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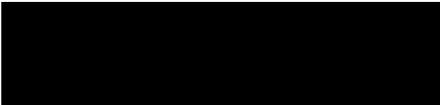
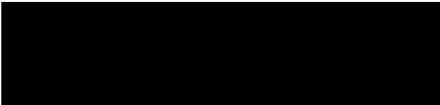
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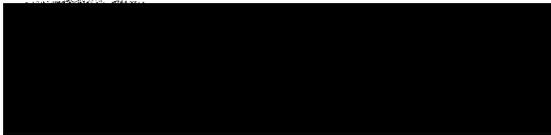


FILE: WAC-02-210-54389 Office: CALIFORNIA SERVICE CENTER Date: **MAR 07 2005**

IN RE: Petitioner: 
Beneficiary: 

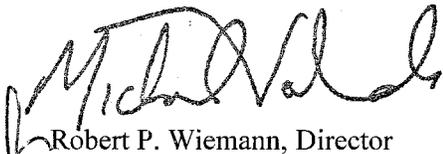
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

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 a business involved in production and manufacture of clothing¹. It seeks to employ the beneficiary permanently in the United States as a sewing machine repairer. 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 director also determined that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position.

On appeal, counsel submits a brief and previously submitted evidence.

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.

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 September 4, 1998. The proffered wage as stated on the Form ETA 750 is \$9.46 per hour, which amounts to \$19,676.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner from June 1996 to December 1997.

In support of the petition, the petitioner submitted Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for the years 1999 and 2000 for a joint married couple, [REDACTED] and [REDACTED] and a business entity called [REDACTED] Clothing Fashion, with the same address as the petitioner and with an employer identification number (EIN) of [REDACTED]. The petitioner also submitted other tax and internally generated ledgers for [REDACTED] Clothing Fashion. Additionally, the petitioner submitted a Form 1120, U.S. Corporation Income Tax Return, for the year 2000 for a business entity called 3D Apparel, Inc., with the same address as the petitioner and with an EIN of [REDACTED].

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 18, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested

¹ The petitioner's full business service offerings are unclear from the record of proceeding.

that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also noted the petitioner's omission of information on the visa petition.

In response, the petitioner submitted a corrected visa petition indicating its EIN as [REDACTED] an unaudited² "trial balance" for 3D Apparel, Inc.; and other documents formerly submitted with its initial submission.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on April 8, 2003, the director issued a notice of intent to deny pertinent to that ability. The director noted that the petitioner's name on its petition and ETA 750 is "Four 7 Fashion" but all evidence submitted was in the name of "3D Apparel" or [REDACTED] Clothing Fashion." In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director detailed multiple items possible for the petitioner to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Since the notice of intent to deny is contained in the record of proceeding, the lengthy list of requested items will not be detailed in this decision.

In response, counsel submitted a letter stating that "[t]he business is family operated and has made changes over the years however; [sic] continues operating from the same location. Due to the changes in administration it has also been challenging to obtain records so far back to 1998 and 1999." The petitioner provided many business documents relating to 3D Apparel Inc. and photographs of an unknown place.

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 October 8, 2003, denied the petition. The director noted that "[t]he petitioner has not established [that] the [petitioner, 3D Apparel, Inc., and [REDACTED] Clothing Fashion] are one in the same," and "there was no evidence submitted suggesting a change of ownership has occurred."

On appeal, counsel asserts the following, in pertinent part:

Please be advised that the evidence was complete and was submitted with the application or petition, or the requested [sic] for initial evidence or additional information was complied with during the allotted period requested by your office, [sic] However your office was requesting the petitioner to provide evidence from September 04, 1998 to the present [sic] please understand that the buyout occur [sic] after September 04, 1998, [sic] the petitioner can not [sic] demonstrate this ability at the time the priority date is established because due to the buyout after September 04, 1998 [sic]. Instead the petitioner submitted a statement of ability to pay the proffered wage signed by the president of the above mention [sic] company as well as to the companies [sic] Federal Income Tax Returns for the year 1999 until the present time.

² It is noted that unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Your office [sic] second request was to provide legal documentation that showed Four 7 Fashion, 3D Apparel and [REDACTED] Clothing fashion was one in the same company [sic] as explained before the buyout occurred by word of mouth this is due to the ownership of family member and there was no documentation to provide or show how the buyout occur [sic], that is why the petitioner provided with a letter explaining the change of ownership.

