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**U.S. Citizenship
and Immigration
Services**

B6

FILE:

Office: NEBRASKA SERVICE CENTER

Date: **MAY 21 2004**

IN RE:

Petitioner:

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:

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

The petitioner is a shipping and transportation firm. It seeks to employ the beneficiary permanently in the United States as a documentation supervisor. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (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 March 8, 1996. The beneficiary's salary as stated on the labor certification is \$2,500 per month or \$30,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated September 1, 1999, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted, for 1996-1999, the petitioner's federal income tax returns, annual report, or audited financial statement, as well as the most recent quarterly wage report (Form 941) and unemployment compensation report form.

In response to the RFE, the petitioner, Dyna Transport, Inc. of Itasca, Illinois, offered no documentation of its ability to pay the proffered wage. Its Immigrant Petition for Alien Worker (I-140), filed May 25, 1999, claimed 15 employees, its founding in 1987, and net income of \$77,103.37 on gross income of \$2,085,524.89. The petitioner submitted evidence related to Dyna Communication Corp. (DCC) of Walnut, CA. The DCC fiscal year (FY) 1996 Form 1120, U.S. Corporation Income Tax Return, covered a tax year from its incorporation on November 21, 1996 to September 30, 1997. Forms 1120 for calendar years 1997 and 1998 showed the incorporation of CNS-Dyna International (CNS) of Compton, California on January 8, 1997. Neither DCC nor CNS submitted federal tax returns that included the petitioner's priority date.

In response to the RFE, also, counsel submitted an accountant's letter (RFE letter), dated October 28, 1999. It stipulated that the accountant had no records for the priority date, though data for June 30, 1996 was favorable, and speculated that, therefore, data for the priority date, very likely, established the ability to pay the proffered wage. The RFE letter acknowledged that the petitioner was formally liquidated on October 31, 1997 and claimed that CNS, formed on January 8, 1997, as already noted, replaced the petitioner. The RFE letter, apparently, discussed the petitioner's Form 1120 for FY 1996, beginning July 1, 1996, though counsel did not present this Form 1120 until the appeal.

In particular, the petitioner filed the Immigrant Petition for Alien Worker (I-140) on May 21, 1999, long after the RFE letter claimed its liquidation on October 31, 1997. The director objected to the lack of documentation of the liquidation and of the transfer of ownership. Also, the director took exception to unexplained conflicts in the claimed location of the petitioner (at Itasca, Illinois) with its claimed successors, DCC (at Walnut, California), and CNS (at Compton, California). Further, the June 30, 1999 Illinois quarterly wage report for CNS reported only seven (7) employees, not the 15 claimed for the petitioner in the Immigrant Petition for Alien Worker (I-140), filed May 25, 1999. The director rejected CNS's use of the petitioner's ETA 750 because of the absence of credible evidence to establish the three (3) firms' connection, either for tax reporting purposes or for a job offer under the approved Form ETA 750.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits the petitioner's FY 1996 Form 1120, for an irregular year FY from November 21, 1996 to September 30, 1997. It reflected initial current assets of \$2,068,257 minus current liabilities of \$1,924,649, a difference of \$143,608 of net current assets, a sum equal to, or greater than, the proffered wage. The FY 1996 Form 1120, however, does not include the priority date. The petitioner neither offered its FY 1995 Form 1120, including the priority date, nor explained why the writer of the RFE letter had no access to it. The RFE letter did not discuss the FY 1995 Form 1120, but assumed that it was, likely, favorable to the ability to pay the proffered wage.

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). Moreover, 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).

Counsel and the director misconstrue the taxable loss for FY 1996, beginning July 1, 1996. The RFE, in any case, exacted the petitioner's complete tax filings consistent with regulations in 8 C.F.R. § 204.5(g)(2). The petitioner failed to submit its tax return for FY 1995 at the priority date.

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 such 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).

The petitioner explains neither its irregular fiscal year for tax reporting in 1996 nor the omissions both of its final Form 1120 upon its averred dissolution and of any other Form 1120 pertinent to its filing of the I-140 now on appeal. Defects in its federal tax returns aggravate doubts about the petitioner's relationship to DCC and CNS. Thus, the record did not establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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.

