

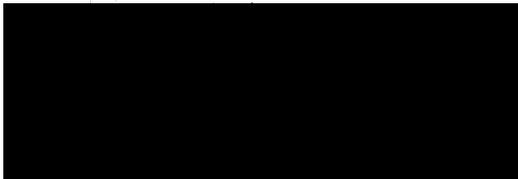


U.S. Citizenship  
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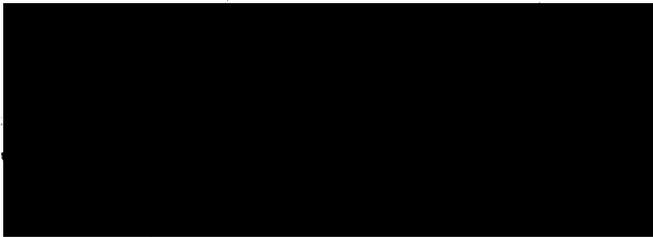


FILE: WAC 02 132 54316 Office: CALIFORNIA SERVICE CENTER Date: MAY 12 2004

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

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:



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 an air conditioning service firm. It seeks to employ the beneficiary permanently in the United States as an installer and servicer. 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 hinges on the petitioner's ability to pay the wage offered from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is December 8, 1997. The beneficiary's salary as stated on the labor certification is \$27.15 per hour or \$56,472 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 29, 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. For 1997 through 2001, the RFE exacted copies of the petitioner's original, signed federal income tax return, with all schedules and attachments as submitted, the annual report, or the audited financial statement. The director noted that the record for the Immigrant Petition for Alien Worker (I-140) did not include audited financial statements. The I-140 designates Rassac, Inc. as the petitioner, and this discussion reserves the status of the petitioner for Rassac, Inc.

The RFE required evidence to clarify the relationship between the petitioner, Rassac, Inc., as named in the I-140, and Rohan and Assoc. (RA), the employer as certified on Form ETA 750. Also, the RFE requested the translation of a Spanish language document.

In response, counsel submitted copies, with EIN number 95-4482578, of Forms 1120, U.S. Corporation Income Tax Returns, for fiscal years (FY) beginning July 1, 1997, and ending June 30, 2001. Form 1120 for FY 1997 named the taxpayer "Rassac H & C, Incorporated Rassac Air Systems." Forms 1120, for FY 1998-2000, named "Rassac H & C Incorporated." No copy was signed or otherwise verified as submitted, as the RFE specified, and the petitioner gave no explanation for the omission. Moreover, none named the petitioner or RA. Counsel submitted the requisite translation of a letter, dated February 4, 2002, stating the beneficiary's experience as a heating and air conditioning technician.

The president [CR], on letterhead of Rassac-Air/System, mechanical contractors, in a letter dated June 5, 2002 (CR1), averred that :

This corporation, RASSAC H & C, Inc., started in March of 1990 as a Partnership with the name [RA]. For the first four years this company was a partnership. In 1994 this company became a corporation with the name RASSAC H&C Inc. This company has been in business for over 12 years.

The director determined that the I-140 stated a different employer than Form ETA 750 and, further, that the petitioner did not establish either that the petitioner, Rassac, Inc., and RA were one and the same, or that they had a business relationship. The director weighed the lack of evidence that the petitioner is responsible for RA's debts and reasoned that it was not a successor in interest to RA. The director concluded that Citizenship and Immigration Services (CIS), formerly the Service or INS, could not reaffirm the Form ETA 750 and, absent an appropriate labor certification, denied the petition.

Counsel countered with a motion to reopen and reconsider on August 29, 2002 (MTR) and stated:

Enclosed is evidence to show Rassac, Inc. is the successor in interest [sic] to Rohamed [sic] Associates.

CR, on the same letterhead, dated August 13, 2002 (CR2), signed as president of the petitioner and said:

Rassac, Inc. is the successor in interest to [RA]. Rassac, Inc. assumes all rights, duties, obligations, and assets of [RA] and continues to operate the same type of business as [RA].

Rassac, Inc. is willing to sponsor [the beneficiary] in all his immigration matters.

In support of these assertions, the MTR included an undated extract of minutes of an unidentified corporation establishing its bank accounts. It warrants no further discussion, since the proceedings, as presently constituted, do not hint at its authenticity or materiality.

The MTR, also, included Articles of Incorporation of RASSAC-H&C, Inc. dated March 14, 1994 (Articles). The petitioner named in the I-140 is simply Rassac, Inc. The Articles did not name Rassac, Inc., Rohamed and Associates, or Rohan and Associates. The Articles appointed one (1) incorporator as the corporation's initial agent for service of process. The Articles do not mention, and are not relevant to, the status of, Rassac, Inc., as the same as, or a successor in interest to, RA.

The MTR, finally, offered another extract, page 1 of Minutes of Organizational Meeting, held May 6, 1994. This fragment merely acknowledged the filing of Articles and seems to have no connection to the status of RA as the predecessor of Rassac, Inc.