The petitioner submits previously submitted evidence.

At the outset, the letter referred to by counsel concerning the petitioner's ownership structure and purported "buyout" is not contained in the record of proceeding. No document or piece of substantive or probative evidence is contained in the record of proceeding concerning that factual assertion. The record of proceeding does not contain any discussion, explanation, or documentary evidence providing independent corroboration of counsel's assertion that some "buyout" occurred. Indeed, it is unclear what the "buyout" resulted in – whose name, whose EIN, whose ownership interests, whose controlling interests. The record is simply void of information to link any other business entity to the petitioner. 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). 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). Thus, counsel's reliance on the assets of 3D Apparel, Inc. and [REDACTED] Clothing Fashion is not persuasive. 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 determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-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.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its tax returns for the three years prior to filing the petition. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The 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). CIS is unable to determine the petitioner's continuing ability to pay the proffered wage beginning on the priority date since it failed to provide any financial documentation pertaining to the petitioner. Thus, CIS cannot derive the petitioner's net income or net current assets or other appropriate resources from which to pay the proffered wage.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 1998 and onwards. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is September 4, 1998. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of sewing machine repairer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
Grade School

6

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

High School	Blank
College	Blank
College Degree Required	Blank
Major Field of Study	Blank

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states, in pertinent part:

Repairs and adjusts sewing machines such as overlock, cover stitch, in sewing departments of industrial establishments, using handtools: Turns screws and nuts to adjusts [sic] machine parts. Regulates leng[th] of stroke of needle and horizontal movement of feeding mechanism under need[ie]. Dismantles machines and replaces of [sic] repairs broken or worn parts, using handtools. Inspacts [sic] machines, shafts, and belts. Repairs broken transmission belts. Installs attachments on machines. Initiates orders for new machines or parts. Operates machine tools, such as lathes and drill presses, to make new parts.

Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he indicated that he worked for [REDACTED] (Manufacturer), located at 8 [REDACTED] as a full time sewing machine repairer from July 1994 through August 1994; for [REDACTED] (Manufacturer), located at [REDACTED] as a full time sewing machine repairer from September 1995 through May 1997; and for [REDACTED] (Manufacturer), located at [REDACTED] as a full time sewing machine repairers from June 1997 through December 1997.

With the initial petition, the petitioner submitted a letter from David Kim of ISID Sign & Neon, stating that the beneficiary worked at [REDACTED] at [REDACTED] from January 1995 to March 1996 as a repair technician. The director requested additional evidence concerning the evidence of the beneficiary's qualifications on October 18, 2002. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week.

In response to the director's request for evidence, the petitioner provided a translated letter from Julian Nieves Casique of La Milpita Agricola, stating that the beneficiary worked for him from February 1987 through December 1988 as a machine mechanic. David Kim also submits another letter stating that he paid the beneficiary in cash and cannot provide a W-2 form to corroborate his prior employment. The beneficiary provides a letter on his own behalf stating that he worked for PJ Fashion from July 1994 to August 1994 but was paid in cash and has no record of employment.

In the director's notice of intent to deny issued on April 8, 2003, the director noted the inconsistencies contained in three separate evidentiary submissions pertaining to the beneficiary's past employment with PJ Fashion, and that the experience for [REDACTED] only added up to a 22 month period. The petitioner did not respond to the director's points in its response.

The director's decision stated that the petitioner failed to provide evidence in response to the points he raised in the

notice of intent to deny. He stated that a W-2 form from the petitioner, with whom the beneficiary purported worked for in 1997, would have corroborated prior qualifying employment experience.

On appeal, counsel states that the petitioner submitted a letter from [REDACTED] "Agricola," signed, notarized, on letterhead, verifying the beneficiary's past employment in details, and requesting a reason for the director's rejection of it.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO concurs with the director's determination that the petitioner failed to submit sufficient evidence of the beneficiary's past qualifying employment experience evidencing his qualification for the proffered position. While the letter from [REDACTED] "Agricola" may contain items conforming to the guiding regulation, it only states that the beneficiary received 22 months of experience, not 24. The ETA 750A explicitly requires two years of qualifying employment experience. No other letter submitted into the record of proceeding conforms to 8 C.F.R. § 204.5(1)(3). Thus, the petitioner failed to prove that the beneficiary is qualified for the proffered position. For this additional reason, the petition may not be approved.

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.