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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services

36

[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

JAN 03 2011

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

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. § 203 (b)(3)

ON BEHALF OF PETITIONER:

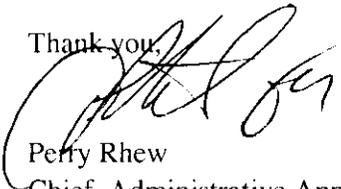
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you

  
Perry Rhew

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, [REDACTED] is a tomato packing house. It seeks to employ the beneficiary permanently in the United States as a control room operator. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that a successor-in-interest relationship has occurred. Counsel asserts that both the predecessor and successor-in-interest have had the continuing ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>1</sup>

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 other 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 at 8 C.F.R. § 204.5(g)(2) states:

*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 [U.S. Citizenship and Immigration Services (USCIS)].

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<sup>1</sup>The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

The petitioner must demonstrate that it has had the continuing financial ability to pay the proffered wage as of the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on August 23, 2004. The proffered wage is set forth as \$576.93 per week which amounts to \$30,000.36 per annum. The beneficiary signed Part B of the Form ETA 750 on May 5, 2006, indicating that he has worked for the petitioner since October 2003.

Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on October 4, 2007, by the petitioner, [REDACTED], indicates that it was established on October 27, 1973, employed 120 workers, and claims a gross annual income of \$39,000,000 and a net annual income of \$600,000.

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 continuing financial ability to pay the proffered wage as of the priority 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, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall 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).

The petitioner filed the petition with no evidence of its continuing ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2). On August 25, 2008, the director denied the petition, citing this lack of documentation. An appeal was filed on September 18, 2008. Counsel submitted evidence of the petitioner's ability to pay the proffered wage consisting of: 1) a copy of the state corporate record showing that [REDACTED] was still considered an active corporation; 2) a copy of a letter, dated September 9, 2008, from [REDACTED] Treasurer, stating that the company employs more than 100 workers and is able to pay the proffered wage to the beneficiary; 3) copies of unaudited financial statements of [REDACTED] for 2005, 2006, and 2007. Besides asserting that the petitioner had established the ability to pay the proffered wage to the beneficiary, counsel asserted that the director should have issued a request for evidence.

We note that the burden of proof lies with the petitioner in establishing eligibility for the visa classification sought. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 204.5(g)(2) requires that any employment-based petition filed for a beneficiary that requires an offer of employment must be accompanied by evidence that the petitioner has the continuing financial ability to pay the proffered wage. Further, as noted by the director, the regulation at 8

C.F.R. § 103.2(b)(1) requires that eligibility for the requested benefit must be established at the time of filing the application or petition. The regulation at 8 C.F.R. § 103.2 (b)(8)(ii) specifies that if all required initial evidence is not submitted with the petition or does not demonstrate eligibility, USCIS may, in its discretion, deny the petition for lack of initial evidence or ineligibility.<sup>2</sup>

On July 29, 2010, this office issued a notice of derogatory information, informing the petitioner that state electronic corporate records indicated that [REDACTED] had been dissolved on February 16, 2009. The AAO also requested additional information relevant to the petitioner's ability to pay the proffered wage including evidence of any payment of wages to the beneficiary, as well as documentation that the beneficiary met the other specific requirements of Block 15 of the labor certification that the beneficiary was "bi-lingual in Spanish/English."

In response, counsel submitted documentation identifying [REDACTED] as a successor-in-interest to [REDACTED]. Counsel provided an affidavit from [REDACTED] as CFO of [REDACTED] as well as [REDACTED], as well as copies of a bill of sale and blanket assignment and Memorandum of Asset Sales Agreement

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<sup>2</sup> 8 C.F.R. § 103.2(b)(1) states that a petitioner must demonstrate eligibility at time of filing:

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. All required application or petition forms must be properly completed and filed with any initial evidence required by applicable regulations and/or the form's instructions. Any evidence submitted in connection with the application or petition is incorporated into and considered part of the relating application or petition.

If the application does not demonstrate eligibility, the director is not required to send a request for evidence. *See* 8 C.F.R. § 103.2(b)(8):

...

(ii) *Initial evidence.* If all required initial evidence is not submitted with the application or petition or does not demonstrate eligibility, USCIS in its discretion may deny the application or petition for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.

As the petitioner failed to submit all the required initial evidence, the director in his discretion denied the petition pursuant to the regulations and was not required to issue an RFE.

between [REDACTED] and [REDACTED] that was executed on March 11, 2008, effective January 1, 2008. Additionally provided on appeal are copies of unaudited consolidated financial statements of [REDACTED] from 2004 to 2009, which includes financial information related to [REDACTED] and [REDACTED].

It is noted that a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only obtained the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).<sup>3</sup> If a

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<sup>3</sup>*Matter of Dial Auto* involved a petition filed by Dial Auto Repair Shop, Inc. (Dial Auto) on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, Elvira Auto Body, filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to Elvira Auto Body. The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

Additionally, the *representations made by the petitioner* concerning the relationship between Elvira Auto Body and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to Elvira Auto Body, counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of Elvira Auto Body and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of Elvira Auto Body's rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

successor-in-interest cannot be established, then the labor certification may not be used by the entity claiming to be the successor.