If Citizenship and Immigration Services (CIS), formerly the Service or the INS, fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Counsel's brief on appeal asserts:

[CNS] is the successor corporation to [the petitioner]. It assumed all the rights, duties, obligations, and assets of the original petitioner and continues to run the same type of business. These are the essential requirements for finding successor status. [citations]. In addition the owners of both corporations are essentially the same. In fact there has not been a significant change in ownership. Proof of this relationship is being submitted with this appeal, with additional evidence to be submitted in the immediate future.

On the contrary, neither the certificate of dissolution, filed with the California Secretary of State on December 26, 1997, nor contractual evidence, documents that CNS assumed all of the assets and liabilities of the petitioner. The certificate of dissolution vaguely hints at other parties:

4. The known assets have been distributed to the persons entitled thereto.
5. A person or corporation assumes the tax liability, if any, of the dissolving corporation as security for the issuance of a tax clearance certificate from the Franchise Tax Board and is responsible for additional corporate taxes, if any, that are assessed and that become due after the date of the assumption of tax liability.

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 persists, in a supplemental brief, that:

The Certificate of Dissolution for Dyna Transport (Exhibit 1) states that all of [the petitioner's] debts and liabilities have been assumed by [CNS]. As the stock certificates for the two companies shows [sic], the shareholders of [the petitioner] are also shareholders in [CNS] (Exhibits 2-4). The stock transfer ledger for [the petitioner] (Exhibit 5) indicates that the shareholders for both corporations are essentially the same.

Though the petitioner's certificate of dissolution was filed on December 26, 1997, it states, at best, an assumption of debts by CNS. As to that date, the accountant, in the RFE letter, *supra*, says that the dissolution occurred on October 31, 1997. The FY 1996 Form 1120 for DCC, said to be a participant in the succession, covered a period ending September 30, 1997, but offered no terms of its status as a successor. A key provision, in 3 of the certificate of dissolution, postulated that CNS became the successor on December 26, 1997. In contradiction, CNS did not issue these certificates of stock ownership until January 12, 2000. Supplemental Exhibit 5, a stock ledger, said to represent transfers, has no date after September 8, 1995. No dated entry relates to the priority date, the contradictory, averred dates of the dissolution, or the belated, unrecorded issuance of stock certificates in CNS.

The record contains no credible evidence that CNS qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that CNS has assumed all of the rights, duties, and obligations of the predecessor company. The certificate of dissolution is incomprehensible as to the person or entity that received assets and that might assume, or be assessed, tax liabilities. Even if the successor is doing business at the same location as the predecessor, that presence does not establish that the petitioner has established 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 or continuing until the dissolution. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Counsel contends, in part, that if owners of the predecessor and successor are essentially the same and are conducting the same business at the same place, then a successor status exists. The stock transfer ledger is a selected extract with no label, identifies no corporation, and contains no dated entry after September 8, 1995. The stock certificates bear dates long after the averred dissolution and assumption. They are of little evidentiary value. They are not credible evidence of the truth of the matters asserted.

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).

In any event, counsel does not explain why the Form 941 of CNS reflects less than half as many employees as the petitioner's contemporaneous I-140 if the CNS and the petitioner ever were the same. Pertinent authority contradicts counsel's stated principle, that common ownership might subject the successor corporation to the debts of the predecessor by some operation of law without credible contractual evidence.

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.

Counsel cites a CIS Memorandum of December 10, 1993 to support status as a successor, if CIS finds the assumption of all of the rights, duties, obligations, and assets of the predecessor. The petitioner failed to provide credible evidence for just such a determination. The record reveals no comprehensive contractual or documentary arrangement of the predecessor and successor, as expected under *Matter of Dial Auto Repair Shop, Inc.*, *supra*.

After a review of Forms 1120 for the petitioner in FY 1996, DCC in FY 1996, CNS in 1997-1999, Form 941, the RFE letter, stock certificates, the stock transfer ledger, and counsel's briefs, 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.

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.