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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **SEP 06 2005**
WAC-03-154-53221

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

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:
[Redacted]

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
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 The director's decision will be affirmed in part and withdrawn in part.

The petitioner is provides landscape planning and maintenance services. It seeks to employ the beneficiary permanently in the United States as a landscape gardener. 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 it was a bona fide company or that Weissman Property Management is a successor-in-interest to the petitioner. 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 additional 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 (DOL). See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on July 11, 1995. The proffered wage as stated on the Form ETA 750 is \$10.78 per hour, which amounts to \$22,422.40 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for "Weissman Group" as of May 1995. 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. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification application was filed by "Weissman Group/Weissman Builders & Developers, Inc." with an employer identification number (EIN) of [REDACTED] and an address at [REDACTED]. Submitted with the petition is correspondence between the petitioner and DOL in connection with certifying the Form ETA labor certification application. One piece of correspondence, dated July 25, 2002, informs DOL that the petitioner is "currently located at [REDACTED]. This is a result of the fact that my father retired and I have assumed responsibility for this company." Another piece of correspondence, dated May 29, 2001 states, in pertinent part, that "I, Andrew Weissman, am the Vice President of [the petitioner] and the President and Sole Proprietor of Weissman Property Management. Weissman Property Management is the successor company to [the petitioner] as my father, Nathan Weissman, has retired."

That letter gives a different address again for the location of the business. DOL certified the Form ETA 750 labor certification application without any amendment to the name or address of the petitioning employer.

On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$1 million, and to currently employ four workers. In support of the petition, the petitioner submitted 2002 Forms 1065, U.S. Return of Partnership Income tax returns for "Weissman & Weissman Woodside Apartments," with an address at [REDACTED] and an EIN of [REDACTED] indicating that its business started in 1991; and for "Weissman & Weissman Brentwood West Apartments," with an address at [REDACTED] and an EIN of [REDACTED] indicating that its business started in 1960.

Because the director deemed the evidence submitted insufficient, on July 17, 2003, the director requested additional evidence. The director noted that the petitioner's business has been suspended, according to corporate information from the California Secretary of State, and referenced [REDACTED] May 29, 2001 letter that indicated that Weissman Property Management is a successor to the petitioner. The director requested a detailed explanation as to "why the current petition was filed by [the petitioner], a company that is claimed to be no longer in existence." The director requested business licenses, documentary evidence that the petitioner is the same as Weissman Group and documentation that Weissman Property Management assumed all rights, duties, obligations, and assets of the petitioner, itemizing a list of non-exhaustive examples of the types of documentation that would prove successorship. Additionally, 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 requested the petitioner's IRS-certified copies of tax returns for 1995, 1996, 1997, 1998, 1999, 2000, 2001, and 2002, quarterly wage reports, and any evidence of wage payments actually made to the beneficiary from the petitioner. The director acknowledged receipt of tax returns from Weissman & Weissman Woodside Apartments but stated there is no evidence that business is the petitioner. The director requested evidence of the beneficiary's qualifications.

In response, the petitioner submitted a letter from Andrew Weissman, dated September 26, 2003, that stated the following, in pertinent part:

I am writing you this letter to explain once again the relationship between [the petitioner] and Weissman Property Management. Weissman Property Management is the successor company to [the petitioner] as my father, [REDACTED] passed away on October 22, 2002, and I took over management of properties that he had been previously managing: Woodside Apartments at [REDACTED] and [REDACTED]. The reason why [the petitioner] has been suspended is that my father passed away. The successor firm, which is Weissman Property Management accepted all the rights, benefits and responsibilities of [the petitioner]. . . .

Whereas my father managed the business out of [REDACTED] address, and then subsequently out of his personal residence. Upon taking over the management of the properties, I have managed these properties out of my personal residence, located at [REDACTED]. As my company was and is separate from my father's, I use my social security number and file through a Schedule C. I

have no access to my father's previous tax returns. There are no quarterly wage reports as all service personnel have been paid up to the present as independent contractors.

Weissman Property Management charges a management fee to manage the two buildings referenced above. [The beneficiary] has been paid as an independent contractor through each building. His salary appears as part of the operating expenses in each company's partnership return.

Of relevant evidence submitted into the record of proceeding in response to the director's request for evidence, the petitioner provided partnership tax returns for Weissman & Weissman Brentwood West Apartments for 2002, 2001, 2000, 1999, 1998; Weissman & Weissman Woodside Apartments for 2002, 2001, 2000, 1999, 1998; a letter written by [REDACTED] on the petitioner's letterhead, dated June 28, 1995, attesting to the beneficiary's experience with the petitioner in the capacity of landscape laborer since September 1990 with a full description of duties that match the duties of the proffered position on the ETA 750B; and copies of W-2 forms issued by Spring Valley Development to the beneficiary for 1998 through 2002 which correspond to copies of the beneficiary's individual income tax returns as the only reported compensation the beneficiary received during those years.

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 November 8, 2003, denied the petition. The director noted that the tax returns submitted into the record of proceeding are for partnerships, not sole proprietorships, which [REDACTED] claimed Weissman Property Management is structured as. The director determined that there is no documentary evidence that Weissman Property Management is a successor-in-interest to the petitioner or evidence that either Weissman Property Management or the petitioner has or had the ability to pay the proffered wage. Noting that the petitioner was structured as a corporation, the director surmised that a "true successor in interest would have access to the tax returns of the company it bought out, merged with, etc." Finally, the director determined the beneficiary was not qualified for the proffered position because the letter signed by [REDACTED] did not contain the number of hours the beneficiary worked per week.

