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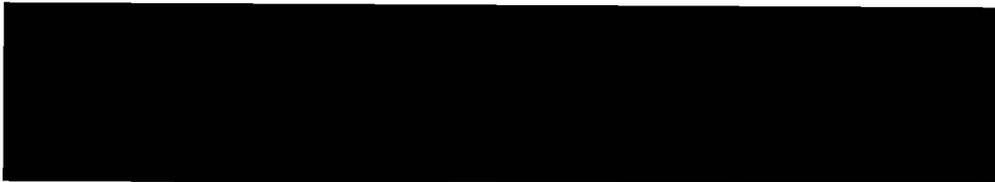
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Washington, DC 20529



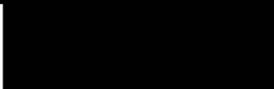
U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: JUN 27 2008

SRC-03-153-51881

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a steel fixtures manufacturing and installing company. It seeks to employ the beneficiary permanently in the United States as a metal products fabricator assembler (metal/steel assembler). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750), approved by the Department of Labor (DOL). The director determined that the petitioner did not establish that American Boys Inc (American Boys) is the successor-in-interest to Anmol Window Screen and Shutter Inc (Anmol) and did not establish its continuing ability to pay the beneficiary the proffered wage beginning at the priority date. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial on October 5, 2006, the issues in this case are whether the successor-in-interest relationship between American Boys and Anmol has been established and whether the petitioner demonstrated that it and its successor-in-interest had demonstrated 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(l)(3)(i) states in pertinent part:

... Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program ...

The instant case is not an application for Schedule A designation, nor an application that the alien qualifies for one of the shortage occupations in the DOL's Labor Market Information Pilot Program. Therefore, the petitioner must submit an individual labor certification from DOL for the proffered position.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The record shows that Anmol filed a Form ETA 750 on behalf of the instant beneficiary on April 30, 2001 and the Form ETA 750 was certified on April 11, 2003 to Anmol. The proffered wage as stated on the Form ETA 750 is \$783 per week (\$40,716 per year). On May 5, 2003, the instant petition was filed by Anmol and American Boys. On the petition, it is claimed that the petitioner was established on January 1, 1994, has a gross annual income of \$117,279, has a net annual income of \$18,000+, and currently employs one worker.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal counsel submits a brief and copies of documents submitted previously. Other relevant evidence in the record includes a stock certificate issued by ████████ to ████████ (Mr. ████████) on May 10, 1999, documents regarding the establishment and corporate records of Anmol and American Boys, the beneficiary's 1099 forms for 2002 through 2004, Anmol's corporate tax returns for 2001 through 2003, and American Boys' corporate tax returns for 2000 through 2004. The record does not contain any other evidence relevant to the successor-in-interest relationship between American Boys and Anmol and the petitioner's ability to pay the wage.

On appeal, counsel asserts that submitted evidence shows that American Boys became the parent company of Anmol by purchasing or transferring 100 % of stock of Anmol on May 10, 1999, that Anmol was dissolved on October 4, 2002, and that American Boys was reinstated on November 30, 2001. Counsel asserts that this evidence establishes American Boys' successor-in-interest relationship to Anmol and the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

However, the record contains no evidence that American Boys qualifies as a successor-in-interest to Anmol. This status requires documentary evidence that the successor company has assumed all of the rights, duties, and obligations of the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). 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. The evidence submitted in the record shows that American Boys was incorporated on February 10, 1994² in the State of Florida and is currently in active status; that American

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). 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).

² Although American Boys' tax returns for 2000 and 2001 indicate the date incorporated as March 1, 1999, and the tax return for 2002 and the instant petition claim the date incorporated as January 1, 1999, this office takes February 19, 1999 as the date American Boys established based on the certificate of good standing issued by Florida Secretary of State on September 17, 2004 for American Boys and the Florida Department of State Division of Corporation official record at <http://www.sunbiz.org/scripts/cordet.exe?action=DEFIL>

