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U.S. Citizenship
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Services

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[REDACTED]

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FILE: [REDACTED]
EAC 02 153 53526

Office: VERMONT SERVICE CENTER

Date: JUN 12 2008

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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.

Kieran S. Ponlos for

Robert P. Wiemann, Chief
Administrative Appeals Office

CC: [REDACTED]

DISCUSSION: The Director, Vermont Service Center, denied the petition and a subsequent motion to reconsider. The Administrative Appeals Office (AAO) dismissed an appeal. Subsequently, the petitioner initiated litigation in the United States District Court of the District of Connecticut upon which the parties to the litigation stipulated to remanding the matter to the AAO to issue another decision. Accordingly, the AAO reopened the matter on its own motion and dismissed the appeal anew. The visa petition is now before the AAO on a motion to reopen/reconsider. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will remain denied.

The regulation at 8 C.F.R. § 103.2(a)(3) states:

Requirements for motion to reconsider. 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 [Citizenship and Immigration Services (CIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

Since counsel has not provided a reason for reconsideration supported by pertinent precedent decisions indicating that the decision was based on an incorrect application of law or CIS policy, and has not established that the decision was incorrect based on the evidence of record at the time of the initial decision, the motion does not meet the requirements for reconsideration.

The regulation at 8 C.F.R. § 103.2(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

In this case, the motion will be treated as a motion to reopen as counsel contends that the submission of new evidence with the motion demonstrates that the petitioner had sufficient funds to pay the proffered wage.¹

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The AAO concurred with the director's decision on appeal and on motion.

The record shows that the motion is properly filed and timely. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

¹ A properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative (Form G-28), is included in the record of proceeding signed by both [REDACTED] and the petitioner's representative. New counsel, [REDACTED] did not submit a properly executed G-28 into the record of proceeding, but initiated litigation, negotiated a remand, and has submitted new evidence on motion. Thus, both [REDACTED] are being provided a copy of this decision as noted on the front of the decision.

As set forth in the AAO's April 6, 2006 dismissal, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 or seasonal 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date 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). The priority date in the instant petition is April 12, 2001. The proffered wage as stated on the Form ETA 750 is \$79,000 annually.

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). Relevant evidence submitted on motion includes counsel's brief, a copy of the 2004 Form 1120, U.S. Corporation Income Tax Return, for Optims America, Inc., for the period March 9, 2004 through December 31, 2004, copies of various press releases explaining the purchase of Optims on February 14, 2005 by Amadeus, copies of the 2001 through 2005 annual reports for Amadeus Global Travel Distribution, S.A., a copy of Amadeus' first quarter results published on its website, and copies of previously submitted documentation on behalf of former I-140 immigrant petitions filed by _____ including statements from the Chief Financial Officer and Treasurer, _____ dated January 14, 2003, December 12, 2000, and July 1999. Other relevant evidence in the record includes previously submitted documentation that will not be reiterated here since that documentation has been discussed in great detail on the prior appeal and motion. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The 2004 Form 1120 for Optims America, Inc. reflects a taxable income before net operating loss deduction and special deductions or net income of -\$478,949 and net current assets of -\$517,160.

The 2001 through 2005 annual reports for Amadeus Global Travel Distribution, S.A. reflect net incomes (expressed in thousands of Euros – Keurs) reflect net incomes of \$132,723, \$147,087, \$160,114, \$208,032, and \$172,396 (January – July 31, 2005), respectively. The 2001 through 2005 annual reports also reflect net current assets (expressed in thousands of Euros – Keurs) of -\$229,469, -\$57,583, -\$85,532, \$6,169, and \$15,353 (January – July 31, 2005), respectively.

A letter, dated July 7, 1999, from [REDACTED] Vice President, Corporate Planning & Finance, Chief Financial Officer and Treasurer for Amadeus Global Travel Distribution, L.L.C. states that “Amadeus Global Travel Distribution, L.L.C., presently employs 700 persons in the United States. Our gross annual revenues for the last fiscal year were approximately \$180 million. Thus, Amadeus Global Travel Distribution, L.L.C. is fully able to pay the wages offered to the foreign national employees of the company.”

A letter, dated December 12, 2000, from [REDACTED] for Amadeus Global Travel Distribution, L.L.C. states that “Amadeus Global Travel Distribution, L.L.C., presently employs 672 persons in the United States. Our gross annual revenues for the last fiscal year were approximately \$173 million. Thus, Amadeus Global Travel Distribution, L.L.C.² is fully able to pay the wages offered to the foreign national employees of the company.”

A letter, dated January 14, 2003, from [REDACTED], Senior Vice President Corporate Planning & Finance, Chief Financial Officer and Treasurer, for Amadeus NMC Holding, Inc., states that “Amadeus NMC Holding, Inc. presently employs 143 persons. Our gross annual income for the last fiscal year was approximately \$21,607,397.00. Thus, Amadeus NMC Holding, Inc. is fully able to pay the wages offered to the foreign national employees of the company.”

A second letter, dated January 14, 2003, from [REDACTED] Senior Vice President Corporate Planning & Finance, Chief Financial Officer and Treasurer, for Amadeus North America, LLC, states that “Amadeus North America, LLC presently employs 712 persons in the United States. Our gross annual income for the last fiscal year was approximately \$185,935,097.00. Thus, Amadeus North America, LLC is fully able to pay the wages offered to the foreign national employees of the company.”

