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U.S. Citizenship  
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FILE: [REDACTED]  
SRC 06 202 51934

Office: TEXAS SERVICE CENTER Date: APR 03 2008

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, 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, [REDACTED], Inc. (d.b.a. Production Modeling Corporation), is a manufacturing, sales and project engineering firm. It seeks to employ the beneficiary permanently in the United States as a project engineer. 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, as a successor-in-interest to the original employer specified on the ETA 750, had failed to demonstrate its 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 additional evidence and contends that the petitioner has demonstrated that it has had 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).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.<sup>1</sup> *See* 8 C.F.R § 204.5(d). Here, the Form ETA 750 was accepted for processing on May 23, 2002. The certified salary as stated on the Form ETA 750 is \$27.00 per hour, which amounts to \$56,160 per year.

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

The employer specified on the Form ETA 750 was Bach Technologies, Inc. On the Form ETA 750B, signed by the beneficiary on May 17, 2002, the beneficiary claims to have worked for this employer from March 2000.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), which was filed by [REDACTED] Inc. (d.b.a. Production Modeling Corporation) on June 19, 2006, the petitioner claims that it was established in 1985, currently employs from 90 to 100 workers and reports a gross annual income of five million dollars.

A letter, dated April 24, 2006, signed by [REDACTED], the president of Production Modeling Corp. was submitted with the I-140. He offers permanent employment to the beneficiary as a project engineer. Mr. [REDACTED] explains that his company, [REDACTED], Inc. (d.b.a. Production Modeling Corporation), purchased the entire interest of Bach Technologies, Inc. in November 2004 and wishes to continue to sponsor the beneficiary. A copy of the Asset Purchase Agreement executed on November 29, 2004 on behalf of the two companies accompanies this letter. It states that:

Transfer of Asset: Seller agrees to transfer to Buyer, and Buyer agrees to purchase and accept from Seller, the entire interest of the Seller in the following, which constitutes the Asset ("Asset"): customer lists and records, including any records, files, lists or other tangible records that pertain to the Seller's customers, suppliers, sales, services, delivery, or operations, except those items required to be retained by law, which includes but is not limited to accounting records and returns.

Liabilities: Buyer shall assume no obligations or liabilities of Seller in connection with the acquisition of the Asset hereunder. Specifically, the Buyer shall assume no obligations or liabilities if Seller were to go into bankruptcy.

In support of the petitioner's continuing ability to pay the proffered wage of \$56,160 per annum beginning at the priority date and in response to the director's request for additional evidence issued on July 17, 2006, the petitioner provided copies of Bach Technologies, Inc.'s Form 1120S, U.S. Income Tax Return for an S Corporation for 2002 and 2003 and copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 2004 and 2005. These returns contain the following information:

(Bach Technologies, Inc.)	2002	2003
Net Income <sup>2</sup>	-\$158,118	-\$415,205

<sup>2</sup>For the purpose of this review, the amount shown on Schedule K of the Form 1120S will be treated as net income. Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120S states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>. For the purpose of this review, the figure on line 28 of Form 1120 indicated as taxable income before net operating loss deductions & special deductions will be treated as net income.

Current Assets (Sched. L)	\$157,709	none listed
Current Liabilities (Sched. L)	\$616,562	\$478,562
Net Current Assets	-\$458,853	-\$478,562

[REDACTED], Inc. d/b/a Production Modeling Corp.)	2004	2005
Net Income	\$ 33,984	-\$534,469
Current Assets (Sched. L)	\$ 31,281	\$ 22,850
Current Liabilities (Sched. L)	\$175,602	\$907,572
Net Current Assets	-\$144,321	-\$884,722

As noted in the above table, besides net 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.<sup>3</sup> A petitioner's year-end current assets and current liabilities may generally be found on line(s) 1 through 6 and line(s) 16 through 18 of Schedule L of a 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.

As noted by the director, the petitioner additionally provided copies of Wage and Tax Statements (W-2s) issued to the beneficiary by the following entities.

2002	[REDACTED]	\$49,141.94
2003	[REDACTED]	\$ 4,653.80
2003	[REDACTED]	\$26,669.49
2004	[REDACTED]	\$16,850.46
2004	[REDACTED]	\$35,940.48
2004	[REDACTED]	\$ 3,593.31
2005	[REDACTED]	\$65,167.07

The petitioner also submitted copies of two pay periods representing the month of May 2006 showing that the petitioner paid the beneficiary approximately \$6,066 in gross pay for that month. His year-to-date gross earnings are shown as \$22,748.35 as of May 31, 2006.

Other documentation supplied by the petitioner includes copies of two unaudited financial statements pertinent to the petitioner's financial status in 2004 and 2005; copies of the petitioner's other employees' W-2s issued in 2005; copies of the petitioner's bank statements for two checking accounts covering January to July 2006 for one account and February to July 2006 for the other; and a letter from Mr. [REDACTED], dated August 25, 2006, in which he

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

states that the petitioner employs about 95 workers, generates gross revenue of over seven million dollars and asserts that the petitioner has the ability to pay the proffered wage.