Boys is identified with its federal employer identification number (FEIN) 65-0462507 and filed its corporate tax returns for 2000 through 2004 as a C corporation. The record also shows that Anmol was incorporated on May 10, 1999 with FEIN 65-0927237; and that the Florida Department of State Division of Corporation official record shows that Anmol was administratively dissolved for failure to file an annual report on October 4, 2002,³ however, the record of proceeding contains Anmol's corporate tax returns as a C corporation for not only 2001 and 2002 but also for 2003.⁴ Anmol is still listed as an active business in a website indicating that it is still in business.⁵ Although both Anmol and American Boys were listed on the petition as the petitioner, counsel identified the petitioner with American Boys' establishment date and FEIN. Therefore, the AAO finds that the petitioner in the instant case is American Boys. The evidence counsel submitted to assert that American Boys is the successor-in-interest to Anmol is the Anmol's stock certificate. The stock certificate shows that Anmol issued a one-thousand-share stock certificate (100%) to its sole shareholder, Mr. [REDACTED] on May 10, 1999, the date Anmol was established. However, on the same day, Mr. [REDACTED] endorsed the certificate and transferred all his shares to American Boys. Therefore, American Boys became the sole shareholder and the parent company of Anmol on May 10, 1999. However, the record does not contain any documentary evidence that American Boys has assumed all of the rights, duties, and obligations of Anmol. The fact that a company becomes the parent company of the other business entity does not automatically establish that the parent company has assumed all of the rights, duties, and obligations of the other company. In this case, evidence shows that each of American Boys and Anmol had its own FEIN, filed its own corporate tax returns, and thus, were separate corporations even after American Boys became the shareholder and parent company of Anmol. Because a corporation is a separate and distinct legal entity from its owners and shareholders (no matter whether the owners and shareholders are natural persons or corporations), the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the AAO concurs with the director's determination that the petitioner failed to establish that American Boys was the successor-in-interest to Anmol with evidence that American Boys became the parent company of Anmol on May 10, 1999.⁶

On April 30, 2001, Anmol as the prospective employer filed the underlying labor certification application with DOL and the labor certification application was certified on April 11, 2003 to Anmol. The instant immigrant petition was filed on May 5, 2003. Counsel did not submit any evidence showing that American Boys assumed all of the rights, duties, and obligations of Anmol and thus became the successor-in-interest to Anmol during the period from May 10, 1999 to May 5, 2003, but asserted that Anmol was dissolved on

[&inq_doc_number=P94000011247&inq_came_from=NAMFWD&cor_web_names_seq_number=0000&names_name_ind=N&names_cor_number=&names_name_seq=&names_name_ind=&names_comp_name=AMERICANBOYS&names_filing_type=](#) (accessed on June 16, 2008).

³ See (accessed on June 16, 2008).

⁴ Anmol's 2003 tax return indicates that Mr. [REDACTED] owns 100% of the corporation's stock.

⁵ See <http://www.thecityofmiami.com/shutter/index.html>.

⁶ If American Boys had established its successor-in-interest relationship to Anmol on May 10, 1999 as counsel claimed, it should have filed the ETA 750. However, the record does not contain any ETA 750 filed by American Boys.

October 4, 2002 and submitted the printout for Anmol from the Florida Department of State Division of Corporation official records to support his assertion. However, counsel did not submit any documentary evidence for the administrative dissolution. Without further documentation about the dissolution, the AAO cannot determine whether all of the assets, rights, duties, and obligations of Anmol were transferred to American Boys when Anmol was dissolved on October 4, 2002. In addition, the record contains inconsistent information about Anmol's dissolution. While the Florida record shows that Anmol was administratively dissolved for failure to file an annual report on October 4, 2002, the tax returns submitted in the record show that Anmol filed its federal corporate income tax return for 2003. The record does not contain any explanation from counsel or the petitioner how a company dissolved in 2002 could continue its business and file a corporate income tax return for 2003. Nor did counsel submit any solid independent evidence to resolve the inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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* further states: "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." *Id* at 591-592. Therefore, the petitioner also failed to submit sufficient evidence to establish that American Boys became the successor-in-interest to Anmol when it was dissolved on October 4, 2002.

The AAO finds that the petitioner has not submitted persuasive evidence that indicates that American Boys is the successor-in-interest to Anmol. The director's decision is affirmed. In addition, in order to maintain the original priority date, the petitioner must demonstrate that the successor-in-interest has the continuing ability to pay the proffered wage from the date of the establishment of the successor-in-interest relationship. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage from the priority date to the date of the establishment of the successor-in-interest relationship. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant case, counsel also claimed that American Boys became the successor-in-interest to Anmol on October 4, 2002. If the successor-in-interest relationship had been established as counsel claimed, the petitioner must demonstrate that America would have the continuing ability to pay the proffered wage from October 4, 2002 to the present, and that Anmol would have paid the proffered wage or would have the ability to pay the proffered from the priority date to October 4, 2002.

In determining a petitioner's ability to pay the proffered wage during a given period, 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.