On appeal, the petitioner maintains it is a successor-in-interest. The petitioner submits new evidence on appeal consisting of a letter addressing the issue of successorship. As new evidence, the petitioner submits a letter that states the following:

[REDACTED] through his firm [the petitioner], managed family-owned properties for the past 30 years. Upon his illness, and subsequent passing, [REDACTED] Property Management assumed all rights, management duties and obligations of [the petitioner].

In as much as the Woodside Apartments and Brentwood West Apartments are wholly-owned by family members, there were no formal agreements with respect to the management of the properties. In fact, [the petitioner] managed these properties for approximately 30 years without a formal management agreement as well.

The ownership interests of the properties have been controlled by the same individuals and/or heirs, since they were originally constructed 1969 for Brentwood West Apartments & 1987 for the Woodside Apartments.

The letter is signed by [REDACTED] and [REDACTED] individuals listed on the partnership returns for Weissman & Weissman Brentwood West Apartments and Weissman

& Weissman Woodside Apartments. The letter is not notarized. The petitioner also submits the death certificate of Nathan Weissman.

The AAO concurs with the director's decision because the record of proceeding does not contain sufficient evidence that Weissman Property Management succeeded the petitioner with the type of corroborating documentation typical for such types of transactions and because no evidence was submitted into the record of proceeding to establish that either the petitioning entity or Weissman Property Management has or had the continuing ability to pay the proffered wage beginning on the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Additionally, the letter submitted on appeal is insufficient because the individuals signing the letter were not sworn to or affirmed before an officer authorized to administer oaths or affirmations who has, having confirmed the declarant's identity, administered the requisite oath or affirmation. See *Black's Law Dictionary* 58 (7th Ed., West 1999). Nor, in lieu of having been signed before an officer authorized to administer oaths or affirmations, do they contain the requisite statement, permitted by Federal law, that the signers, in signing the statements, certify the truth of the statements, under penalty of perjury. 28 U.S.C. § 1746. Such unsworn statements made in support of a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The record contains no evidence that Weissman Property Management qualifies as a successor-in-interest to the petitioner. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. Even if the petitioner was doing business at the same location as the predecessor, that would not necessarily 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. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

In the instant petition, [REDACTED] and others state that no formal agreements are in place. However, basic contract law dictates that any agreement that lasts longer than one year must be in writing¹ and all agreements pertaining to real estate law must be in writing. Additionally, there is always documentation available showing the dissolution of a corporation and how its assets and liabilities were disposed of. Even if [REDACTED] established that he is [REDACTED]'s rightful heir, he has not established that Weissman Property Management inherited the interests of the petitioning entity's business. DOL did not acknowledge that Weissman Property Management is the petitioning entity and did not certify the ETA 750A in Weissman Property Management's name or address or EIN. Only the petitioning entity certified on the ETA 750A may claim rights to the immigration benefits invested in that application. Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As the director noted, a petitioner may not make

¹ Pursuant to the Statute of Frauds, referring to a general rule in every state that requires that certain documents be in writing, such as real property titles and transfers (conveyances), leases for more than a year, wills and some types of contracts. The original statute was enacted in England in 1677 to prevent fraudulent title claims.

material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Additionally, no formal documentation has established that Weissman & Weissman Brentwood West Apartments or Weissman & Weissman Woodside Apartments have a relationship, shared interests, or any other formal commonality. They both have different EIN and even [REDACTED] concedes that they, as well as Weissman Property Management, are different entities than the petitioner. Thus, the AAO cannot review the financial situation of either Weissman & Weissman Brentwood West Apartments or Weissman & Weissman Woodside Apartments in the context of the petitioner's continuing ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL [REDACTED] (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."

In determining the petitioner's ability to pay the proffered wage during a given period, 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.² 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 petitioner failed to submit evidence pertaining to its ability to pay the proffered wage or to establish that Weissman Property Management is its successor and has the ability to pay the proffered wage. Because of the petitioner's failure to provide regulatory-prescribed evidence in this matter, the AAO cannot assess either the petitioner's or Weissman Property Management's net income or net current assets. Thus, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date and this portion of the director's decision is affirmed.

The director also determined that the petitioner failed to establish that the beneficiary is qualified for the proffered position due to insufficient detail in a letter provided by [REDACTED]. The AAO notes that neither the petitioner nor counsel addressed this issue on appeal and thus, this aspect of the appeal should be summarily dismissed. The AAO, however, withdraws this portion of the director's decision since 8 C.F.R. § 204.5(l)(3) does not require the content of employer experience letters to state the amount of hours per week worked and otherwise meets the content requirements set forth by the governing regulatory provision³. Since the letter was dated 1995 and the supervisor signing the letter stated that the beneficiary began his employment as a landscape laborer in 1991, it can be extrapolated that he had four years of qualifying employment experience on the date of the priority date⁴. The

² 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.

³ The regulation at 8 C.F.R. § 204.5(l)(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.

⁴ The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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

ETA 750A only requires that the beneficiary have two years of experience as a landscape gardener or three years of experience in the related occupation of landscape laborer⁵. Additionally, the petitioner submitted sufficient evidence that the beneficiary completed a high school education. Thus, the AAO determines that the beneficiary is qualified to perform the duties of the proffered position.

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. The director's decision is affirmed in part and withdrawn in part.

the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

⁵ In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).