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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: DEC 27 2007
WAC 06 094 52820

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director denied the petition, determining that the petitioner had not established that it was the successor-in-interest to the original employer named on the labor certification and had additionally failed to demonstrate its continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits additional evidence and contends that the petitioner has established that it is the successor in interest to the original employer and has the continuing financial ability to pay the certified wage.

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).¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$11.55 per hour, which amounts to \$24,024 annually.

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). Except as discussed herein, 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 petitioning employer identified on the ETA 750 is Frankies Southern Italian Cuisine. The petitioner named on the Immigrant Petition for Alien Worker (I-140) is the same name with the same employer tax identification number. On the Form ETA 750B, signed by the beneficiary on April 14, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, which was filed on February 2, 2006, the I-140 petitioner claims that it was established on June 15, 2003, has a gross annual income of \$1,036,734, a net annual income of \$59,318, and currently employs twenty workers.

A letter, dated January 25, 2006, signed by [REDACTED] Owner, was submitted with the I-140. He offers employment to the beneficiary at the certified wage and adds that he is the new owner of "[REDACTED]". As one of the general partners, Mr. [REDACTED] states that he bought out his partner's interest on June 14, 2003 and became the sole owner of the restaurant. As a successor-in-interest of the original [REDACTED], he states that he has agreed to continue to sponsor the beneficiary.

In support of the petitioner's ability to pay the proffered wage of \$24,024 per annum, the petitioner provided several copies of federal income tax returns. Three copies of Form 1065, U.S. Return of Partnership Income for 2001, 2002 and 2003 were submitted. Each of these returns reference the same tax identification number that is used on the ETA 750 and the I-140. Each of these returns contains partnership information reflecting the same three partners' financial interests. Mr. [REDACTED] is designated as a general partner and the two other partners were identified as limited partners, although the partnership was designated as a domestic general partnership on the 2001 return and as a domestic limited partnership on the 2002 and 2003 returns. The 2001 partnership return names the filer as "[REDACTED]". The 2002 partnership return names the filer as "[REDACTED]" and the 2003 filer is designated as "[REDACTED]". The 2003 return is designated as the filer's final return.

Copies of two additional federal income tax returns are provided. Form 1120S, U.S. Income Tax Return for an S Corporation for 2003 and 2004 filed by [REDACTED] indicate that Mr. [REDACTED] is the sole shareholder. In connection with the 2003 return, which covers the period from June 16, 2003 to December 31, 2003, a copy of a document identified as a statement on transfer of property under section 351 indicates that on June 16, 2003, a California limited partnership named [REDACTED] dissolved and that the general partner who had owned 33.33 % of the partnership interest received the distributed assets and liabilities as described below, which he immediately contributed to a newly formed corporation called [REDACTED]. He received stock in exchange for this transfer which qualifies as a tax-free exchange.

The director issued a request for evidence on April 20, 2006. She requested that the petitioner provide evidence that [REDACTED] became the sole owner of "[REDACTED]" (sic) in 2003 and to provide evidence that [REDACTED] (sic) and [REDACTED] are the same company.

In response, counsel provided an additional copy of the 2003 tax return for [REDACTED], indicating the attached statement of the transfer of property under tax code describing the dissolution of [REDACTED] and formation of [REDACTED].

The director denied the petition on September 25, 2006. She determined that the evidence submitted did not clearly demonstrate that [REDACTED] is the successor-in-interest to [REDACTED] and assumed all the rights, duties, obligations and assets of the original employer. The director additionally determined that although the tax returns provided demonstrated the ability to pay in 2001 and 2004, the returns failed to establish the petitioner's ability to pay the proffered wage of \$24,024 in 2002 and 2003.

On appeal, counsel reiterates that evidence shows that [REDACTED] dissolved in 2003 and that [REDACTED] acquired its status as a successor-in-interest through Mr. [REDACTED] contribution of the assets and liabilities received from the partnership's dissolution. As evidence of the petitioner's ability to pay the proffered wage of \$24,024, counsel provides a copy of an October 31, 2006 bank statement of an account held by [REDACTED] copies of unexecuted escrow and purchase and sale documents related to an October 2006 purchase of a restaurant identified as '[REDACTED]' by Mr. [REDACTED] and another individual; a copy of a Uniform Commercial Code (UCC) executed bulk sale and intention to transfer an alcoholic beverage license related to [REDACTED]; copies of Wage and Tax Statements (W-2s) issued by [REDACTED] to the beneficiary in 1999, 2000, 2001, 2002, and 2003, as well as W-2s issued by [REDACTED] to the beneficiary in 2003 and 2004; and a copy of page one of the beneficiary's 2005 individual income tax return.

It is noted that at the outset, that a labor certification is valid only for the employer to which it is issued, unless a merger, reorganization, transfer, or acquisition occurs that creates an employer that may be considered a successor-in-interest to the original employer. 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 this matter, the evidence provided failed to demonstrate that a successorship-in-interest has been created. In such a case, a merger, transfer, reorganization or acquisition should be supported by copies of the executed purchase and sale agreements, stock purchases or exchanges that make it clear that the acquiring person or company has acquired the rights and obligations of the original entity and may be considered a successor-in-interest. Here, although the petitioner provided a letter from Mr. [REDACTED] and a summary of the property transfer as attached to the 2003 tax return of [REDACTED] the evidence should have included such documents as a copy of the dissolution of the limited partnership which operated the restaurant and then dissolved in 2003, copies of any executed agreements of transfer which specifically identified and allocated all of the restaurant's assets and liabilities to [REDACTED] through its sole shareholder, as well as copies of the pertinent UCC, fictitious trade name and other state or municipal records that clearly link the successor-in-interest to the restaurant identified on the ETA 750. Although the director's request for evidence did not articulate specific items of proof to be submitted, it remains the petitioner's burden to provide sufficient documentary evidence to support the claim

of eligibility. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).²

With respect to the petitioner's continuing financial ability to pay the proffered wage, the following observations will be made. The tax returns reveal the following:

Form 1065, Partnership Returns of [REDACTED] al (2001) and [REDACTED] h (2002 & 2003) ³	2001	2002	2003
Net Income ⁴	\$4,364	-\$ 354	-\$28,249
Current Assets (Sched. L)	\$35,595	\$40,823	\$20,459
Current Liabilities (Sched. L)	\$ 9,721	\$24,140	\$39,736
Net Current Assets	\$25,874	\$16,683	-\$19,277

Form 1120S, S Corporation Returns of [REDACTED] e. for (6/16 to 12/31/2003)	2003	2004
Net Income	\$18,895	\$59,318
Current Assets (Sched. L)	\$40,793	\$42,532
Current Liabilities (Sched. L)	\$47,300	\$35,383
Net Current Assets	\$ 6,507	\$ 7,149

As noted in the above table, besides net taxable income, CIS will consider *net current assets* as a measure of a petitioner's liquidity during a given period and 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 petitioner's year-end current assets and current liabilities may generally be found on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of a partnership return. Current assets of a corporation are found on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18 of Schedule L of a

² It is noted that the claimed successor-in-interest, [REDACTED], claims to have acquired [REDACTED] K [REDACTED]. The petitioner failed to provide any clarification of how the restaurant designated on the ETA 750 as [REDACTED] which established an April 25, 2001 priority date sought by the petitioner became interchangeably identified as [REDACTED]'s Italian Kitchen, which in turn, is said to have been the limited partnership that dissolved.

³ These two entities have the same partners and use the same employer tax identification number.

⁴ For the purpose of this review, ordinary income as shown on line 22 of the Form 1065 and line 21 of Form 1120S will be treated as net income.

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.

corporate return. If a petitioner's year-end 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.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

In this case, on appeal, counsel provided copies of W-2s issued to an individual with the beneficiary's name from 1999 to 2003 by [REDACTED]. [REDACTED] also issued W-2s to this person in 2003 and 2004.⁶ The W-2s reflect the following compensation:

2001	\$17,942.50
2002	\$17,932.76
2003	\$7,922 and \$8,511 = \$16,433
2004	\$19,856

It must be noted that the beneficiary failed to mention his employment with [REDACTED] on the ETA 750B which he signed in 2001, and which instructed the signer to list all jobs held during the last three years. As noted above, the W-2s submitted on appeal indicate such employment since 1999. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).⁶ Further, it is noted that a partial copy of the beneficiary's 2005 individual tax return indicating a particular wage amount and reflecting what appears to be a tax identification number not revealed by the earlier W-2s issued to the beneficiary, will not be considered as it does not indicate the payer of the compensation and is not supported by a corresponding W-2 containing a consistent social security or tax identification number. Without further corroboration such as state quarterly wage reports or payroll records verifying the beneficiary's employment and payment of compensation in all of the relevant years, such reported wages will not be included in a determination of the petitioner's ability to pay the certified salary of \$24,024.

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 taxable income figure (or net current assets) as

⁶. See also *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, supra; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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.

It is noted that the documents related to Mr. [REDACTED] 2006 individual purchase of an unrelated restaurant are not relevant to the determination of the petitioner's ability to pay the proffered wage. The claimed successor in interest is a corporation. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). CIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft* 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

It is further noted that a selected bank statement from October 2006 reflecting the balance of an account held by [REDACTED] on a given date does not demonstrate a sustainable source of funds that is determinative of the petitioner's ability to pay the proffered wage. Bank statements as additional evidence may be considered but they are not among the three forms of evidence that are required by the regulation at 8 C.F.R. § 204.5(g)(2) and generally show only a portion of a petitioner's financial status. They do not reflect, for example, other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as may be set forth on an audited financial statement or a federal tax return.

Based on the current record, even if [REDACTED] had established that it is the successor-in-interest to the original employer as identified on the ETA 750, the AAO concurs with the director's conclusion as to the ability to pay the proposed wage offer. The 2001 tax return reflected sufficient net current assets of \$25,874 to cover payment of the proffered wage. The 2004 tax return indicated that the proffered wage could have been met through the net income of \$59,318. Those figures demonstrate the ability to pay the proffered salary during the years specified. The remaining 2002 and 2003 returns failed to demonstrate either sufficient net income or net current assets to pay the certified salary. In 2002, neither a net income of -\$354 nor net current assets of \$16,683 would have been sufficient to pay the proffered salary of \$24,024. In 2003, the fact that the limited partnership return of "[REDACTED]" indicated that during the period of its operation of the restaurant neither its net income of -\$28,249, nor its net current assets of -\$19,277 were sufficient to pay the certified wage or cover any shortfall between the actual wages and the proffered salary even if the beneficiary's wages would be appropriately corroborated as discussed above.

Finally, as noted above, the petition was filed on February 2, 2006. The petitioner failed to provide any of its own financial information pertinent to 2005 either to the underlying record or on appeal. As the regulation at 8 C.F.R.

§ 204.5(g)(2) requires that a petitioner must demonstrate its *continuing* ability to pay the proffered wage as of the priority date, the petition may not be approved.

A review of the evidence contained in the underlying record and the evidence and argument submitted on appeal reflects that the petitioner has failed to establish that Nabi Brambila, Inc. is the successor-in-interest to Frankies Southern Italian Cuisine or demonstrated that it and the predecessor entity had the continuing financial ability to pay the proffered salary as of 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.