



U.S. Citizenship
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Services

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FILE: [Redacted]
WAC 02 206 50647

Office: CALIFORNIA SERVICE CENTER

Date: **SEP 20 2005**

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:



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 immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) affirmed the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a Motion to Reopen and Reconsider. The motion will be denied.

The petitioner is a management company for a Mexican restaurant. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and, it seeks to employ the beneficiary permanently in the United States as a cook. The director determined that the petitioner had not established that petitioner had the ability to pay the beneficiary on the priority date of the visa petition and denied the petition accordingly, and, and, that petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The AAO affirmed that decision, summarily dismissing petitioner's appeal of the director's decision.

In support of the motion, counsel submits the following documents: an original letter from S&P Fresh Ltd., No. 3 stating that "... employees were on the payroll of the petitioner from 1996 through 2002 ..."; a copy of the tax returns of S&P Fresh Ltd., No. 3 for 2001 through 2003. There was no brief with the documents submission. Petitioner's counsel states in a cover letter transmitting the above the above documents that the "... employees of S&P Fresh Ltd., No. 3 were on the [petitioner's] payroll for administrative purposes...."

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion does not qualify as a motion to reconsider because counsel fails to identify any erroneous conclusion of law or statement of fact for the appeal, and, he asserts no precedent decisions for any position. There was no brief in the matter. Petitioner's counsel, in his cover letter transmitting the abovementioned documents, does not raise any issues of law or fact not already submitted and reviewed.¹.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

¹ The petitioner has admitted it is a management company without revenues, not provided by S & P Fresh Ltd. No. 3, and, according to counsel's letter dated August 25, 1999, petitioner has employees. M & S Management Inc. is the petitioner on the I-140 petition, and, the employer under the certified Alien Employment Application with the legal obligation to pay the proffered wage. There is no dispute on the record to these facts. For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means a person, association, firm or a corporation which currently has a location within the United states to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm or corporation.

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The instant motion does not qualify as a motion to reopen. There are no new facts presented here by counsel that related to his initial evidence accompanying the petition, or to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage.

The petitioner's evidence offered on appeal is an admission against petitioner's interests in this matter and speaks to the issue of the proper party (i.e. petitioner) in this matter. The I-140 petition and the certified Alien Labor Certification both name M & S Management Inc. as the party of interest as employer. It is also the same or similar evidence already presented to the director of the Service Center and AAO. M & S Management Inc. is named in those documents as petitioner. The petitioner upon appeal admits that M & S Management Inc. was the employer from 1996 through 2002 but it has offered evidence for S&P Fresh Ltd., No. 3 as if it was the petitioner.

In addition, pertinent precedent decisions offer guidance on this issue. *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968) has held that since the petitioner was providing benefits, directly paying the beneficiary's salary, making contributions to the employee's social security fund and workmen's compensation as well as unemployment insurance programs, withholding federal and state income taxes and providing paid vacation and group insurance, it was the actual employer of the beneficiary.

The weight of the evidence presented by petitioner in this matter demonstrates that M & S Management Inc. is the prospective employer of the beneficiary, but there is no evidence presented that demonstrates that it has the ability to pay the proffered wage. If M & S Management Inc. is not intended to be the employer/petitioner, than the petition must be withdrawn.

Petitioner has responded to the director's request for evidence of petitioner's ability to pay by submitting the financial information of another company. There is no evidence presented why this other company's financial information is relevant under the regulations. S&P Fresh Ltd., No. 3 is not legally obligated to pay the proffered wage by any evidence presented. 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 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."

Beyond the decision of the director, the petitioner has not presented sufficient evidence concerning the qualifications of the beneficiary for the occupation as requested by the director, nor has petitioner met its burden of proof that the beneficiary was qualified for the occupation.

The petitioner's motion does not meet applicable requirements as a motion to reopen or reconsider the AAO's prior decision. Accordingly, the motion will be denied, the decision of the director will be affirmed, and the petition will remain denied.

ORDER: The motion is denied, and, the decision of the director will be affirmed. The petition will remain denied.