



U.S. Citizenship  
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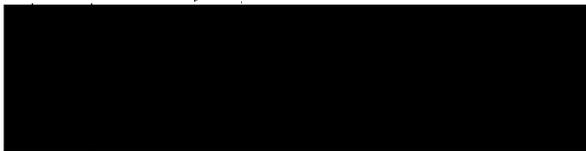
Date: OCT 02 2006

IN RE: Petitioner:  
Beneficiary:



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

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing facility. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. 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 it was the employer of the beneficiary and thus eligible to file the petition or that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, counsel states that Citizenship and Immigration Services (CIS) applied the law incorrectly. Counsel submits a brief and additional evidence.

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(l)(3) also provides

(ii) Other documentation--

(D) *Other Worker*. If the petitioner is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 19, 2001. The proffered wage as stated on the Form ETA 750 is \$8.71 per hour, which amounts to \$18,116.80 annually. The beneficiary indicated on the Form ETA 750 that she had worked for the petitioner since October 1996.

On the petition, the petitioner indicated it was established in 1950, has 65 employees, a gross annual income of \$3.5 million and a net annual income of \$1,000. With the petition, the petitioner submitted an Internet printout form the Colorado Secretary of State Business Center that identified Pinon Management as a corporation in good standing that was formed in 1980. Another document submitted by the petitioner to the record indicated that the Pinon Management changed to its present name in July 6, 1999, having previously been named Financial and Accounting Services Corporation. The petitioner also submitted a web-based brochure for Pinon Management that stated it offered management and consulting services to owners and developers of senior housing and health care facilities since 1979. This brochure identifies 15 facilities in Colorado and one facility in New Mexico that the brochure identifies as "Pinon Facilities," and also advertises open staffing positions at various facilities. Brookshire House is one of the facilities identified in Denver.

The petitioner also submitted a copy of a provisional business license for Brookshire House for the month of August 2000 that identified it as a long term care facility, as well as a document entitled "Colorado Nursing Home Census Bed Report for 9/30/2004" that stated Brookshire House had 58 licensed beds, with 43 Medicaid, one Medicare patient and 11 Medicaid HMO patients. Finally the petitioner submitted W-2 forms for the beneficiary for tax years 1999 to 2002. The W-2 forms all identified the beneficiary's address as Denver, Colorado, and her wages and employers as follows:

In 1999, the beneficiary was paid \$20,826.03 by [REDACTED], Scottsdale, Arizona;

In 2000, the beneficiary was paid \$6,217 from [REDACTED] Denver, Colorado, and also was paid \$18,160.03 by Healthcare Personnel Associate, Atlanta, Georgia;

In 2001, the beneficiary was paid \$25,582.44 by Healthcare Personnel Associate, Atlanta, Georgia; and

In 2002, the beneficiary was paid \$10,881.80 by [REDACTED] Atlanta, Georgia.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 13, 2005, the director requested additional evidence pertinent to that ability. The director identified the petitioner as Brookshire House and noted that the W-2 form issued in 2000 by Brookshire House did not establish that the petitioner had paid the beneficiary a salary equal to or greater than the proffered wage. The director also stated that the other W-2 forms submitted by the petitioner were not material to the proceedings as the petitioner had not issued them. The director then specifically requested that the petitioner provide copies of its 2001, 2002, 2003, and 2004 federal income tax returns, or audited financial statements or annual reports for the same years. The director noted that the documentation must show that the petitioner's taxable income or net current assets was equal to or greater than the proffered wage.

The director noted that some petitioners submit copies of documentation such as bank statements, profit and loss statements, unaudited financial statements, and/or balance sheets. The director stated that the additional documentation is usually not persuasive as the documents are not legally binding and are often incomplete, inaccurate, and error-prone. The director also noted that with regard to the petitioner's federal income tax return,

CIS does not usually consider depreciation, loans, and the personal assets of shareholders, in the case of incorporated petitioners, in its evaluation of the petitioner's tax returns and its ability to pay the proffered wage.

