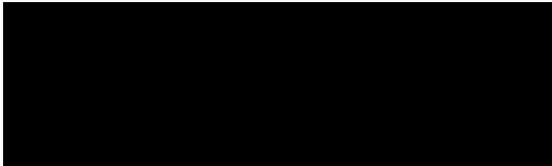




U.S. Citizenship
and Immigration
Services

identifying information is not to be
disclosed to the public without a
warranted
prevent clearly
invasion of personal privacy

PUBLIC COPY



B6

FILE: [REDACTED]
LIN-03-212-51231

Office: NEBRASKA SERVICE CENTER

Date: AUG 2008

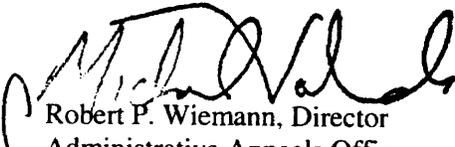
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as an Other (Unskilled) Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 healthcare company. It seeks to employ the beneficiary permanently in the United States as a coordinator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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.

The name of the employer on the ETA 750 is "[REDACTED] Inc." The petitioner's name on the I-140 petition is also given as "[REDACTED] Inc." The evidentiary documents in the record which mention the petitioner's name have the letter "s" at the end of the word "Service," so that the petitioner's name appears in those documents as "[REDACTED] Inc." Despite the spelling differences, those evidentiary references appear to pertain to the petitioner, not to a different company with a similar name. All evidence in the record is discussed below.

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.

The regulation at 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$8.50 per hour, which amounts to \$17,680.00 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner beginning in February 2001 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on July 18, 2003. On the petition, the petitioner claimed to have been established in 1987, to currently have 200 employees, to have a gross annual income of \$12,034,518.00, and to have a net annual income of \$111,218.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated August 28, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on September 15, 2003.

In a decision dated March 25, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, the petitioner submits a brief in the form of a letter dated May 2, 2004 from its director of human resources and also submits additional evidence. The petitioner states on appeal that the petitioner is part of another company, [REDACTED], Inc. The petitioner states that the building where the beneficiary works was sold to another corporation, REM Minnesota Community Services, Inc., and that the beneficiary continues to be employed in that same location by REM Minnesota Community Services, Inc. The petitioner states that REM Minnesota Community Services, Inc. is also a part of [REDACTED] Inc.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, one of the documents submitted for the first time on appeal had been specifically requested by the director. In the RFE, the director specifically requested copies of the petitioner's corporate income tax returns for 2001 and 2002. The petitioner's response to the RFE did not include any copies of the petitioner's corporate income tax returns.

On appeal, one of the documents submitted is a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001. Since that document had been specifically requested by the director and was not submitted to the director, it will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764. The other documents submitted for the first time on appeal were not specifically requested by the director in the RFE, therefore no other documents will be precluded from consideration on appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The I-140 petition states in Part 5 that the petitioner employs 200 employees. The regulation at 8 C.F.R. § 204.5(g)(2) states that where a petitioner 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. Although the petitioner was permitted by this regulation to submit a statement from one of

its financial officers in order to establish the petitioner's ability to pay the proffered wage, the petitioner did not do so.

In the absence of a statement from a financial officer of the petitioner, in determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner beginning in February 2001 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001 and 2002. The record before the director closed on September 15, 2003 with the receipt by CIS of the petitioner's submissions in response to the RFE. As of that date no Form W-2's of the beneficiary for 2003 were yet available. Therefore the two years at issue in the instant petition are 2001, which is the year of the priority date, and 2002.

Of the two Form W-2's in the record, only the beneficiary's Form W-2 for 2001 shows compensation received from the petitioner. The amount of compensation on that Form W-2 is \$32,105.38. That amount is higher than the proffered wage of \$17,680.00. The beneficiary's form W-2 for 2001 is therefore sufficient to establish the petitioner's ability to pay the proffered wage in 2001.

The other Form W-2 in the record was issued to the beneficiary by REM Minnesota Community Services, Inc. That Form W-2 shows compensation to the beneficiary in the amount of \$47,917.83, an amount which is also greater than the proffered wage of \$17,680.00.

The record contains extensive evidence purporting to explain the relationships between the petitioner and REM Minnesota Community Services, Inc., as well as the relationships among those two corporations and other corporations in the same business group. Most of that evidence is submitted for the first time on appeal, in response to a portion of the director's decision which declined to consider evidence about REM Minnesota Community Services, Inc., to be relevant to the instant petitioner. The evidence in the record shows that business relationships have existed between the petitioner and REM Minnesota Community Services, Inc., as well as with other companies in Minnesota and elsewhere. The principal company of the business group is REM, Inc., which is headquartered in New York. The initials REM are the initials of the founder of that company, [REDACTED]. The company provides services in eighteen states. (REM Fact Sheet, Jan. 1, 2001).

