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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B6

DATE: JUN 2 2 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision in part and withdrawing his decision in part. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion to reopen and will affirm the previous decisions of the director and the AAO as set forth in the AAO's December 7, 2010 decision. The petition remains denied.

The petitioner, [redacted] claimed that it is a research and publishing firm. It seeks to employ the beneficiary permanently in the United States as a publication manager.[1] A Form ETA 750, Application for Alien Employment Certification[2] approved by the Department of Labor (DOL), accompanied the petition.[3] Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. The director additionally concluded that the petitioner had not established its continuing financial ability to pay the proffered wage[4] because the two entities submitting financial documentation could not be collectively regarded as the beneficiary's actual employer.

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[1] 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[3] It is additionally noted that Dr. Hisham AlTalib is one of IIIT's officers as indicated by the tax returns contained in the record. He and the beneficiary share virtually the same surname. This issue requires clarification if IIIT sponsors the beneficiary on future employment-based petitions, or in any further filings on this matter. 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). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000).

[4] 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 either in the

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).[5] The regulation at 20 C.F.R. § 656.3 states:

> *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.

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)or (ii). *See* 8 C.F.R. § 204.5(c).

> at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

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> form of copies of annual reports, federal tax returns, or audited financial statements.

The proffered wage is $31,450 per year as stated on the Form ETA 750. The priority date as set forth on the Form ETA 750 is November 17, 2003. On Part B of the Form ETA 750, which the beneficiary signed on October 9, 2003, he claims that he has worked for the petitioner since June 19, 2001.

[5]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

> (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is noted that on appeal, the AAO determined that the beneficiary possessed the educational credentials required by the labor certification and withdrew that part of the director's decision. With reference to the petitioner who filed the labor certification as '[redacted]' and the Form I-140 petition as [redacted] the AAO found that the petitioner '[redacted]" has not established that it is the actual intended employer of the beneficiary or had demonstrated its ability to pay the proffered wage to the beneficiary. The AAO stated:

> This issue was raised in the director's decision relating to the petitioner's submission of federal tax returns bearing a different federal identification number (FEIN) than the one claimed on the Form I-140 as belonging to the petitioner. As herein initially stated, the petitioner styles itself on Part 1 of the Form I-140 as [redacted]" The federal employer identification number (FEIN) stated on Part 1 of the I-140 is [redacted] However, as is revealed in the supporting documentation submitted to demonstrate the petitioner's ability to pay the proffered wage, there is no business or legal entity by the name of '[redacted]" that is singularly associated with the FEIN as claimed on the Form I-140. Rather, there is a corporation identified as Reston Investments Inc. that individually holds a FEIN of [redacted] and there is a separate non-profit entity called the '[redacted] that is singularly associated with the FEIN of [redacted] as revealed by the Form 990(s), Return of Organization Exempt from Income Tax for 2003, 2004, 2005, and 2006.

The petitioner, through counsel, had asserted on appeal that both entities should be considered as the beneficiary's proposed employer and that this would support their collective ability to pay the proffered wage. A letter, dated August 18, 2000, from "[redacted]" relevant to an H-1B petition submitted to the U.S. Citizenship and Immigration Services [USCIS], was provided in which [redacted] sought the temporary employment of the beneficiary. In this letter, signed by [redacted] it states that [redacted] is a [redacted] investment and management corporation and that included in its management services, it is the "employer and management agent" for the [redacted]

The AAO determined that as there is no entity by the name of "[redacted] associated with the singular FEIN number given on the Form I-140, and '[redacted]' represented itself on the Form ETA 750 as the "employer," the petitioner '[redacted]' had not established that it was the beneficiary's proposed actual employer.

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[6] The AAO noted that the petitioner '[redacted]' had filed seven Immigrant Petitions for Nonimmigrant Workers (Form 1-129), on the beneficiary's behalf using one or the other of the two different FEINs with each petition. Four of the Form I-129s represented that FEIN [redacted] is held by [redacted], individually. The others used the FEIN for [redacted]

On January 06, 2011, the petitioner, through counsel, filed a motion to reopen. *See* 8 C.F.R. § 103.5(a)(2). A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included with the motion, counsel submits new evidence related to the issue of who is the beneficiary's actual proposed employer. The petitioner, through counsel, now asserts that [redacted], alone, is the beneficiary's current employer and proposed actual employer. [redacted] is a "payroll service provider" that issues Forms W-2s and files quarterly tax returns. A copy of a 1996 '[redacted]' between [redacted] and [redacted] was submitted in support of counsel's argument. The contract is signed by the owner of IIIT and the manager of [redacted], but the signatures are illegible and their identities are not apparent. The document indicates that it commenced on January 1, 1996 and was valid for two years[8] with automatic renewal every two years unless otherwise terminated. It provided for management services to be provided to [redacted] by [redacted]. "for and on behalf of Owner, to the Owner and its affiliates all over the world." [redacted]

[7] The contract identifies [redacted] as a non-profit corporation registered in [redacted] and [redacted] as a [redacted] corporation. The two companies are separately registered in separate states. *See* online [redacted] corporation/business entity search records at [redacted] (accessed June 20, 2011) and online [redacted] corporation records at [redacted] (accessed June 20, 2011). One is a corporation and the other a non-profit entity. The two companies are separate and distinct. 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'r 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 [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

[8] As the contract is from 1996, the document and information contained therein would not be "new" evidence to meet the terms of a motion to reopen. Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding. The word "new" is partially defined as "1: having recently come into existence : recent, modern ; 2*a (1)* : having been seen, used, or known for a short time : novel <rice was a *new* crop for the area> *(2)* : unfamiliar <visit *new* places>. *See* Merriam –Webster HTTP://WWW.MERRIAM-WEBSTER.COM/DICTIONARY/NEW?SHOW=0&T=1308684446 online dictionary (Accessed June 21, 2011).

