Department to previous counsel that referenced Siesta Manufacturing Company, Inc., and the beneficiary. This letter stated that the petitioner did not submit its response to a final documentation notice on time. The EDD letter informed the petitioner that it could resubmit the ETA application at any time, and it would be treated as a new application and a new local office priority date would be established. The petitioner, still using the name Siesta Manufacturing Company, Inc. resubmitted the original Form ETA 750 and received a priority date of September 30, 1999.

On motion, counsel also submits the entire 17 page Asset Purchase Agreement signed by [REDACTED], Vice President, Blumenthal Distributing, Inc. and the president, Siesta Manufacturing Company, Inc. Counsel asserts that the new owners were granted authorization to use the name of Siesta Manufacturing Company, Inc., and that the new owners continued to use the name of Siesta Manufacturing Company, Inc on the resubmitted ETA 750. Counsel also states that Innovative Office Concepts, Inc., the business entity identified as the petition on the I-140

³ The name [REDACTED] is not encountered anywhere else in the record. The president of the petitioner that submitted the I-140 petition is [REDACTED] however, neither counsel nor the petitioner clarifies the difference in names on the EDD document.

petition, is now known as DBA, Innovative Seating, formally Siesta. Counsel resubmits the letter from [REDACTED] dated August 23, 2000, that contains this information.

The main issue to be examined in these proceedings is the relationship between the entity that bought the petitioner in 1997, Blumenthal Distributing Company, and the entity that filed the I-140 petition, Innovative Office Concepts, Inc. Since the sale of Siesta Manufacturing Company occurred prior to the 1999 priority date, the entity that owned the petitioner's business at the time of the priority date was established, according to the record of proceedings, is Blumenthal Distributing Company. Nevertheless, Innovative Office Concepts, Inc. filed the I-140 petition. The burden of proof is on the petitioner to establish that Innovative Office Concepts, Inc., is either the same entity as Blumenthal Distribution Company, doing business under the name Innovative Office Concepts, or that Innovative Office Concepts, Inc. is a successor in interest to Blumenthal Distribution Company.

Upon review of the record, counsel provides documentation from an EDD office in California that clarifies the resubmission of the original Form ETA 750 in 1999 by the business entity that purchased the original petitioner in 1997. The record reflects that Innovative Office Concepts, Inc., submitted the I-140 petition with the certified ETA 750 on December 26, 2001. Therefore the petitioner did not have to submit a new I-140 petition as outlined in the Puleo memo referenced earlier in these proceedings.⁴ In addition, the petitioner has submitted the complete Asset Purchase Agreement which establishes that Blumenthal Distributing Company purchased the assets of the Siesta Manufacturing Company, Inc. Nevertheless, the petitioner has not provided sufficient evidentiary documentation to settle the successor-in-interest issue, upon which the initial denial of the petition and the subsequent dismissal of the appeal are based. The record still does not contain sufficient evidentiary documentation with regard to the relationship between Blumenthal Distributing Company, the buyer of Siesta Manufacturing Company in 1997, and the I-140 petitioner, namely, Innovative Office Solutions, Inc.

For example, the response to the EDD's request for information in 1998 with regard to the sale of the original petitioner to Blumenthal Distributing, Inc. stated that the petitioner submitted a new business license to the EDD office. However, this document, which could perhaps help to clarify the relationship between the buyer and the current petitioner, is not found in the record. In addition, although [REDACTED] in his August 2002 letter described the filing of a fictitious business document with the State of California in 1997, this document is not found in the record. The coversheet for the Secretary of State's copy of the document is not sufficient to establish that an actual document was filed, and does not identify the contents of any such document. The letter from [REDACTED] to customers dated August 23, 2000 with regard to a change in the name of Innovative Office Concepts, Inc. does not have sufficient evidentiary weight to establish the relationship between Blumenthal Distributing Company, the buyer of Siesta Manufacturing Company, Inc. and either Innovative Office Concepts, or Innovative Seating. The record also does not contain any evidentiary documentation with regard to the change of business name from Innovative Office Concepts, Inc., to Innovative Seating. Upon review of the record, neither counsel's assertions nor [REDACTED] letters carry sufficient weight to establish the relationship between Blumenthal Distributing, Inc., and Innovative Office Concepts, Inc., or between Innovative Office Concepts, Inc., and Innovative Seating. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici* I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Neither counsel nor the petitioner has provided any explanation as to why documents mentioned in the proceedings such as fictitious business filings, or new business licenses were not submitted to the record. Furthermore it is noted that Blumenthal Distributing Company and Innovative Office Concepts, Inc. have different Employee Identification Numbers (EIN).⁵

⁴ See Note 2.

