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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 02 2006

LIN-03-254-52064

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for Alien Worker as an Other Worker Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a grocery store. It seeks to employ the beneficiary permanently in the United States as a night manager. 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 the beneficiary had the experience required by the ETA 750. The director also found 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 also determined that the petitioner is an individual but that the intended employer is a corporation. The director accordingly denied the petition.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 15, 2001. On the Form ETA 750B, signed by the beneficiary on March 12, 2001, the beneficiary did not claim to have worked for the petitioner. The ETA 750 was certified by the Department of Labor on January 24, 2003.

The I-140 petition was submitted on October 21, 2003. On the petition, the petitioner claimed to have been established on July 11, 1991, to currently have two employees, to have a gross annual income of $502,508.00, and to have a net annual income of $10,092.93. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 26, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 19, 2004.

In a decision dated August 5, 2004, the director determined that the petitioner had not established that the beneficiary had the experience required by the ETA 750. The director also found 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 also determined that the petitioner is an individual but that the intended employer is a corporation. The director accordingly denied the petition.

On appeal, the petitioner submits a brief and additional evidence. The petitioner states on appeal that the evidence submitted prior to the director's decision and evidence newly submitted on appeal are sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period.

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).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of night manager. On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as follows:

14.	Education (number of years)		
	Grade School		8
	High School		4
	College		[blank]
	College Degree Required		[blank]
	Major Field of Study		[blank]
	Training - yrs		[blank]
	Experience		
	Job Offered	Yrs	1
	Related Occupation	Yrs	[blank]
	Related Occupation (specify)		[blank]
15.	Other Special Requirements		Willing and able to work night time hours as needed for operational basis.

The beneficiary states his or her qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
North Gujarat University Gujarat, India	[blank]	03/95	06/96	[blank]
LOC Nikatam Ahmad, India	General	92	94	yes

[remaining blocks blank]

The record contains a copy of a school leaving certification of the beneficiary dated July 2, 1994 showing her graduation from the 12th grade from N.B. Panchal High School, in Dangara, India, on May 31, 1994. That document is sufficient to establish that the beneficiary met the educational requirements of the ETA 750 as of the priority date.

The record contains a letter dated April 13, 2004 from the proprietor of a grocery store in Wilistone Park, New York, stating that the beneficiary worked for him as a night manager from July 1, 2000 until March 8, 2001, which is a period of eight months. However, the letter states experience which does not appear on the ETA 750B. As noted above, the beneficiary signed the Form ETA 750B on March 12, 2001.

The instruction to the ETA 750B, block 15, Work Experience, states as follows: "List all jobs held during the last three (3) years. Also list any other jobs related to the occupation for which the alien is seeking certification as indicated in item 9." (ETA 750B, block 15).

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains no explanation for the inconsistency between the information on the letter dated April 13, 2004 and the absence of any reference to that experience on the Form ETA 750B.

The April 13, 2004 letter was submitted prior to the director's decision. The record before the director contained no other evidence of the beneficiary's experience. The director found that the petitioner had failed to establish that the beneficiary had one year of experience in the offered position and stated that the failure of the evidence on that issue was sufficient reason to deny the petition. The decision of the director was correct on that issue, based on the evidence then in the record.

On appeal, the petitioner submits a letter dated September 29, 2004 from the owner of a convenience store in New York, New York, stating that the beneficiary worked for him as a night manager from January 1999 until April 2000. That letter therefore asserts that the beneficiary had one year and two months of experience in the offered position as of the priority date. However, like the letter submitted previously from a different employer, the September 29, 2004 letter states experience which does not appear on the ETA 750B. As noted above, the beneficiary signed the Form ETA 750B on March 12, 2001. The record contains no explanation for the inconsistency between the information on the letter dated September 29, 2004 and the absence of any reference to that experience on the Form ETA 750B. The evidence submitted on appeal therefore fails to overcome the decision of the director concerning the issue of the beneficiary's experience.

