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FILE: [REDACTED]  
SRC 04 067 50165

Office: TEXAS SERVICE CENTER

Date: DEC 03 2007

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and a motion to reconsider. The motion to reconsider will be denied. The motion to reopen will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner, Eclipse Training Center, is a horse farm. The petitioner sought to employ the beneficiary permanently in the United States as a horse trainer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.

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 DOL's employment system. See 8 CFR § 204.5(d). The ETA 750 reflects that the priority date in this case is August 29, 2002. As set forth on the ETA 750, the certified wage is \$20,800 per year.

The director determined that the petitioner failed to establish that it had the continuing financial ability to pay the proffered wage and on February 8, 2005, the director denied the petition

On appeal, the AAO reviewed the evidence of the petitioner's continuing financial ability to pay the proffered wage and dismissed the appeal on August 1, 2006, concluding that the evidence did not support the petitioner's ability to pay. In rendering this decision, the AAO recognized that the petitioning corporation and another corporation, [REDACTED], were wholly owned by same two shareholders, however the AAO declined to impute the income and assets of [REDACTED], a separate legal entity, to the petitioner to establish the latter's financial ability to pay the proffered wage.

Through counsel, the petitioner submits a motion to reopen and a motion to reconsider the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be

submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Accompanying the motion is a document identified as a General Guaranty. It is dated August 10, 2006 and is executed on behalf of the petitioning corporation and [REDACTED]. It states that [REDACTED] unconditionally guarantees payment of all wages due to the beneficiary as required by the labor certification beginning at the time the labor certification was submitted and continuing through his acquisition of permanent residence in the U.S. Counsel's motion for reconsideration is a restatement of the assertion that [REDACTED] Inc.'s relationship with the petitioner and past practice of paying the beneficiary's wages should be considered as establishing the petitioner's ability to pay the proffered wage. This argument was previously presented and addressed on appeal and is not supported by pertinent legal authority on motion. It will be denied as it does not qualify as a motion for reconsideration under 8 C.F.R. § 103.5(a)(3). The document designated as a General Guaranty is considered as new evidence which supports counsel's motion to reopen under 8 C.F.R. § 103.5(a)(2).

It is noted that counsel refers to the AAO's comment contained in a footnote in its August 1, 2006 decision that although the debts of a corporation as a separate and distinct legal entity are not considered the debts of its individual shareholders or other entities, this general rule might be amenable to alteration pursuant to a contractual obligation. Counsel maintains that the guaranty submitted on motion is unnecessary as he continues to assert that the petitioner's past practice to look to its affiliate [REDACTED] c. should have been probative of the petitioner's ability to pay the proffered wage. Nevertheless, counsel asserts that the guaranty submitted with the motion, now overcomes the general rule that as the petitioner's affiliate, [REDACTED] is not liable for the petitioner's obligations.

Counsel's assertion is not persuasive. It is noted that because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition subsequently based on that 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 C.F.R. § 204.5(g)(2). A document executed August 10, 2006, after the dismissal of the appeal, purporting to establish the petitioner's ability to pay the certified salary as of the August 29, 2002 priority date through a retroactive guaranty of a separate corporate entity will not be considered on motion. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after eligibility is sought under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).<sup>1</sup>

As noted in the AAO's previous decision, it may have been the petitioner's practice to look to Manuden Farms, Inc. to pay the beneficiary's wages, but Eclipse Training Center was the named petitioner on the ETA 750 and the immigrant petition that sought to sponsor the beneficiary, not [REDACTED]. The petitioner must demonstrate its own ability to pay the proffered wage as of the priority date. This ability must be existent at the time the priority date was established. *See* 8 C.F.R. § 204.5(g)(2).

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<sup>1</sup> *See also, Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988) [A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements].

The AAO finds that the petitioner<sup>2</sup> has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The motion to reconsider is denied. The motion to reopen is granted. The prior decision of the AAO, dated August 1, 2006, is affirmed. The petition remains denied.

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<sup>2</sup> An online search of Florida corporate records also raises a question as to the current viability of the corporate petitioner. An administrative dissolution for annual report was filed on September 14, 2007. See [http://ccfcorp.dos.state.fl.us/scripts/cordet.exe?action=DETFIL&inq\\_doc\\_number=P9700...](http://ccfcorp.dos.state.fl.us/scripts/cordet.exe?action=DETFIL&inq_doc_number=P9700...)