In response, counsel submitted the 2003 and 2004 federal tax return, Form 1065, U.S. Return for Partnership Income, for [REDACTED], Lakewood, Colorado. Counsel submitted a letter from [REDACTED] Accounting Manager, Pinon Management, dated August 3, 2005. In her letter, Ms. [REDACTED] stated that [REDACTED] came into existence on May 1, 2002. Ms. [REDACTED] stated that there were no full year federal tax returns available for tax years 2001 and 2003 for [REDACTED]. Ms. [REDACTED] stated that [REDACTED] also known as [REDACTED] is one of three homes under the [REDACTED] umbrella. Ms. [REDACTED] stated that prior to May 1, 2002, [REDACTED] was owned by [REDACTED] investors, and that [REDACTED] is a management company and provides management services to [REDACTED]. Ms. [REDACTED] further stated that [REDACTED] does not file separate tax returns, but does have a separate Employer Information Number (EIN), namely, 01-0590194. Counsel, in his cover letter stated that although [REDACTED] currently had 60 employees, the total number of employees for the three homes under [REDACTED] was in excess of 200 employees.<sup>1</sup> Counsel in his cover letter noted that the gross receipts for [REDACTED] in 2004 was \$11,024,910 and its ordinary income was \$259,898.

On August 10, 2005, the director sent the petitioner a second request for further evidence. The director noted that the record contained discrepancies and asked the petitioner to clarify two issues. First, the director noted that the petitioner represented itself as [REDACTED] d/b/a [REDACTED]. The director then noted that in his August cover letter, counsel stated that the petitioner was previously known as [REDACTED] Investors d/b/a [REDACTED]. The director noted that the petitioner with its initial petition had submitted a corporate name change, but that the name change was from Financial and [REDACTED]

Second, the director first noted that the beneficiary had stated on the ETA Form 750 that she worked for the petitioner since 1996; however, the documentation submitted by the petitioner indicated that the beneficiary had been employed by at least one other employer, [REDACTED]. The director also noted that the 2002 W-2 form for the beneficiary's wages identified the petitioner as the employer;<sup>3</sup> however, the EIN number for the petitioner on the W-2 form, namely 84-1123466, differed from the EIN number, 01-0590194,<sup>4</sup> shown on Part 1 of the instant petition and provided by counsel in his letter dated August 3, 2005.

<sup>1</sup> It appears that counsel refers to the umbrella company, [REDACTED] and not to the petitioner, in his estimation of total employees.

<sup>2</sup> The record reflects a third employer, namely, [REDACTED] Arizona for tax year 1999. However, the priority date for the instant petition is April 14, 2001; therefore the beneficiary's wages earned in tax year 2000 are not dispositive, and thus the beneficiary's employment by the [REDACTED] Indiana Partnership will not be discussed further in these proceedings.

<sup>3</sup> This W-2 form identified [REDACTED] as being the employer of the beneficiary. The director appears to have referred to the beneficiary's 2000 W-2 form from [REDACTED], not the beneficiary's 2002 W-2 form from Healthcare Personnel Associate. The 2000 W-2 form prepared by [REDACTED] shows an EIN of 84-1123466.

<sup>4</sup> The EIN or IRS Tax number noted on the instant I-140 is 01-6590194, not 01-0590194, as stated by counsel

The director stated that the petitioner had to resolve these discrepancies to demonstrate its ability to pay the proffered wage as of the priority date to the present. The director then requested that the petitioner submit documentation to establish the relationship between [REDACTED] and [REDACTED] and suggested that acceptable evidence would be a copy of a management services agreement or contract. The director also requested a revised, signed original Form ETA 750, Part B, Statement of Qualifications of Alien, in which the beneficiary stated her actual employment history. The director then stated the petitioner should submit documentation issued by a civil authority that assigned [REDACTED] a federal employer identification number and an explanation as to the noted discrepancy; copies of documentation issued by civil authorities to show that [REDACTED] owned the petitioner prior to May 1, 2002, and if available, copies of the federal income tax returns filed by [REDACTED] in 2001 and 2002. The director also requested documentation filed with civil authorities that showed the petitioner was presently owned by [REDACTED] and a copy of [REDACTED] 2002 federal income tax return for 2002, and finally, evidence that the federal income tax returns filed by [REDACTED] in 2002, 2003, and 2004 reflected the petitioner's business activities.

In response, counsel submitted further documentation. With regard to the relationship between [REDACTED] and [REDACTED] counsel submitted a second letter from [REDACTED] provided a management services contract between [REDACTED] as well as a copy of the 2002 federal income tax filed by [REDACTED] again noted that the return is a combined one for the three entities, and that [REDACTED] does not file a separate tax return. Ms. [REDACTED] also noted that the 2002 federal income tax return did not encompass the entire year's activities as [REDACTED] was not established until May 1, 2002. The 2002 federal income tax return submitted to the record indicates that [REDACTED] has ordinary business income of \$259,416.

