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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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PUBLIC COPY

FILE:

EAC-04-247-50706

Office: VERMONT SERVICE CENTER

Date: JUN 01 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private home. It seeks to employ the beneficiary permanently in the United States as a domestic cook (live in Jain specialty cook). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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 and that the beneficiary qualifies for the proffered position. 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 29, 2005 denial, the two issues in this case are 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, and whether or not the beneficiary qualifies for the proffered position.

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 petition was initially submitted with a copy of the 2003 1120 tax return for _____ and a letter dated March 11, 2004 from _____ a certified public accountant. The petitioner did not submit any evidence of the beneficiary's required experience, nor did the petitioner submit any evidence to establish its ability to pay the proffered wage beginning on the priority date in 2001 and continuing to the present. Therefore, the director issued a request for evidence (RFE) on February 15, 2005. In the pertinent part of the RFE, the director expressly requested the petitioner:

Submit any of the following documents as additional evidence to establish that the employer has the ability to pay the proffered wage or salary of \$43,243.20 as of April 30, 2001, the date of filing and continuing to the-present.

Submit the petitioner's 2001, 2002, 2003 and 2004 United States individual income tax return(s), with all schedules and attachments.

Submit an itemized list of all of your monthly expenses, including rent or mortgage payments, food, utilities, clothing, transportation, insurance, medical costs, etc. for the years 2001-2004.

If the beneficiary was employed by you in 2001, 2002, 2003 or 2004, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid.

Submit evidence to establish that the beneficiary possessed the required 2 years experience as a specialty cook as of April 30, 2001, the date of filing.

In response to the director's RFE dated February 15, 2005 the petitioner submitted none of the requested evidence but a statement from its counsel and a single page statement from ██████████ regarding the assets of ██████████ for the years 2001-2003. The director denied the petition. On appeal counsel submits the petitioner's individual income tax returns for 2001 through 2003 and evidence of the petitioner's other liquefiable assets as evidence of the petitioner's continuing ability to pay the proffered wage from the priority date to the present.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Consequently, the portion of the director's decision denying the petition for ability to pay is affirmed.

Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The certified Form ETA 750 in the instant case states that the position of cook requires two years of experience in the job offered.

The petitioner must 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record does not contain any experience letter from the beneficiary's former or current employer(s) verifying that the beneficiary possessed the qualifications as required by the Form ETA 750. The petitioner failed to submit an experience letter from the beneficiary's former or current employer in response to the director's RFE dated February 15, 2005 despite the director's express request, nor does the petitioner submit such an experience letter on appeal¹. The petitioner failed to demonstrate that the beneficiary possessed the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

required two years of experience prior to the priority date with regulatory-prescribed evidence. Therefore, the AAO would dismiss the appeal even if the AAO considered the sufficiency of the evidence submitted on appeal.

The AAO also notes that the petitioner would have failed to establish its ability to pay the proffered wage from the priority date in 2001 to the present with the evidence newly submitted on appeal.

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 30, 2001. The proffered wage as stated on the Form ETA 750 is \$18.90 per hour (\$43,243.20 per year²).

The evidence in the record of proceeding shows that the petitioner is a private home. On the petition, the petitioner claimed to have a gross annual income of \$1,241,112. On the Form ETA 750B, signed by the beneficiary on March 13, 2001, the beneficiary claimed to have worked for the petitioner since January 1997.

On appeal counsel argues that the petitioner, [REDACTED], is a sole shareholder of [REDACTED] and therefore, the assets of [REDACTED] c. should be considered in determining the petitioner's ability to pay. Contrary to counsel'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, 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." Similarly the assets of the corporation cannot be considered in determining its owners and shareholders' ability to pay the proffered wage. Counsel's reliance

are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

² Based on working 44 hours per week and being paid \$18.90 per hour as indicated on the Form ETA 750.

on the assets of [REDACTED] in determining the company's sole shareholder's ability to pay the proffered wage in the instant case is misplaced. The AAO cannot and will not consider any evidence showing the assets of [REDACTED] in determining the petitioner's ability to pay the proffered wage from 2001 to the present.

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).