In this case, the [REDACTED] affidavit, written dated August 23, 2010, states that on January 1, 2008, [REDACTED] bought [REDACTED] "in its entirety", as a business strategy, but the location, line of businesses, and owners and officers for both companies did not change. He adds that both companies are owned by [REDACTED]. [REDACTED] also confirms that the beneficiary has been working for the company since 2003 and that his employment and job duties have remained the same. He also confirms that the beneficiary speaks English and Spanish.

The Bill of Sale and Blanket Assignment was executed on March 11, 2008, by [REDACTED] President of [REDACTED], effective January 1, 2008. It reflects provisions that transfer all of [REDACTED] assets to [REDACTED] valued at approximately 1.8 million dollars and including packing house equipment, vehicles, and office and computer equipment, as well as 'set up' value, which was explained in the Memorandum of Asset Sales Agreement, also executed on March 11, 2008. It explains that the seller had an existing workforce of mostly unskilled laborers and equipment already in place, which the parties agreed had an intangible value as listed under "set up" value on the list of assets. The purchaser, [REDACTED] also agreed to purchase the assets of the seller including to the extent assignable, all unexpired warranties and guaranties covering such assets.

We find that the evidence submitted by [REDACTED] to document its acquisition of [REDACTED] assets is sufficient to establish that the petitioner is a successor-in-interest, as counsel describes the new company as obtaining all the assets and liabilities that

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(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying labor certification could be invalidated for fraud or willful misrepresentation pursuant to 20 C.F.R. § 656.30 (1987). This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

existed under [REDACTED]. It is noted that the employee work force is regarded as intangible property which was transferred to the purchaser in the transaction. This would necessarily include the essential rights and obligations owed to the workforce. The beneficiary is performing the same position set forth in the labor certification both before and after the transfer to [REDACTED] in operating the MAF equipment. The job continues to be offered by the successor-in-interest. The successor will continue to operate the same type of business as the predecessor at the same location assuming the essential rights and obligations necessary to carry on the business in the same manner of as the predecessor. See [REDACTED] affidavit. Further, the purchaser and seller were both represented by [REDACTED] as President of both entities in executing the Bill of Sale as grantor and the Sales Agreement on behalf of both the purchaser [REDACTED] and [REDACTED].

With respect to the predecessor's and successor's continuing ability to pay the proffered wage of \$30,000.36, it is noted that none of the financial statements related to [REDACTED] or [REDACTED] was audited. 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 accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, there is no evidence that [REDACTED] bears any responsibility to pay the proffered wage of [REDACTED] or [REDACTED]. A corporation is a separate and distinct legal entity from its owners and shareholders. 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 *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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, the petitioner has submitted copies of internally prepared "reconciled" employee checks issued to the beneficiary by [REDACTED] and [REDACTED]. It is noted that these checks also include large individual sums entered as gross wages such as the \$10,000 included on June 13, 2009 or the \$20,000 entered on June 21, 2008. It is unclear if these amounts represented wages or some other kind of compensation.

The petitioner has also provided copies of W-2s claimed to be issued to the beneficiary in 2004, 2005, 2006, 2007, 2008 and 2009 by [REDACTED] (2004-2007) and [REDACTED] (2008-2009), respectively, along with copies of individual federal income tax returns filed in the beneficiary's name using a tax identification number. It is noted that the accompanying W-2s claimed to be issued by the petitioner to the beneficiary do not bear the same social security number. The 2004, 2005, and 2006 W-2s were issued to social security number [REDACTED]. The 2007, 2008 and 2009 W-2s are issued to social security number [REDACTED]. From the record, it is unclear why payments were made to the beneficiary under two separate social security numbers. These documents cannot be accepted as probative evidence of payment of the claimed wages to the beneficiary during the years claimed. As such, the petitioner has not established the ability to pay the proffered wage through actual employment and payment of compensation to the beneficiary. No reliable explanation for these inconsistencies has been offered. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Because the predecessor and successor companies have not submitted audited financial statements or federal income tax returns in support of their ability to pay the proffered wage, no further evaluation may be made.<sup>4</sup> Although, the Treasurer submitted a statement that it employs

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<sup>4</sup> If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net 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 income 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco*

over 100 workers, the labor certification was filed in 2004 and it is unclear that the petitioner continuously employed over 100 workers and that the statement can be accepted in lieu of other regulatory prescribed evidence. The regulation allows that the director (“*may accept*”) a statement in a case where the employer employs 100 or more workers.

Based on a review of the evidence in the record and the argument submitted on appeal, [REDACTED] successor-in-interest to [REDACTED] has not established its *continuing* ability to pay the proffered wage as of the priority date. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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*Especial v. Napolitano*, 696 F. Supp. 2d. 873, (E.D. Mich. 2010). *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner’s gross sales and profits 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 USCIS, 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. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer’s ability to pay because it ignores other necessary expenses).