



U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **SEP 09 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:   
Beneficiary: 

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center, and came before us on appeal. On March 18, 2013, we dismissed the appeal. The petitioner filed a motion to reopen and reconsider our decision, and on January 3, 2014, we affirmed our prior decision. The petitioner has filed another motion to reopen and reconsider. The motion will be granted. Our decisions dated March 18, 2013 and January 3, 2014 will be affirmed, and the petition will remain denied.

The petitioner describes itself as a technology products and services company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).<sup>1</sup> 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. The director denied the petition accordingly.

The director's February 2, 2010 denial concluded that the petitioner had not established that it had the ability to pay the proffered wage as of the priority date from 2002 until 2006. We affirmed the director's decision on March 18, 2013 regarding [REDACTED] ability to pay the proffered wage. We further held that the petitioner had not established that it was a successor-in-interest to the original labor certification employer, that it had the ability to pay its other sponsored workers, or that the beneficiary met the experience requirements of the labor certification.

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

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<sup>1</sup> We noted in our previous decisions, that the instant case involves the substitution of a beneficiary on the labor certification which was permitted by the DOL at the time of filing this petition. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). We previously stated that the requested substitution is permitted because the filing of the instant petition predates the final rule and another beneficiary has not been issued lawful permanent residence based on the labor certification.

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 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 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on May 10, 2002. The proffered wage as stated on the Form ETA 750 is \$60,000.00 per year. The Form ETA 750 states that the position requires a bachelor's degree or equivalent in Computer Science, Engineering, or related and two years of experience in the job offered.

On motion, the petitioner has submitted affidavits from two of the beneficiary's former colleagues at [REDACTED] in New Delhi, India, attesting to his employment there. Therefore, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner has provided new facts with supporting documentation not previously submitted.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.<sup>2</sup>

### ***Successor-In-Interest***

In the instant case, the employer listed on the labor certification is [REDACTED], located at [REDACTED] in [REDACTED], Massachusetts. The petitioner listed on the Form I-140 is [REDACTED] at [REDACTED] in [REDACTED] Massachusetts. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the petitioner is a different entity than the labor certification employer, it must establish that it is a successor-in-interest to that entity.

Considering *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects

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<sup>2</sup> The submission of additional evidence on appeal or motion 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 motion. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

At the outset, the record does not reflect that [REDACTED] (taxpayer Employer Identification Number (EIN) [REDACTED], now known as [REDACTED],<sup>3</sup> is the successor-in-interest to the original labor certification employer, [REDACTED] (EIN [REDACTED]). We stated in our previous decisions that the record did not reflect that [REDACTED] operated in the same metropolitan statistical area or that it operated the same type of business as [REDACTED]. The petitioner has not provided any additional evidence on motion to resolve these discrepancies.

The record contains a Purchase and Sale Agreement between [REDACTED] and [REDACTED] dated December 1, 2006, that states the following:

[REDACTED] hereby sells, transfers and assigns to [REDACTED] all of its right, title and interest in and to its Technology,<sup>4</sup> and does hereby transfer all immigration related rights and obligations of all foreign national employees sponsored by [REDACTED] in regard to [PERM applications and H-1B petitions].

In our previous decisions, we held that this agreement did not transfer any essential rights and obligations of [REDACTED] to [REDACTED], and therefore, the petitioner had not established that [REDACTED] was a successor-in-interest to [REDACTED].

Following our March 18, 2013 decision, the petitioner filed a motion to reopen and reconsider and provided a Purchase and Sale Agreement between [REDACTED] (formerly known as [REDACTED]) and [REDACTED], dated October 30, 2012, which states the following:

[REDACTED] will transfer all its assets and liabilities to [REDACTED]. These include the clients and the relationships with each of them, the experienced employees, all the knowhow and technology, confidential product and service information and trade secrets. The assets include patents, trademarks, copyrights and all Intellectual Property Rights.

Other assets being transferred are office machines and equipment, proprietary software and related systems, current products and those under development. The liabilities are all amounts owed to any party, including banks and financial institutions. The liabilities include all existing contracts with third parties, statutory obligations and related requirements to meet them.

We noted in our January 3, 2014 decision that a search of the Corporations Division of the Secretary of the Commonwealth of Massachusetts reflects that [REDACTED] was voluntarily dissolved on April 27, 2009. This calls into question how all of the assets and liabilities of [REDACTED] were transferred to

<sup>3</sup> See <http://corp.sec.state.ma.us/CorpWeb/CorpSearch/> [REDACTED] accessed September 3, 2014 (stating that [REDACTED] changed its name to [REDACTED] on May 17, 2012).

<sup>4</sup> This Purchase and Sale Agreement defines [REDACTED] "Technology" as "all patents, patent applications, trademarks, trademark applications, copyrights, proprietary software, and all Intellectual Property rights."