Ms. [REDACTED] stated the federal employer identification number previously supplied to counsel on August 3 is a valid number for [REDACTED]. Ms. [REDACTED] also stated that [REDACTED] did not have available "documentation issued by a civil authority" assigning this number. Ms. [REDACTED] also stated that [REDACTED] did not have access to [REDACTED] federal income tax returns and that counsel would need to contact Omega Healthcare Investors directly for that information.

The management contract submitted to the record is dated May 1, 2002 and is between [REDACTED] and [REDACTED]. [REDACTED] is identified as "owner" while [REDACTED] is identified as "manager". The contract outlined the duties of the management company and of the facility manager to be provided by the management company. The contract noted that the manager should furnish administrative consulting services, such as personnel management and management systems and reviews, among other issues. The contract also identified [REDACTED] as the "landlord".

With regard to the beneficiary's qualifications, counsel submitted a copy of the original filed and certified ETA 750 Part B and also copies of the beneficiary's 1995 W-2 Form from Ontario Care Center, a previous employer noted on the Form ETA 750. This form indicated the beneficiary earned \$10,622.14 from the previous employer

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and Ms. Bogucki. This appears to be a typographical error.

during 1995. The petitioner also submitted a letter from [REDACTED] Center, dated April 18, 2001. This letter states that the beneficiary has worked as a certified nursing assistant at [REDACTED] since October 1996. The petitioner also submitted a copy of the beneficiary's certified nurse aide license issued on February 1, 2000 and with an expiration date of January 31, 2002.

With regard to the discrepancies in EIN numbers, counsel states that the Form ETA 750 was filed in 2001 and that since that date the beneficiary's W-2 forms have not indicated an EIN of 84-1123466. The petitioner resubmitted the beneficiary's W-2 forms from tax years 2000, 2001, and 2002, and submits the beneficiary's W-2 for 2003. This form indicates that the beneficiary earned \$31,047.39 in tax year 2003 and was employed by [REDACTED]

Finally with regard to the historical ownership of the petitioner, counsel resubmits the letter written by Ms. [REDACTED] on August 3, 2005, and states that [REDACTED] was sold to [REDACTED] and [REDACTED] immediately hired an outside management company, [REDACTED] to run the business. Counsel further stated that Conifer Care Communities came into existence on May 1, 2002 and since then has owned [REDACTED] further states that [REDACTED] hired Pinon Management to manage [REDACTED]. Counsel also submitted a newspaper article written by [REDACTED] Denver Rocky Mountain News staff writer, entitled "State Slow to Shut Nursing Homes." The article is dated November 19, 2000. This article discusses the action and lack of action taken by the state of [REDACTED] Facilities Division in monitoring problem nursing homes. The article states that since January 1,<sup>5</sup> fifteen of the 224 licensed nursing homes in Colorado had been placed on intensified state monitoring, and that when five homes were sold in March, the new owners were given only conditional licenses "because of less-than-top-notch inspections." The article stated that bankrupt [REDACTED] sold the homes to a branch of [REDACTED]. The article continued that the conditional licenses given to the nursing homes demanded immediate hiring of an outside management company, improved care and significant repairs. The writer then identified the five nursing homes in question as [REDACTED], [REDACTED], [REDACTED] and [REDACTED].

In the cover letter to the response to the director's second request for further evidence, counsel presented a table that described the owners and managers of Brookshire House from the year 2000 to the present time.<sup>6</sup> This table identifies the owner and managing company of [REDACTED] in tax year 2000 as [REDACTED] (EIN 84-1123466). From an unidentified period in 2000 to an unidentified date in 2002, the company owner of [REDACTED] is identified as Omega Healthcare Investors (EIN 58-2526318) with [REDACTED] as the managing company. From May 1, 2002 to the present time, counsel identifies the petitioner's owner as Conifer Care Communities (EIN 03-0373296) with Pinon Management, Inc, as the managing company. Counsel also lists [REDACTED] (EIN 01-0590194) under the ownership and management columns for [REDACTED]

On February 14, 2006, the director denied the petition. The director determined that [REDACTED], was not the petitioner, and the record did not establish that Pinon had either owned or presently owns the petitioner.

