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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

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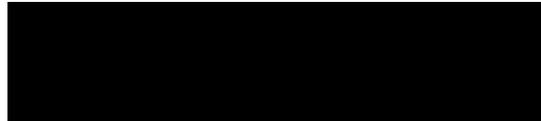


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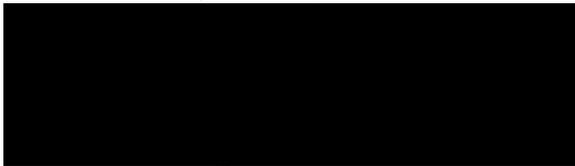
DEC 17 2003

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



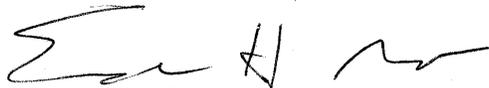
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


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 management and billing services firm for medical facilities. It seeks to employ the beneficiary in the United States permanently as an accountant. 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.

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.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is April 28, 1997. The beneficiary's salary as stated on the labor certification is \$15.38 per hour or \$31,990.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence (RFE) dated February 6, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax return, annual report or audited financial statement for 1997-2000, its 2001 Wage and Tax Statement (Form W-2) for wages paid to the beneficiary, and, finally, quarterly wage and withholding reports (Form DE-6) accepted for the last eight (8) quarters.

The petitioner submitted its Form 1120, U.S. Corporation Income Tax Returns for fiscal years (FY), from 1997 (July 1, 1997 to June 30, 1998), 1998, 1999, and 2000. The Form 1120 for FY 1996 would include the priority date, but the petitioner has never introduced it. See 8 C.F.R. § 204.5(g)(2), *supra*. The Immigrant Petition for Alien Worker (I-140) states that the petitioner began business in calendar year 1995.

The director reviewed the taxable income before net operating loss deduction and special deductions, as reported in Form 1120 in FY 1997-2000. Each was, respectively, (\$8,059) a loss, (\$4,361) a loss, zero, and \$216, less than the proffered wage. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel submits Forms DE-6 and W-2 for calendar years 1997-2001. They show that the petitioner paid the beneficiary \$21,101.31 in 1997, \$31,990.32 in 1998, \$31,990.32 in 1999, \$28,631.72 in 2000, all less than the proffered wage, as well as \$51,000 in 2001, greater than the proffered wage. Results less than the proffered wage in 1998 and 1999 may be discounted as artifacts of mathematical rounding.

Of more concern is counsel's contention on appeal that:

... [T]he beneficiary has been employed by the petitioner since the priority date and has been paid a salary that is equivalent to or significantly above the prevailing wage.

* * *

It has long been held that [Citizenship and Immigration Services [CIS], formerly the Service or the INS] cannot insist on evidence of the employer's ability to pay anything more than the prevailing wage at the time of the application. See *Masonry Masters Inc. v. Thornburgh*, 742 F. Supp 682 (D.D.C. 1990).

The holding in *Masonry Masters, Inc., supra*, does not stand for the proposition that a petitioner's unsupported assertions have greater weight than its tax returns. The holding, that CIS should not require a petitioner to show the ability to pay more than the prevailing wage, depends on proof of a difference between the proffered wage and the prevailing wage, but counsel has offered none in this proceeding. See also, *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989).

Counsel's summary, however, addresses a pertinent fact, that:

For the past four years, Petitioner has paid the beneficiary a salary that is equivalent to, and more recently, higher than the proffered wage.

In calendar year 1997, counsel claims that the petitioner paid the beneficiary, at the rate of the proffered wage, for 247 of 365 days, or 67.7% of the days that year. The product of 67.7% of \$31,990.40 is \$21,648.30, the expected wages of the beneficiary at the rate of the proffered wage. In calendar year 1997, the petitioner paid the beneficiary \$21,101.31, a rate less than the proffered wage.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner paid the beneficiary less than the proffered wage in calendar year 2000, \$28,631.72 in Form W-2 or \$29,800 in Form DE-6. Nonetheless, the FY 2000 Form 1120, in Schedule L, reported current assets of \$65,030 minus current liabilities of \$11,710, or net current assets of \$53,320, greater than the proffered wage.

The outcome turns, ultimately, on the ability to pay at the priority date. The FY 1997 tax return showed a loss. Moreover, it reported, in Schedule L, a deficit of net current assets. This federal tax return covered a fiscal year (FY) from July 1, 1997 to June 30, 1998. Current assets of \$30,848 minus current liabilities of \$46,172 resulted in the deficit of net current assets (\$15,324) for FY 1997, near the priority date. Despite counsel's assertions, the petitioner did not pay the beneficiary at the rate of the proffered wage in calendar year 1997. Finally, the petitioner never introduced the federal tax return for FY 1996, including the priority date, and offered no explanation of this critical omission.

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 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).

Counsel refers to FY 1997 in the brief on appeal and concedes:

... [T]he petitioner's net income was -\$8,059 while total wages paid were \$187,532, \$21,101 of which was paid out to the beneficiary and \$16,666 was paid out to the owner's husband, [PW].

Counsel offers no authority or analysis for the contention that amounts already paid out are available to apply to the salary of the beneficiary. The petitioner did not demonstrate that the beneficiary would replace PW or that its Form ETA 750 for the beneficiary supported the same duties that PW discharged.

Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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.

After a review of the federal tax returns, the employer's records, and counsel's brief, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

Beyond the RFE and the director's decision, this record failed to resolve qualifications of the beneficiary under the statute, § 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). The petitioner's Form ETA 750 required, in Part A, block 14, that the beneficiary have two years of experience in the job offered or a related occupation. *Employment* means full-time work in a permanent position for an employer. 20 C.F.R. § 656.3.

Regulations prescribe a letter from the former employer to verify employment. 8 C.F.R. 204.5(g)(1).

An undated letter of The Development Bank of the Philippines (employment letter) certified only "casual," not full-time or permanent, work. The petitioner's Chief Executive Officer (LW), further, attested to other work of the beneficiary at a firm (CD&F) from October 1996 to March 1997. It lasted, at most, seven (7) months, and CD&F did not verify this claim, the nature of the work, or LW's access to its records. LW composed her letter on personal stationery.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated that the position of accountant required two (2) years of experience in the job offered or a related occupation. Since the director did not request evidence of compliance with this portion of the Form ETA 750, the inconclusive certifications for compliance cannot be part of the basis of the AAO's decision. For this additional reason, however, the petition may not be approved.

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.