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FILE:

[Redacted]
SRC 06 154 52310

Office: TEXAS SERVICE CENTER

Date: DEC 11 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:



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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a publisher and distributor of newspapers. It seeks to employ the beneficiary permanently in the United States as a human resource advisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 2001 priority date of the visa petition and continuing until the beneficiary obtains legal permanent residence. The director also determined that the petitioner had not established that Infowise, Inc. d/b/a Weekend Balita, the applicant that filed the Form ETA 750, was the same company as [REDACTED], the petitioner that submitted the I-140 petition, or that [REDACTED] was a successor in interest to Infowise, Inc. 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 August 3, 2006 denial, the primary issues are whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether the petitioner is the successor in interest of the business that filed the Form ETA 750. The AAO will consider both issues as it examines the petitioner's ability to pay the proffered wage.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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, 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 18, 2001. The proffered wage as stated on the Form ETA 750 is \$23 an hour or \$47,840 per year. The Form ETA 750 states that the position requires a four year baccalaureate degree in psychology or a related field, and one year of work experience in the job offered.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹.

On appeal, Anthony Allen, the petitioner's manager, submits a letter dated August 24, 2006 entitled "[REDACTED]". The letter then lists the following chronology:

- 02-21-1996 Infowise Inc. Incorporated in Nevada
- 09-11-1998 Certified in California to do business as Weekend [REDACTED]
- 04-08-2002 [REDACTED] incorporated in California
- 01-01-2003 Infowise transfers their [REDACTED] interests to [REDACTED]

Mr. [REDACTED] states that in 2002, he and his wife, [REDACTED] the owners of [REDACTED] and publishers of *Weekend Balita* were advised by tax accountants that [REDACTED] should cease operating two different areas of business (publishing and professional services) within one company, due to the IRS requirements for matching SIC codes on tax returns. Mr. [REDACTED] then states that a separate company [REDACTED] was formed that continued the publishing side of the business and that all the *Weekend* [REDACTED] staff, including the beneficiary, continued to work for *Weekend Balita*, now published by [REDACTED] with no change in ownership of either [REDACTED] or [REDACTED]. Mr. [REDACTED] also notes that since [REDACTED] continued existing as a vehicle for other commercial interests, including leasing furniture and other fixed assets to [REDACTED], [REDACTED] continues to file tax returns after the transfer of publishing rights to [REDACTED]. Mr. [REDACTED] notes that the same officer signs all tax returns for both [REDACTED] and [REDACTED].

Mr. [REDACTED] also asserts that since the formation of [REDACTED], the company has uses "PEO" type payroll services that were provided until recently by Benedict Canyon, d/b/a California Professional Employers. Mr. [REDACTED] states that although all employees received W-2 Wage and Tax Statements from CPE, *Weekend Balita* has in fact always employed them, first through [REDACTED] and then through [REDACTED].

Mr. [REDACTED] also submits the following documents:

- A state of California Certificate of Qualification that states as of September 11, 1998, [REDACTED], a Nevada corporation, was qualified to transact intrastate business in the state of California as Weekend [REDACTED]

¹ The submission of additional evidence on appeal is allowed by the instructions to the 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&19 I 764 (BIA 1988).

A one-page document entitled "[REDACTED]" dated September 23, 2002, signed by [REDACTED] that states all of the directors of [REDACTED], a California corporation, waive notice of a special meeting of the Board of Directors and also approve the transfer of publishing rights of the *Weekend [REDACTED]* publication from [REDACTED] to [REDACTED] whose directors and stockholders are the same in both corporations;

A letter written by [REDACTED] Human Resources, [REDACTED], West Hollywood, California, dated August 14, 2006. Ms. [REDACTED] states that [REDACTED] was a client of [REDACTED] from January 1, 2000 to April 1, 2005. Ms. [REDACTED] also states that the company records indicate that [REDACTED] notified the company of a name change to [REDACTED], effective August 30, 2004, and that all active employees of [REDACTED] were transferred to [REDACTED] with no further changes.

A email message dated October 21, 2004 from [REDACTED] Human Resources Generalist [REDACTED] to the an internal email address entitled "Shared-Add book" that Infowise changed its name to [REDACTED] effective August 30, 2004, and to update all necessary files.

A copy of a document from [REDACTED] West Hollywood, California entitled "Client Services Agreement Addendum", that amends the client service agreement between [REDACTED] and [REDACTED] dated January 1, 2000. The document states, in pertinent part, that all references to the business as Infowise, Inc. shall be amended to read "Form Help" as of August 30, 2004. The document is signed by [REDACTED] and [REDACTED], President and Treasurer, Form [REDACTED]

On May 12, 2006, the director requested further evidence from the petitioner with regard to the petitioner's ability to pay the proffered wage from the 2001 priority date to the present; copies of the beneficiary's Form W-2 Wage and Tax statements for tax years 2001 to 2004, if the petitioner employed the beneficiary in these years; evidence of the petitioner's payment of any wages to the beneficiary in tax year 2006; and evidence that [REDACTED] and [REDACTED] are one and the same company. The director noted that if [REDACTED] d/b/a Weekend [REDACTED] were not the same company to submit evidence that [REDACTED] the successor in interest to [REDACTED].