The director denied the petition on September 22, 2006. Although she determined that the evidence supported a determination that the I-140 petitioner, [REDACTED] Inc. (d.b.a. Production Modeling Corporation) may be considered to be the successor-in-interest to Bach Technologies, Inc., the director concluded that, with the exception of 2005, as shown by the beneficiary's W-2 reflecting payment of wages in excess of the certified salary, the continuing financial ability had not been demonstrated. She found that in 2002, 2003 or 2004 neither the reported net income nor net current assets as reflected on the respective corporate tax returns was sufficient to cover the proposed wage offer.

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).

The AAO does not find that the record clearly establishes that the petitioner is a successor-in-interest to Bach Technologies analogous the circumstances described in *Matter of Dial Auto Repair Shop, Inc.* It is noted that the asset purchase agreement does not demonstrate that petitioner assumed all of the rights, duties and obligations of Bach Technologies, rather than, as described above, represented the purchase of an asset limited to Bach's customer lists and related customer and supplier records. It is further noted that the record does not indicate whether these two entities conducted the same kind of business such as would support that the certified job opportunity described in the labor certification. As indicated above, if the petitioner has not established that it is a successor in interest to the employer named on the labor certification, then it must sponsor the beneficiary's employment through its own application for a labor certification.

On appeal, counsel asserts that the *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), supports a finding of an ability to pay the proffered wage if the petitioner is currently paying the proffered wage.

With regard to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.<sup>4</sup> The memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of

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<sup>4</sup>See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is May 23, 2002. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel asserts that the director abused her discretion in requesting the petitioner's last six months of bank statements and Form 941, employer's quarterly federal tax return, only to deny the petitioner's ability to pay the proffered wage based on these bank statements. The AAO cannot speculate why the director requested this evidence except to possibly affirm that the successor company remained a viable concern in 2006. It is noted that bank statements are not among the forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2) which stipulates that an ability to pay must be demonstrated by audited financial statements, federal tax returns or annual reports. In appropriate cases, which could reasonably be interpreted as where there is a relatively short period of time unaccounted for, like 90 days for example, but that the petitioner's continuing ability to pay the proffered wage had already been established as of the priority date, bank statements showing a sufficient cash flow and quarterly tax returns would further support a positive decision. In this case, in addition to bank statements, the successor petitioner was employing the beneficiary and had already paid him \$22,748.35, in 2006, which is fairly close to the proffered wage if calculated on an annual basis. In this case, the director could have determined that the first five months of 2006, in conjunction with the payment of wages in 2005, continued to show the petitioner's ability to pay the proffered wage. However, even if the petitioner were considered to be the successor in interest to Bach Technologies, this would not obviate the successor firm's obligation to establish the predecessor company's ability to pay the proposed wage offer as of the May 23, 2002, priority date.

It is noted that the two financial statements pertinent to the petitioner's financial status in 2004 and 2005 were compilations. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel also contends that it is overly burdensome to require a successor-in-interest to obtain financial or personnel records from a predecessor company that no longer exists. In this regard counsel refers to the beneficiary's W-2s issued by E.A.S. Superior, Inc./E.A.S. Huron, Inc. although the beneficiary claimed to have worked for Bach Technologies from March 2000 until November 2003. Counsel states that Bach hired E.A.S. Superior, Inc./E.A.S. Huron, Inc. as professional employer organization that would handle administrative matters such as payroll and health insurance but that Bach Technologies still retained control over the employees' activities and would therefore be considered as the U.S. employer for immigration purposes. Counsel submits copies of E.A.S. Superior, Inc.'s 2002 and 2003 state registration as a professional employer organization in support of this theory, along with an online printout showing that this firm dissolved on September 20, 2006. Accompanying these documents is a copy of a 2003 state registration document for E.A.S. Huron, Inc. reflecting its status as a professional employer organization and an online printout showing its dissolution on September 20, 2006. None of these documents presents any proof of a qualifying contractual relationship with Bach Technologies or shows that they paid compensation to the beneficiary on behalf of Bach Technologies for work performed as Bach's employee. Similar reasoning would apply to the W-2s issued by Orchid Automation LLC and Orchid Automation, Inc. Counsel's unsupported assertions 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).

It is noted that if a petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear. If a successor-in-interest firm wishes to use the same labor certification and corresponding priority date that was obtained by a predecessor company from the DOL, then it faces the additional burden of establishing the predecessor's company's ability to pay the proffered wage until the date of the transfer of rights and obligations fell to the successor-in-interest. In this matter, counsel's assertion that the director should have explained why she was requesting copies of the W-2s evidencing the payment of wages to support the beneficiary's claimed employment with Bach Technologies in case the W-2s should not reflect his claimed employer is not persuasive. 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).

