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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 02 191 50783 Office: CALIFORNIA SERVICE CENTER Date: MAR 0 9 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a custom architectural and ornamental metal fabricator. It seeks to employ the beneficiary permanently in the United States as a production engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on January 13, 1998, approved by the Department of Labor December 21, 1999. 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.

On appeal, the petitioner's counsel submitted a brief and additional evidence.

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.

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 eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is $4,811.47 per month, or approximately $57,738 per year.

With the petition, counsel submitted the I-140 and the ETA 750. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on August 7, 2002, requested additional evidence pertinent to that ability as well as requesting additional evidence that the current petitioner, I.Z. Construction, was a successor in interest to the original petitioner, G-1 Metal Design. Specifically, the Service Center requested that the petitioner provide evidence of its ability to pay the proffered salary of $57,738 as of the priority date of the petition. The Service Center requested several forms of additional evidence. On the successor in interest issue it requested a new, uncertified labor certification completed by the petitioner, documentation in support of how the change in ownership occurred, and documentation demonstrating that the petitioner will assume all rights, duties, obligations, and assets of the original employer. On the ability to pay issue it suggested three forms of evidence that could be submitted, and specifically requested information for tax years 1998 through 2001. In addition, the Service Center requested that the petitioner provide all schedules and tables accompanying any submitted returns, Form DE-6, Quarterly Wage Report for the past four quarters accepted

by the State of California. The Service Center also requested copies of I.Z. Construction's payroll summary, W-2's and W-3's as to wages paid in tax years 1998 through 2001. It also requested that I.Z. Construction provide a copy of any current city, county, state, and federal business licenses.

In response, on October 30, 2002, counsel submitted a letter enclosing several documents addressing the successor in interest and ability to pay issues. On the successor in interest issue counsel submitted letters from Mr[redacted]nd Mr.[redacted]he partners of G-1 Metal Design[1], explaining the circumstances of the partnership dissolution. On the ability to pay issue, counsel submitted tax returns and related schedules and tables as follows: for tax years 2000 and 2001, the individual tax returns of[redacted] were submitted; for tax years 1998 and 1999, the partnership returns for G-1 Metal design were submitted. In addition, counsel submitted copies of the Form DE-6, Quarterly Wage Report for I.Z. Construction covering the last four quarters, copies of I.Z. Construction's W-3 and W-2 forms for 2000 and 2001 and G-1 Metal Design's W-3 and W-2 forms for 1999. Also submitted was a copy of I.Z. Construction's California Business License issued September 1983, and a copy of a City of Los Angeles Tax Registration Certificate issued to I.Z. Construction in June 2001.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on December 5, 2002, denied the petition.

On appeal, the counsel has submitted a brief along with several attachments, including I.Z. Construction's tax records and additional evidence in the form of bank account records for I.Z. Construction Company, a copy of a residential loan application, investment portfolios, and copies of two subcontract agreements between I.Z. Construction and general contractors.[2]

The brief submitted by counsel urges reversal of the director's decision. First, counsel argues that the conclusion was erroneous and second, counsel urges that additional evidence submitted in support of the appeal supports establishes the petitioner's ability to pay the wage. The AAO will consider each of petitioner's arguments in turn.

The first argument raised by counsel relates to the director's analysis of the petitioner's ability to pay the wage based upon his review of the 2000 and 2001 tax records. In particular, counsel argues that the director erred in considering the adjusted gross income as reflected in Line 33 ($55,770) of the tax return, and instead should have considered the petitioner's total income as reflected in Line 22 ($79,037). Counsel further argues that the director should have supplemented the total income figure with the amount of depreciation as reflected in Schedule C, Line 13 ($5,400) of the petitioner's Form 1040 Individual Tax Return. Counsel's conclusion is that the amount available to pay the wage in Tax Year 2000 would have been $84,437 had the director properly evaluated the tax records.

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[1] It is noted that the record contains records that refer to the original petitioner alternatively as G-1 Metal Design or as G&I Metal Design. Because the ETA 750 refers to it as G-1 Metal Design, this decision will use that reference to the original petitioner.