In Minnesota, the principal company of the business group is REM Minnesota, Inc., and services are provided in Minnesota through ten corporations. In addition to REM Minnesota Community Services, Inc., some of the other companies in the business group are REM Central Lakes, Inc., REM Heartland, Inc., and REM Hennepin, Inc. Each of the ten corporations has a name beginning with the "REM" acronym. (REM Minnesota Fact Sheet, January 1, 2001). Prior to the end of 2001, the petitioner was one of the companies within the REM business group in Minnesota. (REM Minnesota, Inc., Organizational Chart, November 27, 2001). At the end of 2001, according to an officer of REM, Inc., "services previously delivered by [the petitioner] were merged into REM Minnesota Community Services, Inc." (Letter from [REDACTED], Compliance and Privacy Officer, REM, Inc., September 9, 2003). Nonetheless, a job offer letter dated November 11, 2002 from a REM regional director states an offer of employment to the beneficiary by the petitioner, and makes no mention of REM Minnesota Community Services, Inc. (Letter from [REDACTED] Regional Director, REM Minnesota, November 11, 2002, at 2). Another letter dated December 16, 2002 from that same regional director states that as a result of an acquisition, REM had reorganized, and that the beneficiary was now working for REM Minnesota

Community Services, Inc. (Letter from [REDACTED] Regional Director, REM Minnesota, December 16, 2002).

Notwithstanding the corporate changes summarized above, the instant I-140 petition was filed in the name of the petitioner, REM Metro Service, Inc., not in the name REM Minnesota Community Services, Inc. The filing date of the I-140 petition was July 18, 2003. (I-140 petition, at 1).

The record contains copies of several organizational charts for REM Minnesota, Inc., which appear to indicate that the petitioner and REM Minnesota Community Services, Inc., are divisions of REM Minnesota, Inc. A letter from the Director of Human Resources, REM Minnesota, states that the petitioner and REM Minnesota Community Services, Inc., "are parts of the same company, REM, Inc." (Letter from [REDACTED] Director of Human Resources, May 12, 2004, at 1). That official also states, "REM Minnesota is part of REM, Inc." and states, "REM Metro and REM Minnesota are entities of the same corporation, REM, Inc. with headquarters in Edina, Minnesota." (Letter from [REDACTED] Director of Human Resources, May 12, 2004, at 1, 2).

Notwithstanding the evidence suggesting that the petitioner is a "part" of REM, Inc., other evidence in the record indicates that both the petitioner and REM Minnesota Community Services, Inc., are independent corporations. The record contains a copy of minutes of an Annual Shareholders Meeting of the petitioner held on October 24, 2001. Those minutes show the owner of 100% of the shares of the petitioner to be [REDACTED] and the minutes record the election of [REDACTED] and [REDACTED] as directors of the corporation.

The record also contains several corporate documents of REM Minnesota Community Services, Inc., including a copy of the minutes of an Annual Shareholders Meeting of REM Minnesota Community Services, Inc. held October 24, 2001. Those minutes show the election of [REDACTED] as directors of the corporation. The list of shareholders of REM Minnesota Community Services, Inc., is omitted from the copy in the record of those minutes. But a list of shareholders is attached to a copy in the record of the minutes of an Annual Shareholders Meeting of REM Minnesota Community Services, Inc., held the following year, on October 10, 2002. That list shows the share ownership as held by trustees of five trusts and by custodians for two persons under the Minnesota Uniform Transfer to Minors Act. Each of the trustees and custodians has the surname Miller. The minutes of the October 2002 meeting again show the election of [REDACTED] as directors of REM Minnesota Community Services, Inc.

The corporate documents described above indicate that the petitioner and REM Minnesota Community Services, Inc., have the same three persons as members of their boards of directors. But neither corporation has any shareholders in common. Neither the petitioner nor REM Minnesota Community Services, Inc., is a subsidiary of REM, Inc. All of the shareholders of the petitioner are individuals and all of the shareholders of REM Minnesota Community Services, Inc. hold those shares either as trustees or as custodians.

The record contains evidence that the premises where the beneficiary has been employed has been sold by the petitioner to REM Minnesota Community Services, Inc. (Letter from [REDACTED] Administrator, REM Minnesota, December 10, 2001; Deed, December 31, 2001). The record also indicates that the beneficiary is now employed by REM Minnesota Community Services, Inc. (Letter from [REDACTED] Regional Director, REM Minnesota, December 16, 2002). But the record lacks any evidence indicating that the petitioner has been dissolved as a corporate entity.