<sup>5</sup> Presumably, January 2000.

<sup>6</sup> The present time as of the date of counsel's letter was November 1, 2005.

The director stated that [REDACTED] was a management firm hired by [REDACTED] on May 1, 2002. The director stated that the management contract entered into between [REDACTED] corroborates role of [REDACTED] as a management company. The director then stated that [REDACTED], identified in evidence as the facility administrator, is actually an employee of [REDACTED], and as such is not an employee of [REDACTED]. The director then concluded that [REDACTED], as an employee of Pinon, is not authorized to sign the I-140 petition, and also was not authorized to sign the Form ETA 750 on behalf of [REDACTED]. The director also stated that the petitioner by not submitting the evidence requested in the director's request of further evidence had precluded the examination of a material line of enquiry.

With regard to the petitioner's ability to pay the proffered wage, the director stated that although the petitioner had submitted tax returns for [REDACTED] the petitioner also had not submitted any evidence to establish that [REDACTED] owned [REDACTED]. Thus, the director determined that the tax returns found in the record would not be considered as evidence.

Furthermore, the director noted that in response to his second request for further evidence, counsel had stated that prior to May 1, 2002, Brookshire House was owned by [REDACTED]. The director noted that the petitioner had not submitted any evidence or documentation filed with civil authorities that showed [REDACTED] Investors previously owned [REDACTED], and that the petitioner also failed to submit copies of the federal income tax return filed by [REDACTED] care Investors in tax year 2001 and 2002. The director stated that based on this lack of documentation, the W-2 forms issued by [REDACTED] to the beneficiary would not be considered as evidence of the petitioner's ability to pay the proffered wage. The director then noted that the petitioner had not submitted evidentiary documentation that [REDACTED] was presently owned by [REDACTED]. Based on this lack of evidentiary documentation, the director determined that the federal income tax returns filed by [REDACTED] could not be considered evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that CIS errs in concluding that [REDACTED] the administrator for [REDACTED] is not authorized to sign for [REDACTED]. Counsel also states that CIS errs in concluding that the employer has not proved its ability to pay the proffered wage, and errs in its consideration of the ownership and [REDACTED].

With regard to Mr. [REDACTED] work responsibilities, counsel submits a letter written by [REDACTED]. In her letter, Ms. [REDACTED] describes the job functions and essential duties and responsibilities of [REDACTED] administrator, [REDACTED]. Ms. [REDACTED] also states that Mr. [REDACTED] as the licensed nursing home administrator of Brookshire House and as an employee of Pinon Management, Inc. has the authority to sign all contracts on behalf of [REDACTED] and [REDACTED]. Among the duties enumerated in the document are marketing/census development, quality, leadership skills, budget/finance, personnel, and other duties and responsibility. Under personnel, the document states recruits, selects and orients department heads who are competent, efficient and share the organization's philosophy, and ensures that an adequate number of appropriately trained professional and line staff are on duty at all times to meet the needs of the residents.

With regard to the petitioner's ability to pay the proffered wage, counsel provides Conifer Care's 2002 Federal income tax return. This tax return indicates that Conifer Care has ordinary income of -\$186,553 in tax year 2002. Counsel also resubmits the beneficiary's W-2 Forms from tax year 2005 as well as her 2005 Form 1040, U.S. Individual Income Tax Return. The W-2 Form indicates that Conifer Care paid the beneficiary \$29,920.76 and her income tax return indicates that she earned \$29,921 in the same year.

With regard to the ownership and management of Brookshire House, counsel states that [REDACTED] has been owned and managed by different entities, and resubmits the table that shows the owners and managers of [REDACTED] from 2000 to the present. In addition, counsel resubmits Ms. [REDACTED]'s letter dated August 3, 2005, and also submits six new documents. These new documents are as follows:

Articles of Organization for [REDACTED] received by the state of Colorado Secretary of State on February 4, 2002. This document states the name of the business and further states that it is organized to purchase, lease and operate long-term care facilities;

First two pages of an annual report filed with the state of Colorado Secretary of State on February 8, 2005 by [REDACTED]

One page of a document from the Colorado Secretary of State Business Center that provides an ID number and document number of [REDACTED]

A document entitled Application for Authority, dated by the state of Colorado Secretary of State on March 13, 2000. This document state that H [REDACTED] c. located in Atlanta, Georgia applied for authority to transact business in Colorado and that it elected to use the corporate name of [REDACTED] in Colorado.

