



U.S. Citizenship
and Immigration
Services

PUBLIC COPY identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

Bole

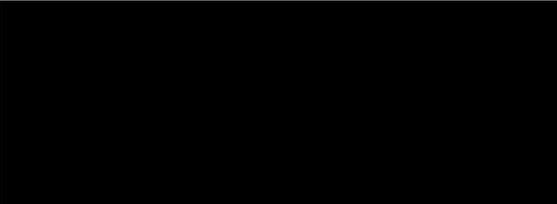


FILE: EAC 02 245 52271 Office: VERMONT SERVICE CENTER Date: JUL 29 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

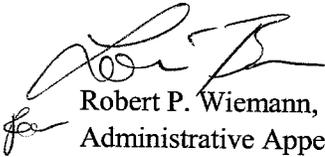
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a water filter systems firm. It seeks to employ the beneficiary permanently in the United States as a department manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.¹ 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 and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that it establishes the petitioner's ability to pay the beneficiary's proffered wage.

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.

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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage 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. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 12, 2000. The proffered wage as stated on the Form ETA 750 is 27.99 per hour, which amounts to \$58,219.20 annually, based on a 40-hour week. The Immigrant Petition for Alien Worker, Form I-140, shows the petitioner's name as "Liberty of America, Inc." Part 5 of the I-140 indicates that the petitioner was established in 1996 and has three employees. Part B of the ETA 750, signed by the beneficiary, indicates that he has worked for the petitioner since 1996.

¹ The record contains a photocopy of Form ETA750, but not the original. Correspondence from counsel, dated July 16, 2002, contained in the record, indicates that the petitioner had advised her that a prior petition (with the original ETA750) had been filed and closed. Counsel states she had no notice of any action taken. CIS electronic records and a note on the instant petition indicate that EAC 0112452869 (same beneficiary) was classified as abandoned and denied on December 7, 2001 and may be at a record storage facility. 20 C.F.R. § 656.30(e) provides that immigration officers may request a duplicate labor certification from a DOL certifying officer. As the appeal from this case is being dismissed, no further action is necessary at this time.

With the petition, the petitioner submitted incomplete copies of the owner's Form 1040, U.S. Individual Income Tax Return for 1999. The tax return shows that the petitioner is a sole proprietorship. Schedule C of the sole proprietor's tax return reflects that the petitioner reported a net profit of \$60,323.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and continuing until the present, on April 14, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of the sole proprietor's 2000 – 2002 "Form 1040" federal tax returns with all schedules and attachments. The director also specifically advised the petitioner to submit copies of the beneficiary's Wage and Tax Statement (W-2) showing how much has been paid to the beneficiary.

In response, the petitioner, through counsel, again submitted incomplete copies of the sole proprietor's individual federal tax returns for 2000 and 2001. Counsel also submitted a copy of Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax Return, reflecting that the sole proprietor had not yet filed her 2002 tax return. Schedule C of the 2000 and 2001 tax returns indicates that the petitioner declared a net profit of \$62,531 in 2000 and \$66,586 in 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 August 28, 2003, denied the petition. The director noted that as a sole proprietorship, the petitioner must show that the sole proprietor's income can support her household expenses as well as pay the beneficiary's proffered wage. The director concluded that since the petitioner had not submitted complete copies of the sole proprietor's federal income tax returns, it had not established its continuing ability to pay the proffered salary.

On appeal, counsel simply states that in lieu of financial documentation, and pursuant to 8 C.F.R. 204.5(g)(2), the petitioner has over 100 employees. Counsel provides a letter from Adolfo Gonzalez, President, on a letterhead of "Liberty Home Products." Mr. Gonzalez attests to the petitioner's economic soundness and states:

I am the President and Financial Officer of Liberty Home Products, Inc. Please be advised that the official name of this corporation and home office is Liberty Home Products, Inc. However, this company is also known as Liberty of America and also just 'Liberty.' Our corporate headquarters employs over one hundred employees.

Counsel further provides, on appeal, a copy of a "Certificate of Amendment to the Certification of Incorporation" reflecting that a company called "Tri State Water Filter Distr. Inc." amended its name in 1992 to "Liberty Home Products Inc."

Counsel's assertion and Mr. Gonzalez' statement on appeal do not establish the petitioner's ability to pay the proffered wage in view of the evidence previously submitted to the record. On the I-140, the petitioner is represented to be Liberty of America, Inc. not Liberty Home Products, Inc. It states that it has three employees on Part 5 of the I-140, not 100 employees. Instead of corporate tax returns provided in support of the ability to pay, however, the petitioner twice submitted partial copies of the federal tax returns of "Zenaida Pitre," including

copies of Schedule C, Profit or Loss From Business, of "Liberty of America" as a sole proprietorship. Adding to the confusion, the employer tax identification number is the same on both the sole proprietorship's Schedule C financial data and on Part 1 of the I-140, listing a corporate petitioner. It is further noted that the employer does not style itself as a corporation on Part A of the ETA 750.

As the prospective U.S. employer, the petitioner bears the burden to show its ability to pay the proffered wage. Neither the statutory nor regulatory provisions relevant to employment based immigrant petitions provide for multiple or co-employers. The regulation at 20 C.F.R. § 656.3 further identifies an "employer" in relevant part as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. (Original emphasis).

It is unclear from the record who has been and who is supposed to be the alien beneficiary's actual employer. See *Matter of Smith*, 12 I&N Dec. 772, 773 (Dist. Dir. 1968). It cannot simultaneously be a sole proprietorship and a corporation. It is further noted that a corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In view of the foregoing, the bald assertion that these entities are the same and have a stated number of employees does not persuasively establish the actual employer's identity on appeal and does not establish its continuing ability to pay the proffered wage. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592.

The AAO concurs with the director's denial. If the beneficiary's actual employer will be a sole proprietorship, then the petitioner misrepresented itself on the I-140 as a corporation and failed to submit sufficient evidence to establish its ability to pay the proffered wage. A sole proprietorship is not legally separate from its owner. Where the petitioner is a sole proprietorship, the sole proprietors' income and other cash or cash equivalent assets are the source of the proffered wage. As such, all of the income and expenses generated by the sole proprietors and their dependents must be reviewed when determining the petitioner's continuing ability to pay the beneficiary's proposed wage offer. Sole proprietors must be able to demonstrate that they can sustain their individual living expenses as well as pay the beneficiary's proposed salary. In this case, the director could not ascertain the sole proprietor's actual ability to pay the proffered wage because the petitioner failed to provide complete copies of the tax returns as specifically instructed. The failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denial. 8 C.F.R. 103.2(b)(14).

Accordingly, based on the ambiguous evidence contained in the record regarding the identity of the actual prospective U.S. employer and after consideration of the information submitted on appeal, the AAO cannot conclude that the petitioner has persuasively demonstrated its continuing ability to pay the proffered wage as of the priority date of the petition.

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.