In response to the director's request for further evidence dated May 12, 2006, counsel submitted the following documents:

A letter from [REDACTED] California dated July 12, 2006. In his letter Mr. [REDACTED] stated that he is currently the accountant for both [REDACTED], and [REDACTED] Inc. Mr. [REDACTED] further stated that [REDACTED] was originally incorporated on February 21, 1996 and commenced a publishing business, and that [REDACTED] was incorporated on April 8, 2002. Mr. [REDACTED] also noted that effective January 1, 2003, the publishing business, including all employees, was transferred from [REDACTED] to [REDACTED], which continues to operating the business as to the date Mr. [REDACTED] wrote his letter;

An IRS Form 7004, Application for Automatic 6-Month Extension of Time to File Certain Business Income Tax, Information and Other Returns;

IRS Forms 1120, U.S. Corporation Income Tax Return, for [REDACTED], Employment Identification Number [REDACTED] for tax years 2003 and 2004;

IRS Forms 1120, U.S. Corporation Income Tax Return, for [REDACTED] for tax years 2000, 2001, and 2002;

Three pay statements for the beneficiary dated June 5, 2006, June 20, 2006, and July 5, 2006 produced by Balita Media, Inc. The last pay statement indicates net pay as of July 5, 2006 of \$8,050.01; and

W-2 Wage and Tax Statements for the beneficiary for tax years 2001 through 2005. The W-2 Forms for tax years 2001, 2002, 2003, and 2004 were issued by [REDACTED], d/b/a/ [REDACTED], both located at [REDACTED] Hollywood, California. In tax year 2005, beneficiary had two W-2 Forms issued to her; one from [REDACTED], and the other from [REDACTED]. In tax year 2001, the beneficiary received \$14,305.84 in wages; in 2002, \$18,639.14; in 2003, \$21,364.70; in 2004, \$17,092.53; and in 2005, \$4,689 from [REDACTED] c. D/B/A/ and \$8,005.75 from Balita Media, Inc. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on February 27, 1992,² to have eighteen employees, and a gross annual income of \$1,026,122. On the Form ETA 750B, signed by the beneficiary on February 14, 2001, the beneficiary did not claim to have worked for 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 C.F.R. § 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 (Reg. Comm. 1967).

On appeal, the petitioner submits additional documents with regard to a claimed name change of [REDACTED] a Nevada corporation to [REDACTED]. However, the documentation submitted on appeal is inconsistent. For example, the Client Services Agreement Addendum submitted to the record identifies a name change for both the client services company that the petitioner claims has processed its employee payroll and for [REDACTED] the business that originally filed the Form ETA 750. However, the new name for Infowise, Inc. noted on the addendum is Form Help, an entity not identified in the record, and thus not relevant to these proceedings. This document is given no probative weight in these proceedings. Furthermore, *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof

² The petitioner's owner's letter submitted on appeal indicates the petitioner's date of incorporation is April 8, 2002.

may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.”

The letter and email from [REDACTED] that refer to [REDACTED]'s claimed name change to [REDACTED] are given limited evidentiary weight, as the documents do not address the question in these proceedings as to whether the two companies are one and the same corporate entity, or whether [REDACTED] is a successor in interest to Infowise, Inc. In addition, Ms. [REDACTED] in her letter states that [REDACTED] was a client of [REDACTED] from January 1, 2000, while the tax returns for [REDACTED] indicate an incorporation date of April 8, 2002. Thus, the record is not clear as to whether the I-140 petitioner was a client of [REDACTED] as of January 1, 2000. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.”

The document entitled “Corporate Resolution” that refers to the transfer of publishing rights of a publication indicates that [REDACTED], is a California corporation, which suggests that the instant petitioner is a different corporate entity than the original petitioner, identified as a Nevada corporation by the state of California in another document submitted to the record on appeal. Thus the documents submitted to the record by the petitioner on appeal do not provide sufficient evidentiary documentation to establish that the director’s decision was incorrect. The AAO concurs with the director that the petitioner has not established that it is the same company as the original petitioner, or a successor in interest, and thus it cannot establish its ability to pay the proffered wage as of the 2001 priority date and to the present.

The director in her decision determined that there is no provision to substitute petitioners on the ETA 750 unless a successor in interest relationship exists, and that the record contained no evidence that [REDACTED] Inc. was the successor in interest to [REDACTED]/b/a [REDACTED]. The AAO concurs with the director in this determination and will comment further on this issue.

The successor in interest 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. 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).