On motion, counsel states:

The original petitioner in this case was Hotel Data Systems, Inc. located at Corporate Drive, Shelton, Connecticut, the original petitioner in 2001. In 2004 the company became know[n] as Optims America, Inc. (hereinafter Optims) (See copy of Form 1120 US Corporation Income Tax Return Exhibit B) assuming the corporate name change in the year 2004. While the Administrative Appeals Office was deliberating its decision, Optims was purchased by Amadeus. (See press release dated February 14, 2005 Exhibit C). The effective date of take-over was January 1, 2006.

Amadeus is an international IT business within the travel and tourism industry. The company was formed in 1987 when Air France, Lufthansa, Iberia, and SAS founded Amadeus as a global

² It is noted that one of the press releases, dated February 1, 2006, states that Amadeus “has changed the legal name of its holding company from Amadeus Global Travel Distribution, SA to Amadeus IT Group, SA.” That same press release states that “the company [Amadeus] is owned by WAM Acquisition, whose shareholders are BC Partners, Cinven, Air France, Iberia, and Lufthansa, and has over 6,500 employees worldwide, representing 95 nationalities.”

distribution company. (See history of Amadeus attached as Exhibit D www.Amadeus.com). As indicated by this business history, Amadeus is a major corporate entity worldwide.

Petitioner's burden is to demonstrate that Amadeus has had the financial ability to pay the prevailing wage (\$79,000 per year) since the initial priority date of April 2001.

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As discussed in the AAO's decision dated April 6, 2006, the original petitioner, Hotel Data Systems, Inc. had established its ability to pay the proffered wage of \$79,000 in 2002 and 2003, but not in 2001. In addition, the AAO determined that Optims America, Inc. had not established its ability to pay the proffered wage of \$79,000 in 2004.

On motion, counsel claims that Amadeus North America, LLC, as the successor in interest to Hotel Data Systems, Inc. and Optims America, Inc., has had the financial ability to pay the proffered wage of \$79,000 since the priority date of April 12, 2001.

Counsel is mistaken. In this case, the labor certification was issued to Hotel Data Systems, Inc., and the I-140 petition was filed by Hotel Data Systems, Inc. Counsel claims that the petitioner changed its name in 2004 to Optims America, Inc. and that on January 1, 2006, Optims America, Inc. was purchased by Amadeus North America, LLC.³ If the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations, and assets of the petitioner and continues to operate the same type of business as the petitioner. In addition, in order to maintain the original priority date, the successor-in-interest must demonstrate that the petitioner had the ability to pay the proffered wage from the priority date in 2001 until the date of the change in ownership in January 2006. Moreover, the successor-in-interest must establish its financial ability to pay the certified wage from the date of the change in ownership. *See Matter of Dial Auto Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The record does not establish that Amadeus North America, LLC is the successor-in-interest to the petitioner. The record does not contain an asset purchase agreement, bill of sale or any other documentation, other than a press release as discussed below, evidencing that the petitioner was purchased by Amadeus North America, LLC. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not

³ The petitioner's name change is supported by the Secretary of the State of Connecticut's website, which indicates that Hotel Data Systems, Inc. changed its name to Optims America, Inc. on December 13, 2004. *See* <http://www.concord-sots.ct.gov/CONCORD/online?sn=InquiryServlet&eid=99> (accessed April 22, 2008). The 2004 tax return of Optims America, Inc. also supports the petitioner's name change.

sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

In the instant case, Amadeus North America, LLC has submitted press releases that state that Amadeus completed the acquisition of Optims on February 14, 2005. These press releases are not sufficient evidence that Amadeus North America, LLC assumed substantially all the rights, duties, obligations, and assets of Optims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). In addition, the petitioner has not submitted any additional evidence that it had the ability to pay the proffered wage in 2001 or 2004. Furthermore, the AAO notes that the press releases in the record of proceeding do not use the full corporate names of the entities involved, but only state that “Amadeus” (not Amadeus North America, LLC) acquired “Optims” (referred to as the leading European supplier of IT services), indicating that the reference may not be to Optims America, Inc.

It is also noted that the 2001 through July 31, 2005 annual reports submitted are for Amadeus Global Travel Distribution, S.A.⁴ and its subsidiaries. However, those subsidiaries are not listed in the annual reports. Therefore, the annual reports do not establish the ability of Amadeus North America, LLC to pay the proffered wage. Further, the letter dated January 14, 2003, from the Chief Financial Officer and Treasurer of Amadeus North America, LLC indicating that the company employs 712 persons in the U.S. and that the company’s gross annual income for the last fiscal year was approximately \$185,935,097.00, does not establish the ability of Amadeus North America, LLC to pay the proffered wage from January 1, 2006 onward. A review of the Secretary of the State of Connecticut’s website at <http://www.concord-sots.ct.gov/CONCORD/InquiryServlet?eid=14&businessID=0514230>, accessed on April 22, 2008, reveals that Amadeus North America, LLC’s status as a foreign limited liability company in the State of Connecticut was cancelled on March 13, 2006. Therefore, for the reasons discussed herein, counsel’s assertion that Amadeus North America, LLC is the successor-in-interest to the petitioner is without merit.

As the record of proceeding currently stands, the AAO does not find that Amadeus North America, LLC is a successor in interest to the petitioner. The AAO also does not find that the petitioner has established its ability to pay the proffered wage in 2001 or 2004.

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 sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition remains denied.

ORDER: The motion to reopen is granted. The AAO’s decision of April 6, 2006 is affirmed. The petition remains denied.

⁴ See footnote 2.