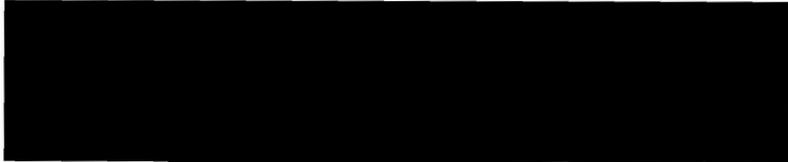


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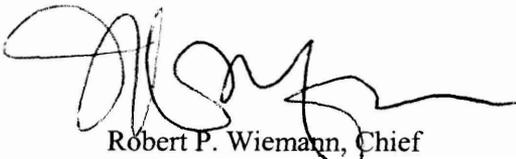
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

**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 commercial real estate investment firm. It seeks to employ the beneficiary permanently in the United States as a financial analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner does not appear to be the actual prospective employer and 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.

On appeal, counsel asserts that the petitioner is the actual employer but the method of compensation is based upon the traditional method of compensation in the real estate industry.

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 employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$97,826 per year. On the Form ETA 750B, signed by the beneficiary on March 20, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed on January 13, 2005, the petitioner claims a gross annual income of 10.3 billion dollars.

In support of the petitioner's ability to pay the proffered wage, the petitioner initially submitted a copy of an individual tax return for 2003 filed by [REDACTED]. A letter signed by [REDACTED] dated November 23, 2004, also accompanies the submission. In the letter [REDACTED] states that he is a vice-president of investments and senior director of the national office and that he needs to employ [REDACTED] as a financial analyst.

further states that his income as a real estate professional is derived from the profits received from sales handled through the office. From these funds, he pays the staff working directly under him. He adds that the beneficiary will report directly to him and that he is personally responsible for his annual income of \$98,826 per year.

The director requested additional evidence on July 21, 2005, noting that the petitioner must provide either federal tax returns, audited financial statements, or annual reports to support its continuing ability to pay the proffered wage as of the priority date from 2001 to the present. The director noted that the tax returns should have been submitted not on behalf of [REDACTED] but on behalf of the named employer of [REDACTED] since the labor certification is valid for [REDACTED] and not for [REDACTED] individually. The director requested documentation for [REDACTED] as well as a clarification of the source of the beneficiary's income and copies of Wage and Tax Statements (W-2s), W-3s and income tax returns for the years 2001 to the present.

In response, the petitioner, through counsel, submitted copies of Form 1099, Miscellaneous Income for 2002, 2003, and 2004, issued by [REDACTED] individually to the beneficiary reflecting nonemployee compensation paid. Copies of the beneficiary's individual income tax returns accompany these 1099s. The amount of compensation was \$49,150, \$48,450, and \$53,300, respectively.

The petitioner also provided a copy of a Form 1099 issued by the petitioner, \_\_\_\_\_ to [REDACTED] showing 2004 compensation of \$738,049.09. Additionally submitted is a letter, dated August 22, 2005, from [REDACTED] as regional manager of the petitioner. He states that the company is a national enterprise with over 900 agents. The company sold billions of dollars of investment real estate in 2004 with commissions ranging in the 2% to 3% range and with each office generally operating with over a 20% profit margin. He adds that the company is privately held with no debt. Finally [REDACTED] states that the beneficiary works directly for [REDACTED] and that there is no reason why they both should not continue to work for the company for many years. [REDACTED] also attaches a memorandum sent to the company's managing directors and corporate department heads with a chart describing the sales volumes of the firm in 2004.

The director denied the petition on November 30, 2005. He noted that the required financial documentation from the petitioner had not been received as requested in the form of federal tax returns, audited financial statements or annual reports. The director also examined the evidence submitted and concluded that it did not appear as though the petitioner, [REDACTED], rather than the individual, [REDACTED] is the actual prospective employer.

On appeal, counsel asserts that [REDACTED] agrees to pay the beneficiary's salary in his capacity as Vice President of Investments and that the beneficiary's work is subject to the ethics and operating procedures of the petitioner. The company is organized so that [REDACTED]'s income is received from commissions and from those commissions he pays for support services needed to conduct his duties. This is the traditional method within the real estate industry. Counsel asserts that the "commitment by [REDACTED] and the position that [REDACTED] holds with the company explain and justify the designation of [REDACTED] on the ETA 750 because the work is done under their auspices."

Counsel's assertions are not persuasive. The petitioner is [REDACTED]. First, based on the petitioner's failure to provide the required financial documentation of either federal tax returns, annual reports, or audited

financial statements in conformance with the provisions of the regulation at 8 C.F.R. § 204.5(g)(2), the petition may not be approved.

Secondly, the AAO notes that [REDACTED], as regional manager of the petitioner failed to specifically confirm in his letter that the certified position described on the labor certification would be directly offered by or paid by the petitioner, [REDACTED]. There is no indication in the record that the petitioner, [REDACTED] would be directly responsible for paying the beneficiary's salary, making contributions to his social security, worker's compensation, and unemployment insurance programs as well as for withholding the applicable federal and state income taxes. *See Matter of Smith*, 12 I&N Dec. 772, 773 (BIA 1968).<sup>1</sup> Rather the evidence indicates that the beneficiary would be working for and being paid by [REDACTED] individually, who stated that he is personally responsible for payment of the beneficiary's salary and for whom the beneficiary has been working as an independent contractor thus far. The regulation at 20 C.F.R. § 656.30 provides that a labor certification involving a specific job offer is valid only for that job opportunity, the alien for whom the certification was approved, and for the area of intended employment. It remains the petitioner's burden to provide sufficient documentary evidence to support the claim of eligibility. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In this case, the petitioner has not established that it has the ability to pay the proffered wage or that it is the actual prospective employer pursuant to the provisions section 203(b)(3) of the Act.

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.

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<sup>1</sup> The employer must be bona fide and not simply a contractor; *Matter of V&R Construction Inc.*, 02-INA-153 (BALCA Feb. 7, 2003) (employer could not establish that the persons working for him were employees rather than independent contractors so labor certification denied because he had no employees).