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, although the beneficiary claimed to have worked for the petitioner since January 1997 on the Form ETA 750B, the petitioner did not submit any W-2 forms, 1099 forms or other documentary evidence showing that the petitioner paid the beneficiary the proffered wage from the priority date in 2001 onwards. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages paid to the beneficiary for these years. The petitioner is obligated to demonstrate that it could pay the proffered wage in each relevant year from 2001 to the present with its adjusted gross income.

Unlike a corporation, a private home is not legally separate from the individual. Therefore the individual's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. The individual's income is reported on his/her individual (Form 1040) federal tax return each year. Like a sole proprietor, the individuals of the household must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

For a private home, CIS considers net income to be the figure shown on line 33³, Adjusted Gross Income, of the household's Form 1040 U.S. Individual Income Tax Return. The priority date in the instant case is April 30, 2001, therefore, the petitioner's tax returns or other financial documents prior to 2001 are not necessarily dispositive. The record contains the petitioner's individual income tax returns for relevant years 2001 through 2003. These tax returns show the following financial information concerning the petitioner's ability to pay the proffered wage of \$43,243.20 per year from the priority date:

³ The line for adjusted gross income on Form 1040 is Line 33 for 2001, however, it is Line 35 for 2002 and Line 34 for 2003.

In 2001, the Form 1040 stated adjusted gross income of \$17,626.
In 2002, the Form 1040 stated adjusted gross income of \$15,006.
In 2003, the Form 1040 stated adjusted gross income of \$26,152.

The petitioner did not submit a statement of monthly expenses for the petitioner's household of four. However, the petitioner's adjusted gross income in 2001, 2002 and 2003 was not sufficient to pay the beneficiary the proffered wage without taking into account the petitioner's household living expenses. Therefore, the evidence submitted demonstrates that the petitioner had no ability to pay the proffered wage to the beneficiary with the adjusted gross income in 2001, 2002 and 2003.

The record does not contain any statement of the sole proprietor's household monthly expenses. Without the statement of the sole proprietor's household monthly expenses, the AAO cannot determine whether or not the sole proprietorship established its ability to pay the proffered wage as well as to sustain his family's living expenses.

CIS will consider the petitioner's individual income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay. The petitioner's individual liquid assets usually includes cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. The petitioner submits on appeal the following items as his liquefiable assets to be used to pay the beneficiary the proffered wage and sustain his family of four: statements from [REDACTED]

[REDACTED] and [REDACTED] and a statement from the petitioner's accountant. However, all of these documents indicate the petitioner's balances in these accounts either prior to 2001 or after 2004, and none of them provides the petitioner's liquefiable assets at the end of 2001, 2002 and 2003 which can be used to pay the proffered wage and cover the petitioner's family living expenses.⁴ The petitioner also submits a statement from the accountant of [REDACTED] confirming that the petitioner is the owner of 100% shares of [REDACTED] and listing [REDACTED]'s assets and profit. The statement is not audited. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The statement lists assets of [REDACTED], and therefore, cannot be accepted as evidence of the petitioner's liquefiable assets in determining the petitioner's individual ability to pay the proffered wage. Therefore, the petitioner failed to demonstrate that the petitioner had extra available funds sufficient to cover the shortage between the proffered

⁴ Investacorp statements show that the account is for [REDACTED] instead of the petitioner himself; [REDACTED] statements reveal the balances in January and February 2000; the balance of [REDACTED] was as of January 31, 2004; the submitted printouts do not indicate at what time point the IBN account value went from \$18,547.75 to \$21,743.94 and to whom the account belongs to; AXA Stock statement provides the cash value of \$73,549.61 as of July 28, 2004 and \$87,542.92 as of July 28, 2005; Fidelity Advisor Funds statements indicate value as of March 31, 2000 and as of September 30, 2000; the petitioner submits Alliance Capital statements for a period from July 1, 2000 to September 30, 2000; [REDACTED] statement shows the balance as of January 1 2000 and as of September 30, 2000; F [REDACTED] Investments statements indicate the balance of the petitioner's account as of December 31, 2000; AXA equitable life insurance account statements provide net cash surrender value information as of October 7, 2005.

wage plus the petitioner's family living expenses and the adjusted gross income at the end of each year 2001, 2002 and 2003.

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 and meet its personal expenses as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through 2003. Counsel's assertions cannot overcome the director's decision and the evidence submitted does not establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date even if the evidence requested but not submitted in response to the RFE but on appeal had been accepted and considered.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.