



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



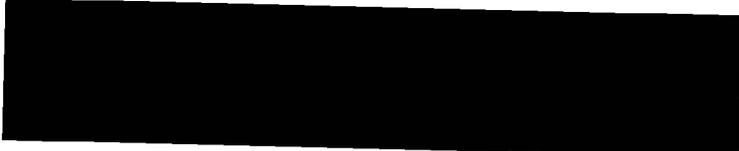
B6

FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: NOV 14 2007
WAC 06 024 51184

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:



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 nature of the petitioner's business is software consulting and solutions. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated July 12, 2006, an 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.

Beyond the decision of the director, a second issue in this case is whether or not there is sufficient evidence presented by the petitioner to determine that the petitioner is a qualifying employer and that it has represented to the Department of Labor the true conditions of employment namely that it will employ the beneficiary under the terms of the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.

Ability to Pay the Proffered Wage

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 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 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 February 6, 2003.¹ The proffered wage as stated on the Form ETA 750 is \$125,000.00 per year.

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 appeal.²

Relevant evidence in the record includes copies of the following documents all concerning the petitioner: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; the petitioner's U.S. Internal Revenue Service Form 1120 tax return for 2003; explanatory letters from counsel dated October 19, 2005 and June 23, 2006; a credential evaluation prepared by FHI - Frances Hewitt Inc. Education Evaluations, Pleasanton, California dated October 4, 2005;³ compiled financial statements of the petitioner from December 31, 2002 to December 31, 2004, and for the year ended December 31, 2004; two reports both entitled "Accountant's Audit Report" for the periods ended December 31, 2004 and March 31, 2005; two financial statements entitled "Audited Financial Statements" dated December 31, 2004 and March 31, 2005; a certificate of amendment amending the corporate name of Compuware Solutions Inc. to Versapos Group Inc.; and copies of documentation concerning the beneficiary's qualifications as well as other documentation.

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 denied the petition accordingly. Specifically the director found that there were inconsistencies in the financial evidence submitted by the petitioner that remained after additional documentation was submitted by counsel.

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 in 2000 and according to a request for amendment to

¹ It has been approximately four years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

³ The beneficiary's qualifications are not at issue in this case.

employ no workers.⁴ According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750 signed by the beneficiary on December 6, 2002, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel makes no assertions. On the appeal Form I-290B, counsel stated "Please see enclosed brief and evidence." No brief was found in the record of proceeding to accompany the appeal.

Accompanying the appeal, counsel submitted additional evidence that includes the following relevant documents all concerning the petitioner: the petitioner's U.S. Internal Revenue Service Form 1120 tax return for 2003 (resubmitted); a compiled financial statement dated September 23, 2005; and an explanatory letter from the petitioner's accountant dated July 31, 2006.

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, Citizenship and Immigration Services (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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2003, the Form 1120 stated net income of \$16,822.00.

Since the proffered wage is \$125,000.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for 2003.

The petitioner is responsible to submit financial evidence to demonstrate that it has the continual ability to pay the proffered wage from the priority date which is February 6, 2003. 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). The director requested additional evidence of the ability to pay the proffered wage on April 4, 2006, but the petitioner, although it has been conducting business continually since the priority date, has not presented additional tax returns such as the tax returns for 2004, 2005 and 2006, which presumably are now available, as required by the regulation at 8 C.F.R. § 204.5(g)(2) aforesaid.

Documentary evidence specifically requested by the director such as annual reports, or tax returns for 2004 and 2005 were not submitted. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). In light of the fact that the petitioner's net income reported for 2003 was minimal in relation to its gross receipts, it is inexplicable why the petitioner even on this appeal has not presented additional tax return evidence during these proceedings. Failure to submit

⁴ A letter from counsel dated June 23, 2006 purportedly amended the petition to change the number of employees from nine employees to none.

requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

If the net income the petitioner demonstrates it had available during the period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2003 were \$64,139.00.

Therefore, for the period for which the tax return was submitted, the year of the priority date, the petitioner did not have sufficient net current assets to pay the proffered wage.

As a preface to the following discussion, counsel had submitted compiled and unaudited financial statements as evidence of the petitioner's ability to pay the proffered wage. The statements were compiled financial statements of the petitioner from December 31, 2002 to December 31, 2004, a compiled financial statement dated September 23, 2005, as well as an explanatory letter from the petitioner's accountant dated July 31, 2006. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

As already mentioned, 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 denied the petition accordingly.

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Specifically the director found that there was insufficient net income and net current assets reported in the sole tax return for 2003 submitted and that there were inconsistencies in the financial evidence submitted by the petitioner's accountant that remained after additional documentation was submitted by counsel. The discrepancy was apparent in current liabilities stated in the 2003 tax return of \$638,292.00 and that same item stated in the accountant's report for 2003 ("Independent Accountant's Report") of \$538,812.00.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner's accountant in a letter dated July 31, 2006, submitted for this appeal stated that the difference mentioned above should be accounted for because the "classification" of accounts payable in the 2003 tax return was incorrect but the Independent Account's Report for 2003 contained a correct rendition of this item.

