



U.S. Citizenship  
and Immigration  
Services

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FILE:

[REDACTED]  
EAC 03 156 51358

Office: VERMONT SERVICE CENTER

Date: MAR 27 2007

IN RE:

Petitioner:  
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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The petition will be remanded to the director.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant restaurant manager (Level I). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 priority date of the visa petition; and, that the petitioner had not shown that it has a permanent job offer for the beneficiary; and, that the petitioner has not shown that Daya LLC is a valid successor in interest to the petitioner. The director denied the petition accordingly.

The procedural history in this case is documented by the record and incorporated into the decision.<sup>1</sup> Further elaboration of the procedural history will be made only as necessary.

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, 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).

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<sup>1</sup> Using the same labor certification, Daya LLC, d/b/a "House of India" has filed two employment based, immigrant petitions for the same beneficiary that are also currently pending. The second petition, of this series (CIS EAC 05 009 52549), was filed on October 12, 2004, in the name of Daya LLC, d/b/a "House of India" located at 4160 Chain Bridge Rd., Fairfax, Virginia 22030. According to counsel, the "Motion to Reopen and Reconsider is premised on the following grounds" chief of which is the fact that the petitioner has filed a "new I-140 visa petition by Daya LLC dba House of India." This petition is the third petition I-140 immigrant petition (CIS EAC 05 181 50138) that was filed for the beneficiary on June 6, 2005 in the name of Daya LLC, d/b/a "House of India" located at 9350 Snowden River Pkwy., Columbia Maryland 21045.

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$28,500.00 per year. The Form ETA 750 states that the position requires two years experience.

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.

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a cover letter from counsel dated April 2, 2003; a letter from the petitioner dated March 25, 2003 offering the beneficiary the job of assistant restaurant manager (Level I) at the proffered wage; non-audited financial statements for the "House of India" as January 2002 through August 2002, as well as of August 31, 2002; a U.S. Internal Revenue Service Form 1120 tax return for 2001; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The above tax return filed in the name of "[REDACTED]" stated its federal employer identification number (FEIN) for the company as "[REDACTED]" that is the same number found on the I-140 petition (the number is obscured for privacy purposes). 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 2000, and at the time the petition was prepared, to employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on April 21, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director requested the petitioner's U.S. federal tax returns for 2002 and 2003 as well as the beneficiary's W-2 Wage and Tax Statements for 2001, 2002 and 2003. Supplementary evidence was also requested to the above. The director also requested annual reports for 2002 and 2003 with audited or reviewed financial statements.

In response to the director's request the petitioner submitted the following copies of documents: an explanatory letter from counsel; an undated letter from petitioner's accountant; a U.S. Return of Partnership Income (Form 1065) for year 2003 for Daya LLC; a U.S. federal tax return for year 2002 for Onkar Limited; three non-audited financial statements; a pay stub issued to "[REDACTED]" dated May 19, 2004; in the amount of \$1,008.00 that stated year-to-date earnings of \$10,080.00 from Daya LLC, 4160 Chain Bridge Rd., Fairfax, Virginia; a W-2 Wage and Tax Statement issued to Sanjay Mohan Rammohan for 2003 in the amount of \$25,704.00 by Daya LLC, 4160 Chain Bridge Rd., Fairfax, Virginia; and, a restaurant menu from the House of India, 9350 F2 Snowden River Parkway, Snowden, Maryland 21045.

Daya LLC stated its federal employer identification number (FEIN) for the limited liability company as #16-1X2X4X9 (the number is obscured for privacy purposes). The petitioner's accountant stated that Daya LLC purchased the petitioner's business in October 2002 without further elaboration or documentation.

The director denied the petition on September 8, 2004. Principally, the director stated, among other findings, 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; that the petitioner had not shown that the petitioning entity has a permanent job to offer the beneficiary, and, the petitioner had not shown that Daya LLC is a valid successor in interest to the petitioner, Onkar Pvt. Ltd.

As additional evidence submitted on appeal, counsel has submitted originals or copies of the following documents. A brief dated October 4, 2004, and, a "Final Agreement" dated January 7, 2003 between the petitioner and Daya LLC; six pages of "Photocopies of Cashier's Check;" an "Interim Agreement" between the petitioner and Daya LLC dated August 25, 2002; a "Buy Sell and "Noncompete [noncompetition] Agreement" dated July 2002; trade name registrations dated December 18, 2002; for "House of India" and Daya LLC; receipt notice of FEIN number by Daya LLC dated September 17, 2002; "Operating Agreement" dated January 1, 2003 among Daya LLC's owners; a U.S. Return of Partnership Income (Form 1065) for year 2003 for Daya LLC; a W-2 Wage and Tax Statement issued to Sanjay Mohan Rammohan for 2003 in the amount of \$25,704.00 by Daya LLC, 4160 Chain Bridge Rd., Fairfax, Virginia; the beneficiary's 2003 personal income tax returns; four pay statements issued by Daya LLC to the beneficiary dated August 11, 2004, September 8, 2004, September 22, 2004 and October 6, 2004 stating year to date wage payments of \$20,160.00; Onkar Limited's U.S. Internal Revenue Service Form 1120 tax returns for 2001 and 2002; and, seven color photos.

The record contains evidence concerning whether or not that the petitioner qualifies as a successor-in-interest to Daya LLC that was not evaluated by the director. 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. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. 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).

The director did not give the petitioner notice and opportunity to address the successor-in-interest issue, and, thus issued a decision without fully evaluating the issue. Therefore, the AAO will remand the petition to the director to evaluate the evidence and contentions as submitted and asserted on appeal. The director can undertake any procedural mechanisms or request any additional information or evidence necessary to make an additional determination.

**ORDER:** The petition is remanded to the director for entry of a new decision.