



U.S. Citizenship  
and Immigration  
Services

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FILE:

EAC 03 024 50899

Office: VERMONT SERVICE CENTER

Date: **APR 27 2007**

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:

SELF-REPRESENTED

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.<sup>2</sup>

The petitioner is a travel agency corporation. It seeks to employ the beneficiary<sup>3</sup> permanently in the United States as a wholesaler. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated , the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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<sup>1</sup> A subsequent I-140 petition filed by the petitioner for the beneficiary (CIS No. EAC 06 091 52526) was approved on June 27, 2006.

<sup>2</sup> The attorney of record in this matter is on the list of disciplined practitioners as maintained by the U.S. Department of Justice, Executive Office for Immigration Review (EOIR) and ineligible to represent the petitioner in this matter. See 8 C.F.R. §292.3; see also the EOIR website ([www.usdoj.gov/eoir/profcond/chart.html](http://www.usdoj.gov/eoir/profcond/chart.html)) accessed April 9, 2007.

<sup>3</sup> The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, [http://ows.doleta.gov/dmstree/fm/fm96/fm\\_28-96a.pdf](http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf) (March 7, 1996). The beneficiary is also called [REDACTED]

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 9, 2001.<sup>4</sup> The proffered wage as stated on the Form ETA 750 is \$45.49 per hour (\$94,619.20 per year). The Form ETA 750 states that the position requires two years of college education and two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>5</sup>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; four bank statements of the petitioner concerning two savings certificates, one dated May 24, 2002 in the amount of \$35,154.19, and one dated August 19, 2002 in the amount of \$9,200.65; a money market account dated November 30, 2002, in the amount of \$80,067.75; an explanatory letter from the petitioner dated October 23, 2003; approximately 43 pages of business checking account statements of the petitioner; five bank statements concerning three bank certificates of the petitioner in the amounts of \$29,641.93, \$9,443.03 and \$37,639.02; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation concerning the owner of petitioner's personal assets.<sup>6</sup>

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the Form ETA 750B, that was signed by the beneficiary but undated, the beneficiary did not claim to have worked for the petitioner. On the Form G-325A dated October 1, 2002, the beneficiary stated she was unemployed from October 1999 to present time (i.e. October 1, 2002).

On appeal, the petitioner asserts that the evidence submitted evidences the petitioner's ability to pay the proffered wage. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of the petitioner do not constitute

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<sup>4</sup> It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

<sup>5</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>6</sup> Since a travel agency will maintain escrow accounts containing its customers' funds, and no named escrow accounts are in evidence in the record of proceeding, the various cash accounts maintained by this travel agency are called into question. If this matter is pursued, proof of the ownership of the funds within those accounts should be provided.

evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As a preface to the following discussion, according to regulation,<sup>7</sup> copies of annual reports, federal tax returns, or audited financial statements are the means by which a petitioner's ability to pay is determined. We note that the director consistent with 8 C.F.R. § 204.5(g)(2) requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2001 and 2002. The petitioner did not provide tax returns, and it has not provided tax returns or other evidence acceptable evidence under the above regulation. The schedules provided were supplemental schedules from the petitioner's tax returns for years 1999 and 2000, and since both were for periods before the priority date of April 9, 2001, they cannot be considered independent, objective evidence of the petitioner's ability to pay the proffered wage from the priority date.

Accompanying the appeal, the petitioner submits a legal brief and additional evidence that includes copies of the following documents: the director's decision dated February 24, 2004; an explanatory letter from the petitioner dated March 23, 2004; supplemental schedules from the petitioner's tax returns for years 1999 and 2000; a note receivable from another corporation; a statement from Sun Trust Bank; and, evidence of funds transferred to and from the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 CFR § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967).

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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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); *Ubada v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits exceeded the proffered wage is misplaced. Showing that

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<sup>7</sup> 8 C.F.R. § 204.5(g)(2).

the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. No tax returns were submitted to demonstrate financial information concerning the petitioner's ability to pay.

The petitioner's reliance on the balances in the petitioner's bank checking account is misplaced. First, 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," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner submitted his personal certificate of deposit, and, evidence of funds held for a time by another corporation and eventually repaid to the petitioner. Contrary to the petitioner's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. 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."

The petitioner submitted certificates of deposit showing sums of money held in the petitioner's corporate name that the petitioner asserts are available to pay the proffered wage. Without documentary evidence to support the claim, the assertions of the petitioner will not satisfy the petitioner's burden of proof. The unsupported assertions of the petitioner do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further since the petitioner failed to submit financial data as requested by the director as noted above, we cannot determine if the petitioner's liabilities from the priority date did or did not outweigh the cash assets disclosed in this matter. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the U.S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner.<sup>8</sup> Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

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<sup>8</sup> We note that the labor certification requires that the beneficiary have two years of college education. While there is a education evaluation in the record of proceeding dated October 22, 2003, stating that the beneficiary attended the University of Bombay, and completed a two-year program leading to a Bachelor of Commerce degree in April 1967, there is no mention of this in the Form ETA 750 Part B prepared by the beneficiary nor is there a diploma or marks sheet in the record of proceeding to substantiate this educational attainment. If

**ORDER:** The appeal is dismissed.

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this matter is pursued, proof of the beneficiary's education is requested.