The AAO notes that the 2003 federal tax return was not amended, or at least no certified tax return filed with the Internal Revenue service amendment for this error amounting to \$99,480.00 discovered according to the petitioner's accountant three years after the filing of that return was submitted into evidence. The AAO does not find the petitioner's accountant's statement made on appeal credible.

Also the petitioner confirmed in two financial statements entitled "Audited Financial Statements" dated December 31, 2004 and March 31, 2005, that the petitioner has no employees and that it has commingled its finances with its "sister" company Systime Computer Corporation of Rutherford, New Jersey, which has the responsibility to pay employees (but the petitioner and "Systime" do not report their incomes on a consolidated basis).

The petitioner does not report wages or labor costs as is evident from the 2003 tax return submitted that is substantiated by counsel's statements mentioned above. The information submitted by the petitioner is grossly insufficient to determine the petitioner's ability to pay the proffered wage.

There is no explanation why financial data for Systime Computer Corporation of Rutherford, New Jersey was not submitted if, as counsel stated, there exists a commingling of financial data, income and expenses between these two separate corporations. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

Qualifying Employer and the Labor Certification

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, 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 (BIA 1967).

In determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. *See Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

According to counsel's letter dated June 23, 2006, at the time of the filing of the petition in 2005 instead of nine employees reported on the petition by the petitioner, there were no employees. Counsel goes on to state in the letter which was a response to the director's request for evidence, that Systime Computer Corporation of Rutherford, New Jersey, is a "sister company" and that the petitioner and Systime Computer Corporation (hereinafter "Systime") "have certain common overheads, which are allocated between VersaPOS and Systime based on revenue. The payroll is also processed on a common paymaster basis. The actual payroll returns are shown under the Federal ID and State ID [of] Systime."

Counsel goes on to disclose that "VersaPOS uses Systime employees for the programming services and reimburses Systime for the services, therefore VersaPOS did not have any employees on its payroll in 2004 and 2005" and it did not file any federally required payroll reports because of this fact. How VersaPOS "uses" Systime employees is not explained.

In fact a close reading of the petitioner's 2003 tax return shows that no wages or cost of labor was reported.

The regulation at 20 C.F.R. § 656.3 states in pertinent part:

"Employment" means permanent full-time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee.

* * *

"Employer" means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation

Essential to the Application for Employment Certification Form ETA 750 process is that it be filed by the *employer that has the ability to pay the proffered wage*. Counsel has admitted by the above statements that the petitioner is in fact not a qualifying employer since another corporation is the employer having the employees the petitioner “uses,” and since the beneficiary is presently employed by [REDACTED] that would include the beneficiary.

Since the petitioner in some manner utilizes Systime’s employees without the obligations of an employer, and [REDACTED] those employees, not the petitioner, the petitioner is not a qualifying employer under the above regulation. There is no evidence submitted in the record of proceeding that this arrangement will change in the future or that the beneficiary will ever be employed or paid by the petitioner. The reality of the operating arrangement between these two “sister” companies is markedly different than the statements expressed in the labor certification and the petition where it is not expressed at all.

It is difficult to believe that, had the petitioner disclosed the above facts to the Department of Labor,⁶ that its labor application would not have been rejected out of hand.⁷

There is evidence that may suggest that the labor certification was secured by, at the minimum, willful misrepresentation.⁸ However, there is no finding by the director in the decision in regard to fraud or willful misrepresentation. Any additional proceedings should address this issue.

⁶ The petitioner did not disclose that fact represented above to CIS when it initially filed the petition nor is it indicated that it made the appropriate disclosure to the Department of Labor (DOL) during the alien labor certification application process, since there is no such inclusion in the purportedly complete copy of the alien labor certification filing submitted to DOL that the petitioner submitted to CIS with the petition. According to DOL precedent and regulations, under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Here the petitioner has demonstrated by the evidence submitted that it does not intend to employ and pay the beneficiary but utilize another corporation for this purpose. According to a letter dated October 6, 2005, from Systime Computer Corporation, Rutherford, New Jersey, the beneficiary at the time of the letter was employed as a programmer analyst, and, according to the record of proceeding the petitioner will “use” but not directly employ Systime’s employee. If Systime Computer Corporation is the actual employer of the beneficiary, then it should have filed the Form I-140 visa petition. *See Avena v. I.N.S.*, 989 F. Supp. 1, 7 (D.D.C. 1997).

⁷ “Systime” is a separate corporate entity with its own federal employer identification number according to counsel. While under common control, the two companies (the petitioner and Systime) file separate income tax returns, and the record is silent concerning any financial data for Systime. 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, 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. Petitioner has submitted no legally binding agreements between the two companies that would ensure that Systime Computer Corporation would pay or guaranty the obligations of the petitioner as the employer of the beneficiary.

⁸ The regulation at 20 C.F.R § 656.30 (d) entitled “Validity and invalidation of labor certifications.” states in pertinent part:

After issuance labor certifications are subject to invalidation by the INS [now CIS] or by a Consul of the Department of State upon a determination, made in accordance

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.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

ORDER: The appeal is dismissed.

with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application