[2] While the agreement between the petitioner and Swinerton Builders is dated October 12, 2001, the document purporting to demonstrate that the petitioner is a subcontractor to Camden Development on the Camden Harbor View project is undated. And appears not to be a contract itself but rather a description of the project. Furthermore, no attachments related to these agreements are attached.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Supra* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The adjusted gross income as reflected on line 33 of the Form 1040 for Tax Year 2000 is $55,770 and for Tax Year 2001 it is $30,973. Counsel, in addition to arguing that the total income must be considered also argues that the income should be supplemented by the amount of depreciation reflected in Schedule C. However, as noted above, no authority supports the counsel's argument; rather, the authorities cited serve to refute it. Furthermore, although counsel argues that it had been the director's policy to examine the total income rather than the adjusted gross income. Counsel fails to cite any specific case, memorandum, or other authoritative CIS determination that such alternative methods of calculating ability to pay are acceptable. Furthermore, unless the source the petitioner would cite is a binding precedent decision, it will not be considered. Finally, we also note that even if counsel could demonstrate some authority for its position, it still has not established, even viewing the tax records under counsel's theory, that the petitioner had any ability to pay the proffered wage in tax year 2001. Under counsel's own calculations the total income for that year was $43,655, and as counsel notes, no depreciation was claimed in that year. Thus, the AAO does not agree with counsel's assertion that "a more fair interpretation ... will resoundingly establish IZ's ability to pay the wage." (Petitioner's Brief p. 4).

The director determined that for tax years 2000 and 2001 the petitioner did not have the ability to pay the proffered wage of $55,738. Based upon a review of the record, the AAO concludes that this determination was reasonable. The AAO also finds reasonable the director's determination that he must also consider the petitioner's ability to support a family of four on the basis of his adjusted gross income and that clearly this could not be done, even for tax year 2000 where the adjusted gross income was close to, although still below, the amount of the proffered wage. Consideration of the petitioner's ability to support a family while paying the proffered wage is supported by case law. *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982). Consequently, the AAO is satisfied that the director correctly determined that the tax records submitted by the petitioner did not establish the ability to pay the proffered wage. Consequently, the AAO will next consider whether any additional evidence submitted on the petitioner's behalf establishes the ability to pay.

Having determined that the tax records themselves do not demonstrate the petitioner's to pay the wage, the AAO will next examine counsel's additional arguments on appeal.

The Petitioner's Business Checking Account Statements

Counsel has submitted monthly checking account statements pertaining to I.Z. Construction for the years 2000 and 20001. Counsel argues that the balances, which range from $28,369.24 to $55,106.98, are more than adequate to cover the beneficiary's monthly wage of $4,811.47. Counsel also notes that the total cash and average monthly cash balance for 2001 exceeds the amounts for 2000, indicating a better financial picture for the petitioner in 2001. Counsel argues that this information is not reflected in the tax records for those years and is sufficient to demonstrate that the petitioner was able to provide for his household while still having the ability to pay the proffered wage.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are preferred evidence of a petitioner's ability to pay a proffered wage. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns for 2000 and 2001.

The Petitioner's Residential Loan Application and Personal Investments

AAO turns next to counsel's submission of a copy of Residential Loan Application for [redacted] owner of I.Z. Construction. Counsel argues that the loan documents reflect that Mr. [redacted] equity was approximately $126,542, an amount that was greater than the proffered wage and which could have been accessed through an equity loan to pay the proffered wage. The AAO is not persuaded by counsel's assertions. It is clearly speculation to conclude that Mr [redacted] would have, in fact, obtained an equity loan, and questionable whether he would incur such additional debt to pay the beneficiary's proffered wage.

Counsel next asserts that M [redacted] personal investments in the amounts of $12,217.69 during 2000 and $17,006.01 during tax year 20001 could also have been accessed, if necessary, and that such amounts, combined with other financial resources could have been adequately paid the proffered wage. First, we note that as is the case with the other additional evidence submitted by counsel, these financial records reflect only a temporary picture of the petitioner's financial situation, and there is no indication that these are additional funds available to the petitioner that are not already encompassed within the information reflected on the tax records. Finally, even if the amounts were actually available to pay the funds, there is no evidence, other than counsel's assertions that Mr [redacted] would actually have placed his own personal assets at risk to pay the proffered wage.

The Petitioner's Award of Subcontracts

Counsel next relies upon additional evidence in the form of two documents purporting to be subcontract agreements between the petitioner and general contractors for work to be performed in Southern California. Counsel asserts that the documents demonstrate that the total value of the contracts to the petitioner amount to $821,810. These documents, however, are incomplete and generally inconclusive. The AAO would agree that the documents indicate that the petitioner appears to have entered into agreements to be a subcontractor on these two projects. However, while the documents may indicate an amount that the petitioner expected to receive, there is no indication beyond the fact that there is an agreement to perform certain work and receive a certain amount for that work, that the scheduled projects ever materialized or what payment, if any, the

petitioner ultimately received. In addition, while the petitioner was the subcontractor, in order to fulfill the contract he presumably either engaged other subcontractors, or at least incurred expenses associated with that contract that are not reflected in the evidence submitted in 2003—over a year after the subcontractor agreements. While the AAO acknowledges that the subcontract agreements indicate that the petitioner was counting on additional cash receipts beyond 2000, there is not sufficient evidence to form a conclusion as to the effect of those subcontracts on the petitioner's ability to pay the wage.