Despite the extensive evidence in the record purporting to explain the relationships among the petitioner and the various corporations in the REM business group, the record lacks evidence explaining the legal relationship

among those corporations. As noted above, some of the evidence states that the petitioner is a part of REM, Inc., but other evidence indicates that the petitioner is a separate corporation, owned by three individuals.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains no explanation for the inconsistencies in the evidence noted above.

The record contains a copy of portions of an audit report, which includes financial statements of the petitioner for the years 2000 and 2001. An explanatory letter from a certified public accountant states that the audit was performed for "REM, Inc. and Related Companies." (Report of Independent Certified Public Accountants, March 8, 2002, at 1). The portions of the report in the record do not explain the nature of the relationships between REM, Inc., and the other companies covered in the report. The copies of financial statements of the petitioner in the report show net earnings in 2001 of \$265,816.00. That figure provides additional evidence of the petitioner's ability to pay the proffered wage in 2001.

The record also contains a copy of portions of an audit report on "REM, Inc. and Related Companies" for the years 2001 and 2002. The portions of the report in the record, however, contain no information about the petitioner and contain information only about REM Minnesota Community Services, Inc. (Report of Independent Certified Public Accountants, February 28, 2003, at 1). The record also contains a copy of an unaudited financial statement of REM Minnesota Community Services, Inc., dated October 31, 2002. The record also contains a copy of the Form 1120S U.S. Income Tax Return for an S Corporation of REM Minnesota Community Services, Inc., for 2002.

For the reasons discussed above, financial information pertaining to REM Minnesota Community Services, Inc. cannot be considered relevant to the instant petition. 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); *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. Although the record indicates that a business relationship has existed between the petitioner and REM Minnesota Community Services, Inc., that fact does not render REM Minnesota Community Services, Inc., liable for the financial obligations of the petitioner.

The record lacks any evidence pertaining to the ability of the petitioner to pay the proffered wage in the year 2002. Therefore the record fails 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.

In his decision, the director correctly determined that the beneficiary's Form W-2 for 2001 was sufficient to establish the petitioner's ability to pay the proffered wage in 2001. The director also correctly determined that Form W-2 issued to the beneficiary by REM Minnesota Community Services, Inc., for 2002 could not be considered as evidence of the petitioner's ability to pay the proffered wage in 2002. The director noted that even after the purported merger of the petitioner's services into REM Minnesota Community Services, Inc., in late 2001, the I-140 petition was filed in the name of the petitioner, on July 18, 2003.

Based on the evidence in the record before the director, the decision of the director to deny the petition was correct. For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted for the first time on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence in the record indicates that a bona fide job offer from the petitioner no longer exists, since the evidence indicates that the beneficiary is now working at the same job location for a different corporation, REM Minnesota Community Services, Inc.

The regulation at 8 C.F.R. § 204.5(I)(1) states, "Any United States employer may file a petition on Form I-140 for classification of an alien under [INA] section 203(b)(3) as a skilled worker, professional, or other (unskilled) worker."

Since the evidence indicates that the petitioner is no longer the intended employer of the beneficiary, the petition, filed in the name REM Metro Service, Inc., may not be approved.

It may be noted that if evidence existed to establish that REM Minnesota Community Services, Inc., has assumed all the rights, duties and obligations of REM Metro Service, Inc., the former corporation would have the right to file an I-140 petition in its own name as a successor in interest, based on the approved ETA 750 filed in the name of REM Metro Service, Inc. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The evidence supporting any new petition by REM Minnesota Community Services, Inc., would have to establish that that corporation is a successor in interest to REM Metro Service, Inc. The evidence supporting any new petition by REM Minnesota Community Services, Inc., would also have to establish the ability of the predecessor corporation to pay the proffered wage beginning on the priority date and continuing during the period relevant to the predecessor corporation, as well as to establish the ability of the successor corporation to pay the proffered wage during the period relevant to the successor corporation.

In any event, however, the instant petition has been filed by REM Metro Service, Inc., which is the same corporation which filed the ETA 750. Therefore the issue of a successor in interest is not relevant to the instant petition.

In summary, the evidence is sufficient to establish the petitioner's ability to pay the proffered wage in 2001, but the evidence fails establish the petitioner's ability to pay the proffered wage in 2002. Evidence pertaining to the financial situation of REM Minnesota Community Services, Inc., cannot be considered relevant to help establish the petitioner's ability to pay the proffered wage. Moreover, beyond the decision of the director, the evidence indicates that the petitioner is no longer the intended employer of the beneficiary.

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.