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U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 079 51122 Office: CALIFORNIA SERVICE CENTER

Date: JAN 31 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:

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, Chief
Administrative Appeals Office

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

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a project administrator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 May 10, 2005 denial, 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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 DOL. 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 DOL 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 November 22, 1999. The proffered wage as stated on the Form ETA 750 is \$73,195.20 per year. The Form ETA 750 states that the position requires a bachelor's degree in business administration.

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.¹ The petitioner submits a letter on appeal. Relevant evidence in the record includes the beneficiary's IRS Forms W-2, Wage and Tax Statements, for 1997, 1998, 1999, 2001, 2002 and 2003, the beneficiary's IRS Form Earnings Summary for 2000, and an itemized statement issued by the Social Security Administration detailing the beneficiary's earnings for January 1997 through December 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.²

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in 1985, to have a gross annual income of \$436,701.40, to have a net annual income of \$87,340.28 and to currently employ five workers. On the Form ETA 750B, signed by the beneficiary on November 3, 1999, the beneficiary claimed to have worked for Wrico International Corporation as a project administrator from March 1997 to the date he signed the Form ETA 750B.

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&N Dec. 764 (BIA 1988).

² The record contains IRS Forms 1120-A, U.S. Corporation Short-Form Income Tax Returns, for [REDACTED] dba [REDACTED] for 2002, 2003 and 2004. The federal tax identification number for Reiki, Inc. is listed as [REDACTED] in 2002 and [REDACTED] in 2003 and 2004. The federal tax identification number for the petitioner, Wrico, Inc., is listed by the Social Security Administration as [REDACTED]. While the petitioner claims that it is operating under the contractor's license of [REDACTED], the two companies are separate entities for tax purposes. 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." Therefore, the petitioner's President's willingness to personally assume responsibility for its financial problems cannot be considered in determining the petitioner's ability to pay the proffered wage. Further, the petitioner claims that in 1985, it transferred its assets to [REDACTED] Corporation and that in 2001, [REDACTED] Corporation transferred its assets to the petitioner. A successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. It must also show that it assumed all of the rights, duties, obligations and assets of the original employer and continues to operate the same type of business as the original employer. *See Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981). The petitioner submitted no proof of the transfer of assets from [REDACTED], it submitted no financial documentation, such as tax returns, annual reports or audited financial statements, for [REDACTED], it submitted no evidence to establish that it assumed all of the rights, duties, obligations and assets of Wrico International Corporation and it submitted to evidence to show that it continues to operate the same type of business as [REDACTED]. The petitioner has therefore failed to establish that it is a successor-in-interest to Wrico International Corporation or that [REDACTED] had the ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner asserts that the proffered wage is unreasonable. The petitioner further asserts that its President will personally assume responsibility for its financial problems.

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 determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 itemized statement from the Social Security Administration stated compensation received from the petitioner of \$15,437.50 in 2002. Therefore, for the years 1999 through 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in 2002.³ Since the proffered wage is \$73,195.20 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$57,757.70 in 2002.

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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his request for evidence dated November 23, 2004, the petitioner declined to provide copies of its annual reports, federal tax returns or audited financial statements from 1999 to the date of the RFE. The documents would have demonstrated the petitioner's ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record contains a Form I-134, Affidavit of Support, from ██████████ on behalf of the beneficiary. However, the petitioner misconstrues the use of the Affidavit of Support. The Affidavit of Support is utilized at the time a beneficiary adjusts or consular processes an approved immigrant visa to provide evidence to CIS that the beneficiary is not inadmissible pursuant to section 212(a)(4) of the INA as a public charge. The beneficiary in this matter has not advanced to a consular processing or adjustment of status phase of the proceeding. At the I-140 immigrant visa filing state of proceeding, evidence is required of a sponsoring

³ The record contains the beneficiary's IRS Forms W-2, Wage and Tax Statements, for 1997, 1998, 1999, 2001, 2002 and 2003. The Forms W-2 show that the beneficiary was employed by Atak Management during the years represented by the Forms W-2.

employer's ability to pay a proffered wage as of the priority date, not its guarantee to support the beneficiary in the future. 8 C.F.R. § 204.5(g)(2). There is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee or Affidavit of Support to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, the Affidavit of Support is a future pledge of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The evidence submitted does not establish that the petitioner 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.