Counsel further asserts that the director should have evaluated the petitioner's ability to pay the prevailing wage of \$42,786 per year rather than the wage set forth on the ETA 750, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989). Counsel claims that this wage should be reduced an additional 5% because the pertinent regulations allowed for this variable, which brings the prevailing wage for the certified position to \$40,646.70 per year. We do not agree. It is noted that the court in *Masonry Masters* was primarily concerned with the former INS' attempt to estimate the prevailing wage during a period where the wage had not been designated by the DOL. *Id.* at 684-685. In this case, the proffered wage was set forth on the ETA 750 by Bach Technologies as of May 23, 2002, when the labor certification application was submitted. It was certified by the DOL. As noted above, it was certified by the DOL at \$27.00 per hour which annualized, amounts to \$56,160 (\$27.00 x 40 hrs per week x 52 weeks per year). Moreover, CIS regulations specifically require that a petitioner demonstrate an ability to pay the "proffered" wage, not the prevailing wage. 8 C.F.R. § 204.5(g)(2).

Counsel's theory that the calculation of the prevailing wage should be reduced an additional 5% is not applicable in this case. Under the regulations in effect prior to the implementation of the PERM Labor Certification System on March 28, 2005, the DOL would accept a prevailing wage in some applications for permanent alien labor certifications if the wage proposed was within 5 percent of the average rate of wages. *See* 20 C.F.R. § 656.40(a)(2)(i) (2003). This never applied to the CIS consideration of the proffered wage in the immigrant visa process except when the employer was requesting a visa under the Schedule A Blanket Labor Certifications, and it doesn't apply to Schedule A petitions filed after March 28, 2005. As discussed above, the proffered wage in this case is \$27.00 per hour, annualized to \$56,160.

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. For the reasons discussed above, only the W-2s issued by Onur Ulgen, Inc. in 2004 and 2005 will be considered. As noted by the director, the 2005 W-2 establishes the petitioner's ability to pay during that year because the wages of \$65,167.07 paid to the beneficiary exceeded the proffered wage of \$56,160. In 2004, the petitioner paid the beneficiary \$3,593.31. Based on the date of the asset transfer agreement, these wages would have accrued during the one month period from November 29, 2004 to December 31, 2004.

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 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)); *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). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, *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.

Counsel asserts that at the time the petitioner filed its alien labor certification application, the business was young but growing. Counsel relies on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), for the proposition that a petitioner's total circumstances should be considered in that a petition may be approved based on a

petitioner's reasonable expectations of increasing profit. Counsel maintains that the petitioner has been in business for over twenty years and has an excellent reputation in the industry. Combined with the increase in gross sales from approximately five and one half million to six and one half million dollars, counsel asserts that this supports the approval of the petition.

Counsel further asserts that this petition may be approved based on the AAO's reversal of other the denials of I-140 petitions by the California Service Center based upon the principles set forth in *Matter of Sonogawa*. Counsel quotes from an unidentified AAO decision. This assertion is not persuasive and the AAO is not bound by a previous decision rendered in a different case. It is noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).<sup>5</sup>

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner is attempting to use its status as an unrelated successor in interest to the predecessor company identified on the labor certification as a way to sponsor the beneficiary and obtain the same priority date without applying for its own labor certification from the DOL. As stated above, because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). The application of *Matter of Sonogawa* is not applicable in this case where one company has dissolved and another is a successor-in-interest with two years of tax returns that show increasing losses in net income and net current assets. This case does not contain such a framework of success such as that discussed in *Sonogawa*, or that the petitioner has demonstrated that such unusual circumstances exist in this case, which are analogous to the facts set forth in that case.

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<sup>5</sup> It is noted that the AAO decision quoted by counsel suggested that the petitioner was a sole proprietorship in which the individual assets of the owner were included in the review of the petitioner's ability to pay a certified wage.

As stated above, the petitioner has not established that it is the successor in interest to Bach Technologies, Inc. Thus, to sponsor the beneficiary on an employment-based petition, it must submit an approved DOL labor certification with the visa petition.

Even if a successor in interest relationship were demonstrated by the record of proceedings, the continuing ability to pay the proffered wage of \$56,160 has not been demonstrated as of the May 23, 2002 priority date. It may be additionally noted, that in 2002, Bach Technologies' tax return failed to demonstrate that either its -\$158,195 in net income or its net current assets of -\$458,853 were sufficient to pay the proffered wage of \$56,160. In 2003, neither Bach Technologies' net income of -\$415,205 nor its net current assets of -\$478,562 was sufficient to pay the proffered salary. In 2004, no financial information relevant to Bach Technologies' ability to pay the proffered wage for the first eleven months was provided. The ability to pay the proffered wage has not been established for 2004 even if Bach Technologies was considered to be the petitioner's predecessor in interest.

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 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.