U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

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U.S. Citizenship and Immigration Services

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[redacted]

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MAR 22 2004

FILE: WAC 02 056 51279 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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:

[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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a general construction firm. It seeks to employ the beneficiary permanently in the United States as a wood finisher. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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

Provisions of 8 C.F.R. § 204.5(g)(2) state:

> *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.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. In addition, the petitioner must qualify as the successor in interest of the predecessor, which obtained the certification of the Form ETA 750. The petition's priority date in this instance is September 9, 1997. The beneficiary's salary as stated on the labor certification is $17 per hour, or $35,360 per year.

Counsel initially submitted insufficient evidence. In a request for evidence (RFE), dated March 14, 2002, the director required additional evidence to establish that the beneficiary's Application to Register Permanent Resident Status or Adjust Status (I-485) was pending. In the alternative, the RFE requested evidence that Germain Construction (the petitioner) qualified as a successor in interest of the original employer, namely, Moser Construction (the predecessor). The RFE, further, exacted documentation of the change of ownership and of the successor's assumption of all the rights, duties, obligations, and assets of the predecessor.

In addition, the RFE exacted complete and signed tax returns for 1997 and continuing until the beneficiary obtains lawful permanent residence. It negated the consideration of Schedules C without the complete, signed U.S. Individual Income Tax Return (Form 1040).

Counsel submitted, in response to the RFE, unsigned Forms 1040 for 1998-2000 from [redacted] and [redacted] The federal tax returns, respectively, reported adjusted gross income of $26,630, $20,539, and $31,394, less than the proffered wage. No evidence of ability to pay the proffered wage related to the priority date.

The petitioner presented an exemplar of its Immigrant Petition for Alien Worker (I-140), observed that it began business only on May 15, 1998, and stated that it had no tax returns before 1998. Counsel elected to proceed with current processing, and not with Form I-485 adjustment under the American Competitiveness in the Twenty-First Century Act of 2000 (AC21). Therefore, the petitioner tendered an amended Form I-140 to Citizenship and Immigration Services (CIS), formerly the Service or INS.

The director determined that the evidence did not establish either that the petitioner was a successor in interest of the original employer, certified on Form ETA 750, or that the beneficiary had filed Form I-485, to qualify under AC21. The director concluded that the Form ETA 750 did not accord a priority date for the petitioner's amended Form I-140 and denied the petition.

On appeal, counsel submits a brief and concludes:

> The new I-140 stated that Germain Construction was the petitioner on behalf of [the beneficiary]. Thus, the appellant has fully complied with the regulations of [CIS] in selecting to proceed under pre-AC21 guidelines, and therefore its I-140 petition was denied in error.

Contrary to counsel's assumption, the petitioner's bare amendment of the I-140 does not constitute evidence that it is a successor in interest. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The record contains no evidence that the petitioner qualifies as a successor in interest to Moser. This status requires documentary evidence that Germain has assumed all of the rights, duties, and obligations of the predecessor company. The mere filing of the amended I-140 does not establish that the petitioner is a successor in interest. In addition, in order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. In this case, the petitioner has not established the financial ability of the predecessor enterprise to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The record contains no evidence of the predecessor's ability to pay the proffered wage at the priority date, of the predecessor's continuing ability to pay it, or of the date at which the successor in interest contracted the obligation to pay it. Indeed, counsel concedes that ". . . [T]he original petitioner was unable to continue the application process." The petitioner's adjusted gross income did not suffice to establish the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

After a review of the federal tax returns, Forms I-140, the petitioner's response to the RFE, and briefs, it is concluded that the petitioner did not establish that it was a successor in interest to the predecessor. The petitioner did not prove that its predecessor and it had sufficient available funds to establish the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. Finally, the record, as presently constituted, does not reflect that the beneficiary filed Form I-485 to qualify under AC21.

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.