██████████ on October 30, 2012 when ██████████ had already been dissolved in 2009. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not provided any independent, objective evidence to resolve the discrepancies in the record regarding the dates the alleged successorship took place. Further, the 2012 Purchase and Sale Agreement also states that ██████████ (██████████) “had promised to pay ██████████ a sum of U.S. \$50,000 . . . a transaction that was partly completed in December 2009. The other payment due, based on profits, will be paid by December 2013.” The petitioner has not provided any evidence of any payments that were made in acquiring ██████████

Therefore, for the reasons noted above, the petitioner has not established that ██████████ (or ██████████) is the successor-in-interest to ██████████

***Ability to Pay the Proffered Wage***

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’l Comm’r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wage.

As stated above, to establish its ability to pay the proffered wage, the petitioner, ██████████ (now ██████████), must first provide evidence that it is a successor-in-interest to ██████████

The evidence in the record of proceeding shows that ██████████ and ██████████ are structured as S corporations. The tax returns in the record for ██████████ state that it was incorporated in 1992. The petition and the tax returns in the record for ██████████ state that it was incorporated in 2001. The petitioner alleges that ██████████ became a successor-in-interest to ██████████ in 2006. Therefore, the petitioner must establish that the predecessor, ██████████ had the ability to pay the beneficiary’s proffered wage from the priority date in 2002 through 2006 and that the successor, ██████████ had the ability to pay the proffered wage from 2006 onward. In our January 3, 2014 decision, we noted that ██████████ had established its ability to pay the proffered wage for 2006, 2007, and 2008.<sup>5</sup>

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the

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<sup>5</sup> In any further filings, the petitioner must establish its ability to pay the proffered wage from 2009 onward.

petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>6</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The tax returns for [REDACTED] state the following amounts of net income for 2002 through 2006:

- In 2002, [REDACTED] Form 1120S stated net income<sup>7</sup> of \$32,859.00.
- In 2003, [REDACTED] Form 1120S stated net income of (\$20,643.00).
- In 2004, [REDACTED] Form 1120S stated net income of \$32,646.00.
- In 2005, [REDACTED] Form 1120S stated net income of (\$45,652.00).
- In 2006, [REDACTED] Form 1120S stated net income of (\$47,296.00).

These amounts are insufficient to demonstrate [REDACTED] ability to pay the proffered wage for 2002 through 2006.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. 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. The petitioner's tax returns demonstrate the end-of-year net current assets for [REDACTED], as shown in the table below.

<sup>6</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9<sup>th</sup> Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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 (7<sup>th</sup> Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6<sup>th</sup> Cir. filed Nov. 10, 2011).

<sup>7</sup> Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on Schedule K, line 23 (1997-2003) and line 17e (2004-2005). See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed September 3, 2014) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because [REDACTED] had additional deductions shown on its Schedule K for 2002 and 2003, its net income is found on Schedule K of its tax returns. For 2004 through 2006, [REDACTED] net income is found on page one, line 21 of its tax returns.

<sup>8</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.

- In 2002, [REDACTED] Form 1120S stated net current assets of (\$53,942.00).
- In 2003, [REDACTED] Form 1120S stated net current assets of (\$56,650.00).
- In 2004, [REDACTED] Form 1120S stated net current assets of (\$10,415.00).
- In 2005, [REDACTED] Form 1120S stated net current assets of (\$50,413.00).
- In 2006, [REDACTED] Form 1120S stated net current assets of (\$94,869.00).

These amounts are also insufficient to demonstrate [REDACTED] ability to pay the proffered wage for 2002 through 2006. Therefore, even if the successor-in-interest relationship had been established between [REDACTED] and [REDACTED] ([REDACTED]), [REDACTED] did not have sufficient net income or net current assets to pay the proffered wage for 2002 through 2006. The petitioner has also failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that [REDACTED] had the ability to pay the proffered wage despite its low or negative amounts of net income and net current assets. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In addition, we concluded in our previous decisions, dated March 18, 2013 and January 3, 2014, that the petitioner must also demonstrate that it had the ability to pay all of its sponsored workers. USCIS records demonstrate that [REDACTED] has filed many Form I-140 and H-1B petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). We noted previously that the evidence in the record does not document the priority date, the proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. The petitioner has not provided this evidence on motion.<sup>9</sup> Thus, it is also concluded that the petitioner has not established that [REDACTED] had the continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

On motion, the petitioner has provided sufficient evidence to establish that the beneficiary met the experience requirements of the labor certification. Therefore, our prior decisions regarding the beneficiary's qualifications are withdrawn.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The motion is granted. The previous decisions of March 18, 2013 and January 3, 2014 are affirmed in part. The petition remains denied.

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<sup>9</sup> We note that, in connection with the motion to reconsider the Form I-485 that was denied by the director on March 17, 2010, the petitioner submitted evidence demonstrating that three of [REDACTED] previously sponsored workers have adjusted to lawful permanent resident status. However, the petitioner has not provided evidence of the proffered wages of these sponsored workers or evidence of wages paid to them. As stated above, the petitioner's low or negative net income and net current assets from 2002 through 2006 do not demonstrate that the petitioner could pay the instant beneficiary's proffered wage or the proffered wages of its other sponsored workers.