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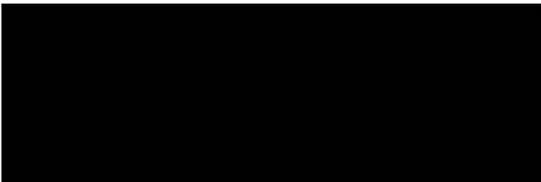
U.S. Department of Homeland Security
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Washington, DC 20529-2090
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U.S. Citizenship
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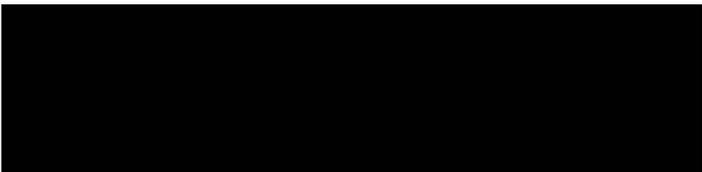


FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: **NOV 25 2008**
WAC 06 056 50952

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.

A handwritten signature in black ink, appearing to read "J. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a restaurant supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Permanent Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established its ability to pay the proffered wage. 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 January 17, 2007 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.

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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [Citizenship and Immigration Services].

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).

In the instant matter, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 9089 is \$17.80 per hour or \$37,024 per year. The Form ETA 9089 states that the position requires two years of work experience in the proffered job.

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 relevant evidence in the record, including new evidence properly submitted on appeal.¹

On appeal, counsel submits a brief and resubmits a copy of front page for Articles for Incorporation of the Beverly-Elyad Corporation. This document from the Secretary of State Corporation Division, is dated January 5, 1996. Counsel also submits a Fictitious Name Statement from the recorder's office, Los Angeles County, recorded by the county office on October 18, 2006. This document states that Beverly Elyad Corporation was filing for the first time and that the Beverly-Elyad Corporation had not begun to transact business under the fictitious business name of Trimana Restaurant. Counsel also submits an order for the publishing of a notice of Fictitious Business name for Trimana Restaurant for four dates from October 24, 2006 to November 14, 2006. Counsel also submits a copy of an interoffice memorandum written by William R. Yates dated May 4, 2004² with regard to determining the petitioner's ability to pay the proffered wage.

In the petitioner's response to the director's Notice of Intent to Deny (NOID) the petition dated July 11, 2006, counsel submitted documents submitted to the registrar's office for the filing of the Fictitious Business Name Statement, as well as Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2001 through 2005. These tax returns were filed by Goodies of Beverly Hills, [REDACTED], Beverly Hills, California. EIN [REDACTED]. Counsel also submitted copies of Form IRS Forms 941 Employer's Quarterly Federal Tax Form, and state of California Employment Development Department (EDD) Forms DE-6, Quarterly Wage Reports, for tax years 2003 to 2005. All these documents identified the company submitting them as Beverly Elyad Corporation, EIN [REDACTED]. The petitioner also submitted W-2 Forms for tax years 2003 to 2005 for Beverly Elyad Corporation. Finally the petitioner submitted listings from the Yellow Pages and Internet sites with regard to the Trimana business in the Los Angeles area.

In response to the director's Request for Evidence (RFE) dated March 31, 2006, counsel also submitted a letter that stated the names [REDACTED] and [REDACTED] are used interchangeably and are the same entity. Counsel noted that the Department of Labor had also used both names interchangeably by certifying the ETA 750 under the name [REDACTED], while addressing the Final Determination letters to [REDACTED] in care of counsel. Counsel states that no successor in interest issue exists in the present petition as, [REDACTED] Corporation and Goodies of Beverly Hills are all the same entity with the same Employer Identification number.

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 Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

On appeal, counsel states the petitioner is a chain of restaurants/delicatessens that cook hamburgers twelve different ways, and that it is a family-owned business enterprise founded 18 years ago. Counsel asserts that Beverly Elyad Corporation or Goodies of Beverly Hills (both with the same employer identification number of [REDACTED]) are doing business as Trimana located at [REDACTED]. Counsel states that Goodies of Beverly Hills filed tax returns from 2001 to 2004 that were submitted to Citizenship and Immigration Services (CIS) as evidence of ability to pay the proffered wage. Counsel notes that the petitioner submitted a copy of a Fictitious Name Statement that clearly showed Beverly Elyad Corporation had a D/B/A named Trimana.

Counsel then notes that both the Beverly Elyad corporation and Goodies of Beverly Hills have the same Employment Identification Number (EIN), namely [REDACTED] and that the tax returns submitted to CIS were filed by Goodies of Beverly Hills. Counsel then notes that the business, Beverly Elyad Corporation, filed the DE-6 Forms Quarterly Wage and Withholding Reports submitted to the record to document the beneficiary's employment. Counsel states that Beverly Elyad Corporation and Goodies of Beverly Hills, two entities that share the same EIN, are one entity. Counsel states that the Fictitious Name Statement submitted to the record, that shows Beverly Elyad Corporation is doing business as Trimana, makes no reference to a tax employer identification number, yet the director erroneously concludes that the EIN numbers are not the same for Trimana Grill and Goodies of Beverly Hills. Counsel states this finding is arbitrary and capricious. Counsel then states that the Fictitious Name Statement document³ submitted to the record makes reference to the Articles of Incorporation or Organization number 1775563, which is the same number assigned to the articles of incorporation of Beverly Elyad Corporation.