⁵ The EIN for Blumenthal Distributing Company is 95-3887135, and for Innovative Office Concepts, Inc., is 95-

Counsel's assertions, on motion, that the current petitioner continued to use the name after the sale only confuses the record. [REDACTED] letter dated August 20, 2002, stated that a fictitious business document was filed in 1997, and the company received a new name as of that date. In addition, the EDD documentation submitted on motion suggests that as of July 1998 the new owners had a new business license. Furthermore, counsel does not substantiate her assertion with any evidentiary documentation.

Finally, as noted in the previous AAO dismissal of the petition, the petitioner resubmitted the original ETA 750 in late 1999, following the EDD instructions, a date some two years after the 1997 purchase of Siesta Manufacturing Company by Blumenthal Distributing Company. Neither counsel nor the petitioner provides any clarification or explanation for why they resubmitted the original the ETA 750 under the original petitioner's name.

Without more persuasive evidence, the petitioner has not established that it is a successor in interest to the original petitioner. The director's decision shall stand.

Although not addressed in the director's decision, the petitioner has established that it has the ability to pay the proffered wage as of the priority date, and that the beneficiary has the requisite work experience to perform the duties of the position. For purposes of clarification, the AAO will address these two issues below.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 30, 1999. The proffered wage as stated on the Form ETA 750 is \$12.31 per hour, which amounts to \$25,604 annually.

In the petition, the petitioner submitted copies of its corporate income tax return, IRS Form 1120, for 1998 to 2000. In response to the director's request for further evidence, the petitioner submitted Forms DE-6, Quarterly Wage Reports, for the last three quarters of 2001 and the first quarter of 2002.

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. The petitioner did not claim to have employed the beneficiary as of the 1999 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS does not consider depreciation deductions to be available cash, but rather only examines net income figures in its analysis. 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. It is noted that the priority date for the petition is September 1999. Therefore, the petitioner's tax return for 1998 is not dispositive in these proceedings, and will not be examined in these proceedings. In examining the petitioner's net income for 1999 and 2000, the petitioner's net income for 1999 was \$10,274 and for 2000, the petitioner's net income was \$24,832. In 1999, the petitioner's net income is clearly not sufficient to pay the proffered wage of \$25,604. While the petitioner's net income for 2000 is very close to the proffered wage of \$25,604, the petitioner still lacks \$772 in net income to match the proffered wage.

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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 5(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 tax returns reflect the following information for the following years:

⁶ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

	1999	2000
Taxable income ⁷	\$ 10,274	\$ 24,832
Current Assets	\$ 565,183	\$ 574,306
Current Liabilities	\$ 348,506	\$ 326,541
Net current assets	\$ 216,677	\$ 326,765

The petitioner has not demonstrated that it paid any wages to the beneficiary during 1999. In 1999, as previously illustrated, the petitioner shows a taxable income of \$10,274, and net current assets of \$216,677. The petitioner has, therefore, demonstrated the ability to pay the proffered wage in 1999, based on its net current assets. The petitioner has not demonstrated that it paid any wages to the beneficiary during 2000. In 2000, the petitioner shows a taxable income of \$24,832, an amount less than the proffered wage. However, the petitioner shows net current assets of \$326,765. Thus, the petitioner had the ability to pay the proffered wage during 2000. Accordingly, the petitioner has established that it had the ability to pay the proffered wage as of the priority date of 1999 and onward. In addition, the petitioner established that the beneficiary had the requisite eight years of work experience outlined in the ETA 750, based on his work experience in Mexico.

Nevertheless, the petitioner has not established that it is a successor-in-interest to the petitioner who originally submitted the Form ETA to the Department of Labor for certification. Therefore, the director's decision shall stand, the motion will be dismissed, 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 motion is dismissed. The petition is denied.

⁷ Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.