

PUBLIC COPY

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

BCIS

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

File: WAC 02 118 50183 Office: California Service Center

Date: **JUL 03 2003**

IN RE: Petitioner: -
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Other Worker pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)(A)(iii)

ON BEHALF OF PETITIONER:

[REDACTED]

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 the Bureau of Citizenship and Immigration Services (Bureau) 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
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 glass fabricator. It seeks to employ the beneficiary permanently in the United States as a glass worker. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. 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, counsel submits additional evidence.

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 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.

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 either 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 the Service.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, 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). Here, the request for labor certification was accepted for processing on April 27, 2001. The proffered salary as stated on the labor certification is \$10 per hour which equals \$20,800 annually.

With the petition, counsel submitted what purports to be the unaudited balance sheet of [REDACTED] as of June 30, 2001. That document is headed [REDACTED] Combined Balance Sheet. No evidence of the relationship of the petitioner to [REDACTED] Group was submitted.

Because the evidence submitted did not adequately demonstrate the petitioner's ability to pay the proffered wage, the California Service Center, on March 13, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested copies of annual reports, audited financial statements, or copies of the petitioner's federal income tax returns. The request stipulated that the documentation submitted must demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response, counsel submitted a letter, dated June 4, 2002, stating that the petitioner would be delayed in submitting the requested documentation, and requested an extension of time until June 30, 2002.

With that letter, counsel submitted a letter from the petitioner, dated May 14, 2002, stating that the petitioner was then preparing its tax returns for 2001, but did not have completed copies available. That letter further noted that the petitioner had employed the beneficiary since January 1999 and was submitting payroll records to demonstrate its ability to pay the proffered wage.

Counsel submitted a photocopied portion of a payroll record, presumably of the petitioner. The document states that the beneficiary was hired on May 5, 1999 and earned \$7,330.50 during an unstated period of time.

No further evidence was received and on July 16, 2002 the Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate the petitioner's ability to pay the proffered wage.

On appeal, counsel submitted an audited balance sheet of [REDACTED] and Subsidiaries. The financial statement

indicated that the company had acquired [REDACTED] LA, Inc., TempWerks, Inc. and [REDACTED] Inc., which it referred to collectively as [REDACTED]. The audited financial statement demonstrates that [REDACTED] is financially sound and would be able to pay the proffered wage if it were obliged to pay it.

A letter from the controller of [REDACTED] Inc., dated July 26, 2002, was also submitted on appeal. That letter states that the petitioner, [REDACTED] San Diego, is an affiliate of the [REDACTED] group. The letter further states that [REDACTED] LA was a subsidiary of [REDACTED] until July 9, 2002, when it was acquired by [REDACTED] Acquisition Corporation, which is comprised of the original owners of the [REDACTED] group. Further still, that letter states that [REDACTED] LA, Inc. employs 350 full-time employees and is able to pay the proffered wage. Finally, that letter claims that [REDACTED] LA, Inc. had an income of \$2.5 million and a positive cash flow of \$4.1 million during 2000, which amounts, it alleges, are included in the sums reported on the audited financial statements of [REDACTED] which was then its parent company.

For the instant petition to be approved, the petitioner, [REDACTED] LLC, must demonstrate the continuing ability to pay the proffered wage beginning on April 27, 2001, the priority date. If this ability relies on the funds of another corporation or person, then the petitioner must demonstrate that the other corporation or person has the ability to pay the proffered wage and is obliged to pay the proffered wage even if it is not in its financial interest to do so. To show that the other corporation has some relationship to the petitioner, or even that its interests currently mandate paying the proffered wage, is insufficient absent that obligation.

Pursuant to 8 C.F.R. § 204.5(g)(2), the unaudited balance sheet submitted with the petition is not competent evidence of the ability to pay the proffered wage. The portion of a payroll record subsequently submitted shows that the petitioner paid \$7,330.50 to the beneficiary, but does not state during what period. Clearly, that is insufficient to prove that the petitioner had the ability to pay the beneficiary \$20,800 annually at any salient time.

Counsel submitted a statement which alleges that the petitioner is an affiliate of [REDACTED] LA, Inc. Counsel has submitted evidence that during salient times, [REDACTED] LA, Inc. was owned by [REDACTED] and that [REDACTED] had the ability to pay the proffered wage. Counsel submitted no evidence, however, that [REDACTED] Inc. or [REDACTED] is required to pay the petitioner's debts and obligations.

Even if [REDACTED] were compelled to pay the proffered wage, the record contains no evidence that it is able. The record contains the statement by the controller of [REDACTED] that it had an income of \$2.5 million and a positive cash flow of \$4.1 million during 2000. However, neither the audited balance sheet submitted nor any other evidence in the record supports that statement, and an unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, because the priority date is April 27, 2001, the petitioner's finances during 2000 are not directly relevant to the petition.

Finally, counsel submitted a statement from the controller that [REDACTED] employs more than 100 people and has the ability to pay the proffered wage. If [REDACTED] were the petitioner, and the controller produced evidence of that fact, and evidence that it employs 100 or more workers, then the petition might be approved, pursuant to 8 C.F.R. § 204.5(g)(2), based on the controller's statement that the petitioner has the ability to pay the proffered wage.

However, the petitioner is [REDACTED] San Diego, LLC, not [REDACTED] LA. No evidence was produced to show that they are identical, and no evidence, other than the assertion of the controller, was submitted to show that the petitioner employs 100 or more workers.

The evidence submitted does not demonstrate that the petitioner has had the continuing ability to pay the proffered wage beginning on the priority date.

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.

APR 27 2001