U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 17 2005

EAC 02 185 51755

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:

SELF-REPRESENTING

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a billiard's club and restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied the petition. 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.

On appeal, the petitioner submits neither a brief nor any additional evidence.

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 granting 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, 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 May 4, 2001. The proffered wage as stated on the Form ETA 750 is $9.21 per hour, which equals $19,157 annually.

On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner stated that it was established on January 6, 2000, and that it employs 43 workers.

In support of the petition, the petitioner submitted the approved ETA-750, application for labor certification; a letter from the beneficiary's former employer in Brazil, Restaurante Burgo Ltda.; and two copies of a monthly Massachusetts state sales tax receipts for January 2002 listing the petitioner by federal tax ID number as "Beloff Billiards Inc., Boston Billiard Club, [redacted]

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on November 7, 2002, requested additional evidence pertinent to that ability. The director also specifically requested a 2001 federal income tax return or the petitioner's annual reports for 2001 accompanied by audited or reviewed financial statements; and W-2 Wage and Tax Statements if the petitioner had employed the beneficiary.

In response, the petitioner's director of accounting, Anthony Asencio, asserted on corporate letterhead that the petitioner was established December 4, 1999, as Boston Billiard Club of Nashua, Inc., operating seven club-restaurants that operate under the name Boston Billiard Club. Among the club locations listed on the letterhead are the Nashua, New Hampshire work site for the proffered position and the petitioner's corporate headquarters at [redacted] In his statement, Asencio states that he is a certified public accountant[1] who does the petitioner's accounting and that for fiscal 2001 the Boston Billiard Club had sales of $12 million, a payroll of more than $3 million and more than 300 employees apparently working at the seven club locations. Asencio added, "These numbers are consistent with previous years and are projected at the same levels for 2002."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on August 15, 2003, denied the petition.

On appeal, the petitioner submits no brief, but on the Form I-290B states that the director erred by not finding the petitioner had established its ability to pay as a seven-store chain with more than 300 workers.[2]

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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, the petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

As was noted above, 8 C.F.R. § 204.5(g)(2) allows organizations which employ at least 100 workers to submit a statement from a financial officer stating that the U.S. employer is able to pay the proffered wage. This provision was adopted in the final regulation in response to public comment favoring a less cumbersome way for large,

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[1] On the Form ETA 750, [redacted] signed on February 2, 2001, as "general manager" of the Boston Billiards at Nashua, New Hampshire.

[2] On January 21, 2005, the beneficiary submitted an address change and stated that she was among a group of people defrauded by a Lowell, Massachusetts man who had misrepresented that he was an immigration attorney and able to process her preference visa petition. The beneficiary stated that she had paid the man, William Ansara, more than $7,000 to help process the petition. On September 19, 2003, the Massachusetts Attorney General's office issued a news release stating that the Suffolk Superior Court entered a consent decree against Ansara to enjoin him from further immigration-related work and alleging that he had failed to provide services as promised to 32 identified victims. *See, Matter of Load*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

established employers to demonstrate the ability to pay. See *Employment-Based Immigrants*, 56 Fed. Reg. 60897, 60898 (November 29, 1991). Although the director retains the discretion to reject the assurances of a financial officer in some cases, this alternative recognizes that large employers may have large net tax losses but remain fiscally sound and retain the ability to pay the proffered wage.

In this case, the petitioner has submitted the state sales tax returns and the statement of its chief financial officer but neither the requested 2001 tax return or any other financial statements, audited or reviewed. Further, the record contains the cited factual inconsistencies about the petitioner's correct corporate name and establishment date. If the evidence provided in accordance with 8 C.F.R. § 204.5(g)(2) is unclear in its support of the petitioner's ability to pay the proffered wage, the burden is on the petitioner to provide additional evidence dispelling that doubt. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986).

The director was correct to point out that the petitioner had not submitted documentation "to establish that the seven entities have any legal connection." The petitioner's submission of the federal tax ID number on the Massachusetts sales tax returns suggests the number may be in common use within the seven-store enterprise with which the petitioner is in some way affiliated. However, without more persuasive evidence, there is insufficient evidence for the assertion that the seven billiard outlets operate as one corporation. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The regulation at 8 C.F.R. § 204.5(g)(2) authorizes a director to request additional evidence in appropriate cases. However, the director specifically and clearly requested copies of its 2001 tax return, which could help decide whether the petitioner and its affiliates operate jointly or as separate entities. Instead, the petitioner's failure to submit the requested evidence may have precluded a material line of inquiry and, accordingly, shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 and continuously thereafter. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is documentation in the file that suggests that the underlying job offer was not valid pursuant to requirement of the Department of Labor regulations.

Among other requirements, the Department of Labor regulations that govern the labor certification process state that:

- The job opportunity has been and is clearly open to any qualified U.S. worker;
- The employer must document a "reasonable good faith effort" to recruit United States workers;
- The alien or his agent or attorney may not participate in the interview and consideration of U.S. applicants for the job offered; and,
- The employer must place an advertisement for the job opportunity in a newspaper of general circulation or in a professional, trade, or ethnic publication.

See 20 C.F.R. §§ 656.20(c)(8), 656.21(b)(1), 656.20(b)(3), and 656.21(g).

Documentation in the file provided by the beneficiary shows that the beneficiary and her agent, and not the petitioning employer, paid for and created the job advertisement for the job offered. This reasonably raises the possibility that the beneficiary or her agent participated in the consideration of U.S. applicants for the job. Obviously, such a practice means that the petitioning *employer* was not the entity that placed the required advertisements and brings into question whether that employer made a reasonably good-faith recruitment effort. Since the AAO is dismissing the instant appeal on other grounds, the AAO is not making any adverse finding regarding these issues nor is this office moving to invalidate the underlying labor certification. However, this issue should be addressed in any future proceedings in this matter.

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.