In the instant petition, the petitioner has submitted federal income tax returns for [REDACTED], the applicant that submitted the labor certification application to DOL, for tax years 2000 to 2002, and federal income tax returns for [REDACTED] the petitioner that submitted the I-140 petition for tax years 2003 and 2004. If the petitioner were to make an assertion that it is the successor in interest to Infowise, there is relevant evidence in the record to consider.

However, the petitioner has not indicated that it wishes to be considered as a successor in interest to another company. The petitioner merely states that the original applicant changed its name to [REDACTED] Inc. As correctly noted by the director in his decision, Mr. [REDACTED] letter stating that [REDACTED] transferred its entire publishing business to [REDACTED] is also not sufficient evidence to establish that the petitioner and [REDACTED] are one and the same business, or that the I-140 petitioner is the successor in interest to [REDACTED] a. Both the petitioner and counsel suggest that some assets of the original petitioner were transferred to another entity incorporated in 2002; which suggests

that [REDACTED] is a corporation separate and distinct from [REDACTED]. If this is correct, then the petitioner is neither the same corporate entity that filed the Form ETA 750, or a successor in interest to the original petitioner who filed the Form ETA 750.

Furthermore, the AAO notes that the tax returns for [REDACTED] and [REDACTED] indicate two distinct EIN numbers, which suggests that each company is a separate entity, rather than the same company with a name change. The AAO also notes that the petitioner on appeal and the petitioner's accountant in the petitioner's response to the director's request for further evidence both claim that [REDACTED], was incorporated in California on April 8, 2002.⁴ The accountant further indicates that [REDACTED] was incorporated in Nevada on February 21, 1996. However, neither the petitioner nor counsel has submitted the articles of incorporation for [REDACTED] to the record.

With regard to the petitioner's claimed name change, evidence of much more probative weight would be documentation from the state of Nevada that Infowise, Inc., a Nevada corporation as established in the record, changed its name, or that [REDACTED], petitioned the state of California to transact business in California as [REDACTED].

Based on the fact that the I-140 petitioner has not provided sufficient evidentiary documentation to establish that it is the same company as the original petitioner that submitted the labor certification application, or its successor in interest, the petitioner has failed to demonstrate that the petition may be approved.

Beyond the decision of the director, the AAO notes that the petitioner did not clearly establish on the record its relationship between [REDACTED] Staff, or [REDACTED]. This factor diminishes the weight to be given the W-2 Forms submitted to the record that were either produced by [REDACTED], Staff, or [REDACTED]. Of more probative weight in establishing that [REDACTED] or [REDACTED] was used to process the petitioner's employee payroll and was not the beneficiary's employer, would be the original entire client services agreement allegedly signed between [REDACTED], and either as [REDACTED] or [REDACTED], that states the duties and responsibilities of [REDACTED].

The AAO also notes that the W-2 documents produced by [REDACTED] Staff or [REDACTED], d/b/a [REDACTED], for tax years 2001 through 2005, the period of time in which the petitioner claims that it employed the beneficiary, all contain different Employer Identification Numbers and State Identification Numbers. Thus, the record is confused as to the beneficiary's actual employer. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Therefore the AAO gives no weight to the W-2 forms provided to the beneficiary by [REDACTED] or [REDACTED]. Thus, the petitioner cannot establish that it paid the beneficiary a salary equal to or greater than the proffered wage as of the 2001 priority date and to the present.⁵

³ The AAO notes that an attachment to the petitioner's 2003 tax return shows that the petitioner and [REDACTED] are separate corporations that are part of the same controlled group.

⁴ The tax returns submitted to the record for [REDACTED] also indicate this date of incorporation.

⁵ The AAO notes that if the I-140 petitioner had established that it employed and paid the beneficiary during the relevant period of time from 2001 to 2005, the record reflects wages of \$14,305.84 in 2001; \$18,639.14 in 2002; \$21,364.70 in 2003; \$17,092.53 in 2004; and \$4,689 from Benedict Canyon Productions, Inc. in 2005

The evidence submitted does not establish that the I-140 petitioner is the same company as the applicant that filed the Form ETA 750, or that it is the successor in interest to the original applicant. Therefore the petitioner cannot establish that it had 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. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

and \$8,005.75 from [REDACTED] in 2005. Thus, the petitioner therefore could not have established it paid the beneficiary the proffered wage of \$47,840 as of the 2001 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage from the priority year 2001 to 2004.

The AAO also notes that if the petitioner's documentation of the beneficiary's wages was considered along with the tax returns submitted for both companies, the petitioner in tax year 2003 failed to establish that either the petitioner's net income or its net current assets were sufficient to pay the difference between the beneficiary's claimed wages of \$21,364.70 and the proffered wage of \$47,840, namely, \$26,475.30. In tax year 2003, the petitioner's net income, identified on line 28 of the IRS Form 1120, is \$14,381, while the petitioner's net current assets are \$20,346. Thus, the petitioner could not establish its ability to pay the difference between the beneficiary's claimed wages and the proffered wage in tax year 2003.