A second reason cited by the director for denying the petition was the petitioner's failure to establish its ability to pay the proffered wage during the relevant period.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. As noted above, the priority date in the instant petition is March 15, 2001. The proffered wage as stated on the Form ETA 750 is $9.50 per hour, which amounts to $19,760.00 annually.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 12, 2001, the beneficiary did not claim to have worked for the petitioner and no other evidence in the record indicates that the beneficiary has worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration

and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The I-140 petition was filed in the name of a private individual, and the type of business indicted on the I-140 petition is a grocery store. The ETA 750 was filed in the name of that same individual as the employer, and the ETA 750t also states that the type of business is a grocery store. The I-140 petition and the Form ETA 750 therefore both indicate that the petitioner is a sole proprietorship. Sole proprietors report income and expenses from their businesses on the Form 1040 U.S. Individual Income Tax Return. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the Form 1040 tax return.

In the instant petition, however, no Form 1040 tax returns were submitted in evidence. Rather, the petitioner submitted copies of Form 1120 U.S. Corporation Income Tax Returns of a corporation named Greencone, Inc., for 1999, 2000, and 2001. The petitioner also submitted a copy of a Form 7004 Application for Automatic Extension of Time to File Corporation Income Tax Return dated March 8, 2004 requesting an extension of time until September 15, 2004 to file the Form 1120 corporate income tax return of Greencone, Inc., for 2003. No copy of a federal tax return for Greencone, Inc., for 2002 was submitted in evidence.

The Form 1120's in the record state that the petitioner is the owner of 55% of the shares of Greencone, Inc.

In his brief on appeal the petitioner states the following:

> The last point on Page 3 of the denial claims that I did not intend to be the employer of the beneficiary. I do not understand? It appears that there is some confussion about the corpoartion and my name. I am the corporation and the corporation is me. I apologize if I made a mistake by putting my name as a petitioner instead of the corporation. I put my name as the petitioner because it was I who was going to sign the application.

(Petitioner's Brief, received October 4, 2004 (grammatical and spelling errors in the original)).

It is a basic rule of law concerning corporations 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). Whether the petitioner is an individual or is a corporation, the financial resources of other individuals, corporations or other legal entities cannot be considered in determining the petitioner's ability to pay the proffered wage. Therefore the Form 1120 corporate tax returns of Greencone, Inc., cannot be used to establish the petitioner's ability to pay the proffered wage.

The record also contains copies of unaudited financial statements of Greencone, Inc. Since those statements do not pertain to the petitioner, they provide no additional support to help establish the petitioner's ability to pay the proffered wage. Moreover, unaudited financial statements are not persuasive evidence in any event. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited.

The record contains no evidence relevant to the petitioner's financial situation. Therefore the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director treated the Form 1120 tax returns of Greencone, Inc., as if those returns pertained to the petitioner. The director's analysis was therefore incorrect, though the director noted later in his decision that the ETA 750 had been filed by an individual, not by a corporation. In any event, the director's conclusion that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period was correct, and the assertions of the petitioner on appeal and the evidence submitted on appeal fail to overcome the decision of the director on that issue.

The third reason stated by the director for denying the petition was that the petitioner is an individual but that the intended employer is a corporation.

The regulation at 8 C.F.R. § 204.5(c) states in pertinent part, "Any United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section 203(b)(1)(B), 203(b)(1)(C), 203(b)(2), or 203(b)(3) of the Act." The instant petition has been filed under section 203(b)(3) of the Act.

The statements in the petitioner's brief on appeal and the corporate tax returns of Greencone, Inc., submitted in evidence are sufficient to establish that the petitioner is not an employer "desiring and intending" to employ the beneficiary. Rather the evidence indicates that Greencone, Inc., is the intended employer. The petitioner therefore fails to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(c).

The finding of the director that the petitioner is not the intended employer was correct, and the assertions of the petitioner on appeal and the evidence submitted on appeal also fail to overcome the decision of the director on that issue.

The ETA 750 was certified with a private individual as the intended employer. Therefore, CIS cannot find that the intended employer is really a corporation. CIS cannot alter, add to or subtract from the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

If the grocery store where the beneficiary is to be employed is not a sole proprietorship owned by the individual who submitted the ETA 750 and if the grocery store never was never previously a sole proprietorship owned by that individual, the ETA 750 as certified by the Department of Labor cannot be used to support an I-140 petition by a corporation which claims to be an intending employer of the beneficiary. If in fact the grocery store has always been organized as a corporation, the corporation would have to obtain a new labor certification in its own name if it wished to submit an I-140 petition on behalf of the beneficiary.

In summary, the evidence fails to establish that the beneficiary had the required experience as of the priority date. Moreover, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and fails to establish that the petitioner is the intended employer of the beneficiary.

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.