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 contrary to the petitioner's assertions. 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income 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 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537

As an alternative method to determine the petitioner's ability to pay the proffered wage, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁷ A corporation's year-end current assets are shown on Part III Balance Sheets per Books, lines 1 through 6 and its year-end current liabilities are shown on Part III lines 13 and 14 if the corporation files its tax return on Form 1120-A or the year-end current assets are shown on Schedule L, lines 1 through 6 and the year-end current liabilities are shown on lines 16 through 18 if the corporation files its tax return on Form 1120. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

In the instant case, the petitioner did not submit any W-2 forms, 1099 forms or other documents showing that Anmol paid any amount of compensation to the beneficiary in the relevant years. Therefore, the petitioner failed to establish Anmol's ability to pay the proffered wage through the examination of wages Anmol actually paid to the beneficiary.

The record contains copies of Anmol's corporate income tax returns for 2001 through 2003. The tax returns demonstrate that Anmol had a net income⁸ of \$33,173 in 2001, \$7,950 in 2002 and \$16,945 in 2003.

⁷According 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.

⁸ Taxable income before net operating loss deduction and special deductions on Line 24 of the Form 1120-A and Taxable income before net operating loss deduction and special deductions on Line 28 of the Form 1120.

Therefore, Anmol did not have sufficient net income to pay the proffered wage, and thus failed to establish its ability to pay the proffered wage with its net income in 2001 through 2003. Anmol did not complete Part III Balance Sheets per Books of Form 1120-A or Schedule L of Form 1120. Thus, the AAO cannot determine whether Anmol had sufficient net current assets to pay the proffered wage for these years.

Therefore, the AAO finds that the petitioner failed to demonstrate that Anmol as the predecessor paid the certified wage at the priority date and had the ability to pay the proffered wage even if American Boys' successor-in-interest status on October 4, 2002 had been established.

The AAO also finds that the petitioner failed to demonstrate that American Boys had the ability to pay the proffered wage from the time of successor-in-interest status if even such status had been established.

The record contains the beneficiary's 1099 forms issued by American Boys for 2002 through 2004.⁹ These 1099 forms show that American Boys paid the beneficiary nonemployee compensation of \$20,552 in 2002, \$21,945 in 2003 and \$41,800 in 2004.¹⁰ Although American Boys demonstrated that it paid the full proffered wage in 2004, it would be obligated to demonstrate that it could pay the differences of \$20,164 in 2002 and \$18,771 in 2003 between wages actually paid to the beneficiary and the proffered wage.

The American Boys' tax returns for 2002 and 2003 demonstrate that American Boys had a net income of \$18,279 in 2002 and \$3,508 in 2003. Therefore, American Boys did not have sufficient net income to pay the differences of \$20,164 in 2002 and \$18,771 in 2003 between wages actually paid to the beneficiary and the proffered wage. The petitioner submitted incomplete tax returns without completed Part III Balance Sheets per Books of Form 1120-A or Schedule L of Form 1120 for American Boys. Thus, the AAO cannot determine whether American boys had sufficient net current assets to pay the proffered wage for these years.

Therefore, the AAO finds that the petitioner failed to demonstrate that American Boys had the ability to pay the proffered wage even if American Boys' successor-in-interest status had been established.

On appeal, counsel cites the December 10, 1993 Memorandum by Acting Executive Associate Commissioner (December 10, 1993 Memo), 70 Interpreter Release 1676, a DOL's Bureau of Alien Labor Certification Appeals (BALCA) case *Elizabeth's Care Home*, 2005-INA-00144 (BALCA 2005), and two decisions by the AAO to support his assertions. The December 10, 1993 Memo provided that a successor-in-interest must submit documentation that it has assumed all the rights, duties, obligations and assets of the original employer. The petitioner in this case failed to submit such documentation, and thus failed to establish its successor-in-interest relationship. While citing *Elizabeth's Care Home* counsel does not state how rules of *Elizabeth's Care Home* applicable to labor certification applications by BALCA are applicable to the instant petition before the Department of Homeland Security's AAO. Counsel refers to two decisions issued by the AAO, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding

⁹ It is noted that the beneficiary did not claim to have worked for either American Boys or Anmol on the Form ETA 750B signed on April 24, 2001, however, on the Form G-325 Biographic Information signed by the beneficiary on April 25, 2003, he claimed to have worked for Super Nice as a taxi driver from 2001 to the present time, i.e. April 25, 2003. The record does not contain any explanation or evidence to resolve this inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."

¹⁰ However, it is noted that these payments were not reflected on American Boys' tax returns as costs of labor.

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).

Counsel's assertions on appeal cannot overcome the director's grounds of denial that the petitioner failed to establish American Boys' successor-in-interest status to Anmol, failed to demonstrate that Anmol as the predecessor paid the certified wage at the priority date and had the ability to pay the proffered wage prior to the alleged successor-in-interest status, and failed to demonstrate that American Boys as the alleged successor-in-interest to Anmol had the continuing ability to pay the proffered wage even if American Boys' successor-in-interest status had been established.

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.