Finally, counsel asserts that the director failed to consider the beneficiary's ability to generate additional income in determining the petitioner's ability to pay the wage. While counsel cites *Masonry Masters, Inc. v. Thornburgh,* 875 f.2d 898 (C.A.D.C. 1989), the only thing offered in support is counsel's assertion that "Petitioner's business is in custom architectural and metal ornamental fabrication and has offered the Beneficiary a position as a Production Engineer/Architectural Metal Fabrication. The Beneficiary has previously worked as an industrial engineer and consultant in the field of architectural metal fabrications." However, the assertions of counsel are not evidence. *Matter of Laureano*, 19 I&N Dec. 1, 3 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). There is no evidence in the record that document what impact, if any, the beneficiary's employment would have upon the petitioner's business operations. Further, the Form I-140 indicates in part 6, that the position is not a new position, so either the beneficiary was already filling the position and thus, any positive impact he has had on the earning ability could be demonstrated, or someone else was occupying the position. Any expected improvement in the beneficiary's ability to perform the job is something that the petitioner should have been able to demonstrate. Consequently, due to the lack of evidence offered in support of counsel's contention, the AAO finds that the director was correct to not address whether the beneficiary's employment would positively affect the petitioner's ability to pay the wage.

Petitioner's Status as a Successor in Interest to the Original Petitioner

Beyond the director's decision the AAO will examine the status of the current petitioner, I.Z. Construction, as a successor in interest to the original petitioner, G-1 Metal Design.

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 original employer and continues to operate the same type of business as the original employer. See *Matter of Dial Repair Shop* 19 I&N Dec. 481 (Comm. 1981).

In the Request for Evidence dated August 7, 2002, the director requested that the petitioner provide additional information regarding the current petitioner's status as successor in interest. Specifically, the director requested: 1) an executed but uncertified labor certification documentation (ETA-750), completed by the petitioner; 2) documentation evidencing the changes of ownership; and 3) documentation demonstrating that the petitioner would assume all rights, duties, obligations, and assets of the original petitioner.

In response, counsel submitted two letters, one each from the two partners who had formed G-1 Metal Design, Mr. [redacted] and Mr. [redacted]

The letters provided the following relative to the dissolution of G-1 Metal Design:

> I further confirm that when Mr. and I decided to split-up our business, we did not have a formal written agreement, we just divided the assets, obligations, and clienteles/customers between the two of us. Mr continued his share of our partnership business at and I continued my share of the partnership's business at

Letter

> Recently, Mr. and myself terminated our partnership and split-up the business. I am continuing the exact same business as a sole proprietorship, under the name of I.A. Construction at the same address (the address on the tax return for the year 2000 is my home address). In this respect, I assume full responsibility of the offer of employment as enumerated in the Form ETA 750A, and it is my wish to continue the immigration case of Mr by taking over the application for Labor Certification as approved by the US Department of Labor, and by filing an employment-based Visa Petition (I-140) on behalf of Mr

Besides the two letters, no other evidence was submitted in support of the petitioner's status as a successor in interest.

In addition to the absence of evidence relating to the successor in interest issue, there are a few indications in the record that petitioner may not necessarily be conducting the same type of business to qualify as a successor in interest. First, the absence of any records at all documenting the dissolution of the partnership and distribution of assets, liabilities, etc. raises questions. It seems doubtful that two businessmen having significant experience in the business world, and at least two years of working together as partners conducting a business generating significant amounts in gross receipts, having substantial expenses, and obligations to employees, would not have any record at all regarding how those outstanding assets, liabilities, and other business matters would be handled. Second, the letters assert that Mr. business operations continued at the same address. However, it appears that it was Mr who continued the partnership business at the same address. As the Golan letter and the partnership tax returns both demonstrate, Mr. continued business operations at It appears that at some point, Mr established business at the same building, but at a different office location, Suite Q, as reflected in his City of Los Angeles Tax Registration Certificate. Furthermore, the 2000 Tax Return indicates that at least for some portion of time, the business operated out of the petitioner's home, as the petitioner readily acknowledges in his letter. Furthermore, additional tax records in the form of W-3's submitted by the petitioner also show a third address for I.Z. Construction in Tarzana, which is an address different from both the Branford Street, Sun Valley address, and Mr address of Canzonet Street in Woodland Hills.

As a result, the AAO concludes that the evidence of whether the current petitioner is a true successor in interest to the original petitioner is murky at best, and petitioner has not satisfied its burden to demonstrate its ability to pursue the petition as the successor at interest.

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.