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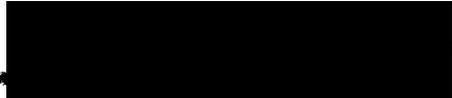
U.S. Citizenship
and Immigration
Services



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FEB 28 2005

FILE: WAC 02 167 50627 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: 
Beneficiary: 

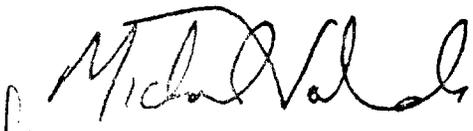
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

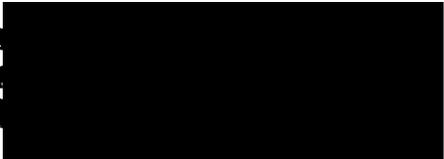
ON BEHALF OF PETITIONER:



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

CC: 

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, Glendale Funding Corporation, is a financing and mortgage company. It seeks to employ the beneficiary permanently in the United States as bookkeeper. 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.

On appeal, counsel¹ asserts that the petitioner's bank statements established that the petitioner has had the continuing financial ability to pay the proffered salary.

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) provides:

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. 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 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 March 28, 2000.² The proffered wage as stated on the Form ETA 750 is \$14.88 per hour, which amounts to \$30,950.40 per

¹ The attorney who has filed the appeal has not submitted a Form G-28, Notice of Entry of Appearance. Another attorney who, according to correspondence letterhead contained in the record, may be affiliated with the counsel who submitted the appeal, previously filed a G-28, however current counsel's name is not included on this G-28. A copy of this decision will be provided to both representatives, however counsel is reminded to submit an individual G-28 if she intends to represent the alien.

² The petitioner has filed this Immigrant Petition for Alien Worker, (I-140) naming a substituted beneficiary.

annum.³ On the Form ETA 750B, signed by the beneficiary on February 1, 2001, the beneficiary does not claim to have worked for the petitioner. On Part 5 of the visa petition, the petitioner claims to have been established in 1996 and to currently employ two workers.

In support of its ability to pay the beneficiary's proposed wage offer of \$30,950.40 per year, the petitioner initially submitted a partial copy of its Form 1120, U.S. Corporation Income Tax Return for 2000, consisting only of the first page. It reflects that the petitioner files its federal tax returns using a standard calendar year. It shows that the petitioner reported a net income of \$60,879 in that year. The petitioner also provided a copy of a state quarterly wage report for the third quarter of 2001 showing that it paid wages to three employees. The petitioner's name is not included on this list of employees. The petitioner further included copies of some bank statements covering a period from December 30, 2000 to December 31, 2001. They indicate that a business checking account at the Union Bank of California was held in the name of "[REDACTED] Estate & Finance." While the address for this business is the same as the petitioner's address given on the visa petition, the name of the company is different.

Because the petitioner submitted insufficient initial evidence in support of its continuing ability to pay the proffered salary, the director requested additional evidence on May 12, 2003. The director advised the petitioner to provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay the proposed wage offer. The director specifically instructed the petitioner to provide this evidence for the period from 2000 to 2002.

In response, the petitioner submitted copies of the individual (Form 1040) income tax returns for the petitioner's president and his spouse for the years 2000, 2001, and 2002. They are not corporate tax returns and do not include any mention of the petitioning business, although they include reports of business income for "Sea Vu Real Estate & Financial" as a sole proprietorship. A transmittal letter from counsel, dated July 17, 2003, provides no explanation for this discrepancy and advises, "some amounts although deductibles on the tax return are not funds paid out to any entity and are in actuality funds that can be utilized by the company." The petitioner also provided copies of additional Union Bank of California bank statements held in the name of "[REDACTED]" and "[REDACTED] Estate and & Finance" covering various periods in 2002 and 2003.

In response to a subsequent request for evidence issued by the director on August 26, 2003 relating to the alien beneficiary's registration with the National Security Entry-Exit Registration System (NSEERS), counsel informs the director that the beneficiary does not reside in the United States and is not subject to such registration.

Inexplicably, the director reviewed the amounts submitted on the petitioner's owner's individual tax returns as opposed to noting the issue of the petitioner's corporate returns and concluded that the evidence did not establish that the petitioner had the continuing ability to pay the proffered wage as of the priority date of March 28, 2000.

On appeal, counsel merely argues that the bank statements submitted to the record demonstrate that the petitioner has maintained sufficient cash balances to pay the proffered wage.

³ The director miscalculated the annual proffered wage as \$28,569 per year.

of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As noted above, the petitioner is a corporation. A corporation is a separate and distinct legal entity from its owners and shareholders, thus the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). With regard to such assets, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, the 2000-2002 individual tax returns of the petitioner's president will not be considered in evaluating the petitioner's corporate ability to pay the certified salary.

Moreover, because nothing in the underlying record or on appeal has clarified why the petitioner provided the individual tax returns and bank statements of the petitioner's president, referencing another business entity organized as a sole proprietorship, rather than its own corporate records, then a question is raised as to whether the petitioner continues to exist as a viable business entity and potential U.S. employer. *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.

Similarly, counsel's reliance on the balances in the bank statements held individually by the president and Seavu Real Estate and Finance is not persuasive in supporting the petitioner's ability to pay the certified wage. Bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," as referenced above, there is no indication in this case that the cash held in these bank statements even represents assets belonging to the corporate petitioner rather than to the petitioner's president and another sole proprietorship.

Based on the evidence contained in the record and after consideration argument presented on appeal, the AAO concludes that the petitioner has not demonstrated its continuing financial ability to pay the proffered 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.