Counsel then appears to state that the director's comment that Goodies of Beverly Hills is a Subchapter Corporation, a separate legal entity, is not relevant to the current proceedings.⁴

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1976 and did not identify its gross annual income, its annual income, or its current number of workers. On the Form ETA 750, the beneficiary claimed that he had worked for the petitioner from September 1993 to the date he signed the ETA 750, Part B, namely April 23, 2001.

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, 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).

³ Submitted for the Trimana business.

⁴ The director's comment on the corporate structure of Goodies is somewhat incoherent. It appears that the director was referring to the inability of one corporation to use the assets of another corporation that it owns to establish a petitioner's ability to pay the proffered wage. The AAO will address this issue more fully further in these proceedings.

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. If the petitioner could not establish its ability to pay the proffered wage using this analysis, CIS would then examine the petitioner's net income and net current assets to determine whether either financial indicator would establish the petitioner's ability to pay the proffered wage. Thus the identification of the actual petitioner is crucial in the analysis of the petitioner's ability to pay the proffered wage under any of the three analysis prongs set forth in the Yates memo.

The AAO notes that the director initially enquired as to whether Trimana Grill was a successor in interest to Trimana, the name of the petitioner on the initial I-140 petition. In response, counsel stated that Trimana Grill, Trimana, Goodies of Beverly Hills (the company identified on the tax returns submitted to the record) and Beverly Elyad Corporation are the same company. The petitioner also submitted Forms 941 and DE-6, as well as W-2 Wage and Tax Statements that were issued by Beverly Elyad Corporation. Further the petitioner submitted to the record a Fictitious Name document that indicates the Beverly Elyad Corporation was doing business as Trimana or Trimana Restaurant.

The AAO also notes that while the petitioner has submitted documentation that indicates both Goodies of Beverly Hills and Beverly-Elyad Corporation are using the same EIN number, the petitioner did not submit any further evidence to substantiate the actual relationship between Goodies of Beverly Hill and Beverly-Elyad Corporation. Although counsel has submitted a fictitious name documentation that indicates Beverly-Elyad is doing business as Trimana, the record contains inconsistent information. The initial I-140 petition states that the petitioner [REDACTED] was established in 1976, while the federal tax returns submitted to the record indicate that Goodies of Beverly Hills was established on January 4, 1996, twenty years later.⁵ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

In response to the director's RFE, the petitioner submitted Internet documentation on Trimana that suggests that the involvement between Trimana and the two companies of Goodies of Beverly Hills and Beverly-Elyad Corporation is that of a franchisee. Counsel also states this on the I-290B appeal form submitted to the record. However, the record does not establish this fact. Further, the record does not clarify that Goodies of Beverly Hills is the same company as Beverly-Elyad, or that one company is an affiliate of the other, or that, contrary to counsel's assertion in the petitioner's response to the director's RFE, that Beverly-Elyad Corporation is doing business as Goodies of Beverly Hills. The assertions of counsel with regard to both companies being the same entity do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further if the petitioner as identified on the I-140 petition is a fictitious name for Beverly-Elyad Corporation, the Beverly-Elyad Corporation should have submitted the initial petition, and the tax returns of Beverly-Elyad Corporation should have been submitted to the record for consideration of the petitioner's ability to pay the proffered position. Without further clarification of the identity

⁵ The state of California corporation database available at <http://Kepler.sos.ca.gov> indicates that the Beverly-Elyad Corporation filed for incorporation on January 3, 1996, and is in active status. (Accessed October 16, 2008)

of the actual petitioner, the AAO cannot determine whether the petitioner has the ability to pay the proffered position. Thus the AAO affirms the director's decision with regard to this issue.

Counsel's assertions on appeal cannot be concluded to provide sufficient clarification with regard to the petitioner's identity. Without establishing the relationship between Goodies of Beverly Hills and the Beverly-Elyad Corporation, the federal tax returns can also not be utilized in examining the petitioner's ability to pay the proffered wage based on its net income or net current assets. Further, the W-2 Forms submitted to the record cannot be utilized to examine any wages paid to the beneficiary as of the 2001 priority date and continuing. Thus, the petitioner that submitted the I-140 petition cannot demonstrate that it was able to pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

With regard to the director's comment with regard to the assets of one corporation not being available to another business's expenses, 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, 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. 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." For this reason, the petitioner was requested to clarify the precise relationship between Goodies of Beverly Hills and Beverly-Elyad, also of Beverly Hills.

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.