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 director believed that the corporate letter, Articles, and extract established only that [redacted] and [redacted] were officers of the petitioner when it incorporated in 1994. The director concluded, however, that this data did not establish that Rassac, Inc. was the successor in interest to RA and denied the MTR in a decision dated January 2, 2003.

The appeal brief reasons that:

Further, the original letter sent by Mr. [REDACTED] [CR1] explains that the business originally started out as [RA] and later changed its' [sic] name to Rassac, Inc. when they [sic] incorporated.

As already found, the Articles and minutes, on the contrary, reference RASSAC-H & C, INC, never Rassac, Inc. The MTR offers no documentary evidence of these as one business or of either one as a successor in interest to RA. The president of Rassac, Inc., in CR2, merely goes on record with a gratuitous assumption of debts, lacking, equally, any basis of corporate authority or a contract. The MTR does not describe "Rohamed Associates" beyond its naming.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel stipulates that a successor in interest must submit documentation that it has assumed the rights, duties, obligations, and assets of the predecessor. The record contains no evidence that RASSAC-H & C, INC., or Rassac, Inc., qualifies as a successor-in-interest to RA. This status requires documentary evidence that Rassac, Inc. has assumed all of the rights, duties, and obligations of RA, the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor 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).

Counsel has provided a penalty notice, dated December 31, 1997, from the Internal Revenue Service (IRS) to "RASSAC-H & C INC, ROHAN & ASSOCIATES," with the EIN number [REDACTED] and speculates that:

This clearly shows that Rassac, Inc. may have been doing business as [RA] at one time, or vice versa, but for all intents and purposes, they are one in the same.

This hypothesis is not convincing. It establishes no contract for the assumption of all of the rights, duties and obligations of the predecessor company, RA. The possibility still does not document the fact that RASSACH-H & C INC and Rassac, Inc. as one and the same business.

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).

Counsel, on appeal, contends that the director confused the petitioner with a request for evidence to clarify the relationship between the petitioner and RA. Counsel faults the director because the RFE might imply proof of a successor in interest, on the one hand, or of "one in the same" business, on the other. The proceedings still lack proof of either status, and the petitioner has the particular knowledge and the duty to establish its status.

The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. §§ 103.2(b)(8)(i)-(iii). Within the 12 weeks allowed, the petitioner may submit all the requested initial or

additional evidence, submit some or none of the additional evidence and ask for a decision based on the record, or withdraw the petition.

The petitioner was put on notice of required evidence of the relationship of Rassac, Inc. and RA and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence. On the MTR, the petitioner offered Articles and fragmentary minutes, titled Rassac H & C Inc, Rohan & Associates, but these did not establish that Rassac H & C Inc, and Rassac, Inc. are one and the same business or that either was the successor of RA. The notice for the MTR avowed that Rohamed Associates, not RA, was the petitioner's predecessor, but the proceedings contain no data for that new entity.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the director. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

On appeal, the record still lacks credible and documentary evidence to clarify the relationship of five (5) named businesses. The proceedings lack probative evidence to resolve two (2) essential questions, at least. Which one of "Rassac H & C Inc, Rohan & Associates," or "Rassac, Inc.," or "Rassac H & C Inc" is the same business as, or a successor in interest to, RA? Does the IRS notice provide contractual, documentary evidence of the relationship of RA to Rassac, Inc., as originally requested in the RFE? The record is unclear.

The record does not reflect a preponderance of credible evidence that the petitioner qualifies as a successor-in-interest to RA. This status requires documentary evidence that Rassac, Inc. has assumed all of the rights, duties, and obligations of the predecessor company, RA. The fact that the petitioner is doing business at the same location as the predecessor 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 petitioner submitted unsigned tax returns, variously naming Rassac H & C, Incorporated and Rassac Air Systems, but they contain no data to establish the business connection of RA [REDACTED] Rohamed Associates, and Rassac, Inc. Rassac, Inc., the corporate petitioner must show that it has the ability to pay the proffered wage. CIS may not "pierce the corporate veil" and look to the assets of these other entities. 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.

Articles of Incorporation, extracts of minutes, CR1, CR2, and briefs, taken together, fail to establish either the petitioner's status as a successor in interest of RA or the business relationship of the petitioner with any named entity. CIS cannot evaluate unverified federal income tax returns that reflect the name of neither the predecessor nor successor. Consequently, AAO can reach no conclusion from this record in respect to the ability, of the petitioner or the predecessor, to pay the proffered wage. This inquiry is essential to the proceedings, as stated in 8 C.F.R. § 204.5(g)(2).

The petitioner has withheld credible evidence of the business relationship of the petitioner, both with RA and with the named parties on unverified federal tax returns. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the application or petition. 8 C.F.R. §103.2(b)(14)

After a review of Articles of Incorporation, extracts of minutes, CR1, CR2, briefs, and unsigned federal tax returns, it is concluded that such evidence has not established that the petitioner was the successor in interest of RA, that the petitioner was the same party as any of those named in the federal tax returns, or, consequently, that the petitioner 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.

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.