A declaration of [REDACTED], Secretary of State, state of Delaware dated March 8, 2000. Mr. [REDACTED] certifies that [REDACTED] is incorporated in the state of Delaware.

A document entitled "Application for Withdrawal for a Foreign Profit Corporation" delivered to the state of Colorado Secretary of State on March 28, 2003 by [REDACTED] located in Atlanta, Georgia.

Upon review of the record, the initial I-140 petition identifies the petitioner as [REDACTED], doing business as [REDACTED]. However, the management contract submitted by counsel to the record clearly identifies [REDACTED] Management, Inc. as the manager of [REDACTED].<sup>7</sup> As such, [REDACTED] is not the petitioner. Therefore the discussion of whether Mr. [REDACTED] can sign the I-140 or the ETA form 750 is moot.<sup>8</sup>

<sup>7</sup> The same document identifies [REDACTED] as the owner of [REDACTED]

<sup>8</sup> The I-140 petition clearly indicates that the petitioner's signature is required on Part 8, Signatures. However, it is noted that if the owner gives someone permission to manage its business, then such an individual could sign for them.

The more important issue to be addressed is the identification of the petitioner as of the April 19, 2001 priority date and to the present. Counsel presents a table of owners and managers on appeal, but does not provide any evidence to establish that the businesses identified in his table were the owners of the petitioner as of April 17, 2001 and to the present. The director correctly requested evidence that [REDACTED] was a separate business entity in early 2001, and/or that [REDACTED] bought [REDACTED] at some point in 2001. Furthermore, the director requested evidence that Omega [REDACTED] at some point sold [REDACTED] to the next claimed owner, [REDACTED]. Counsel on appeal submits documentation such as [REDACTED] request to do business in the state of Colorado and its subsequent application to withdraw from business transactions in the state of Colorado. Counsel further submits an entry from the state of Colorado secretary of state business center that identified [REDACTED], but provides no further information on this entity. Finally counsel submits the articles of incorporation for [REDACTED]. Counsel's submissions, however, are not on point. The director was not asking for documentation as to the existence of [REDACTED] as an incorporated business, or the ability of [REDACTED] to do business in Colorado. Rather, the director asked for evidence to establish the petitioner's chain of ownership from the 2001 priority date to the present. In other words, the director requested evidence as to the sale, or merger, or buyout of [REDACTED] as counsel claimed happened in 2001, and then the next sale of Brookshire House to the current claimed petitioner, [REDACTED] in 2002.

If a petitioner files an ETA 750 using the name of one business, and then files an I-140 petition using the name of another business, the record requires clarification as to whether a successor in interest issue exists. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not 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. Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). For this reason, the director requested the federal income tax returns for Omega Healthcare Investors, Inc., for 2001 and 2002, if available.

Counsel and Ms. [REDACTED] both asserted in response to the director's request for further evidence, that [REDACTED] owned [REDACTED] prior to May 1, 2002. However, 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). On appeal, counsel continues to assert this prior ownership, however he provides no further evidentiary documentation, such as contract of a sale or other transfer of ownership documentation, that would establish the ownership of [REDACTED] by [REDACTED] Investors as of the April 19, 2001 priority date, or the actual ownership by another business entity of Brookshire House as of the April 19, 2001 priority date.

Without establishing the identity of any prior owner as of the 2001 priority date and its present ownership of [REDACTED] cannot establish itself as the petitioner, and cannot resolve any successor in interest issue. Furthermore, it cannot establish its ability to pay the proffered wage, and also the ability of any previous owner as of the April 2001 priority date to pay the proffered wage.

Thus, the director correctly determined that the federal income tax returns for [REDACTED] would not be considered in the proceedings with regard to the petitioner's ability to pay the proffered wage. Such an issue cannot be determined prior to the identification of the actual petitioner or any previous petitioners.

Despite the W-2 forms submitted to the record that show wages more than the proffered wage paid to the beneficiary, the record of proceedings does not show the identity of the petitioner as the same entity that filed the labor certification or as a successor in interest. Thus, the W-2 documents cannot establish the petitioner's ability to pay the proffered wage as of the priority date and to the present. The director's decision will be affirmed, and the petition will be denied.

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.