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

was to pay [redacted]. a minimum of $50,000 per year plus actual cost, with [redacted] providing cost invoices to IIIT. The "Statement of Work" appended to the agreement states that [redacted]. will provide supervision and management of [redacted] employees, including "indentifying key personnel, negotiate and conclude employment agreements in consultation with and on behalf of the owner." Other services to be provided by [redacted] include financial services, publication strategies, investment opportunities and advice on all corporate and tax related matters. It is noted that the scope of [redacted] "supervision and management" is not set forth with any detail and its obligation to file quarterly tax returns, Forms 941 and Forms W-2s for [redacted] is not mentioned.

According to a sworn statement, dated January 5, 2011, by [redacted] as Vice President of [redacted], contrary to the written management contract, all aspects of the beneficiary's work is controlled by [redacted], and [redacted]. is described as merely the payroll services provider. Another sworn statement, dated January 5, 2011, signed by [redacted], indicates that she is an accountant who handles payroll services for [redacted]. She states that she processes and issues payroll every month to [redacted] employees, including the beneficiary and that [redacted] reimburses [redacted] Inc. for these payments. They are not taken as income by [redacted], but are reflected as accounts receivable on [redacted] general ledger detail report as "~~P/R~~ Payroll Journal" entries. Copies of these general entries are provided. It is unclear where these amounts are reported on [redacted]s income tax returns. [redacted] adds that [redacted] files quarterly federal tax returns reflecting wages paid to IIIT workers and files Forms W-2s, which she prepares, for [redacted] to be issued to IIIT employees. It is noted that unsigned copies of [redacted] Forms 941, employer's federal tax return for each of the quarters of 2003 lists one employee but states that total wages paid of $206,158.86, $182,550.94, $162,680.59, and $185,499.50, respectively. Copies of other years' Form(s) 941 reflect wages paid for 10-15 employees, however no individual employee listings are part of these copies. The petitioner has not submitted copies of any state quarterly wage reports such as wage and/or unemployment returns that would list the employer and identify the employees. Further, it is noted that no executed copies of Internal Revenue Service (IRS) Form 8655 "Reporting Agent Authorization," which authorizes agents for taxpayers to sign for and file certain returns such as the Forms 941 have been submitted by [redacted]. No certified Form 2678, Employer/Payer Appointment of Agent has been submitted either that would similarly indicate such authorization. It may not be concluded that the IIIT has clearly established that it is the proposed actual employer.[9]

[9] The AAO's December 7, 2010 decision addressed the analysis and factors considered in determining the actual employer. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)): In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine."

It remains that the stated Form ETA 750 employer of '[redacted]' as represented to DOL in securing the certification of the labor certification did not exist as an individual employer, and, as such, could not represent a *bona fide* job offer.[10] Similarly, the named petitioner, '[redacted]" specified on part 1 of the Form I-140 filed in the instant matter did not exist as a distinct corporate entity with the FEIN of [redacted][11] The two companies are separate entities, one for-profit and the other non-profit. The Form ETA 750 and Form I-140 do not support [redacted] or [redacted]. singly as the designated actual employer based on the record before us.

Although, as noted in the AAO's December 7, 2010 decision, the petitioner established that the beneficiary has the requisite educational credentials for the certified position described in the Form ETA 750, the petitioner, [redacted] failed to demonstrate that it is the actual employer of the beneficiary. Further, even if IIIT is now claiming that it be considered as the actual employer, the Form ETA 750 as submitted to DOL, and the Form I-140 were not filed by an existing legal or business entity with a singularly associated FEIN and could not make a *bona fide* job offer.

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.

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[10] A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(c)(2). It is also observed that IIIT's Form 990, Return of Organization Exempt from Income Tax for 2003 through 2008 were filed with the IRS without authorized signatures from an officer of the entity, due to concerns about self-incrimination. A statement describing the lack of officer signatory authorization accompanied the tax returns. As such, the returns carry less evidentiary weight than would ordinarily be the case. In any future proceedings involving an employment-based petition that would examine the financial profile for this period of time, IIIT, should consider submitting additional forms of financial information consistent with the requirements of 8 C.F.R. § 204.5(g)(2). It is additionally noted that the beneficiary's job title as shown on IIIT's 2005, 2006, and 2007 Form 990s was as a marketing manager, not as alleged, as a publication manager, the job offered as described in the Form ETA 750. Also, the compensation paid to the beneficiary as shown on IIIT's Form 990s for 2005, 2006, and 2007 appears to have exceeded that which was reported on his Forms W-2s that were issued by [redacted]. This raises the question of whether he was additionally separately paid by [redacted] despite [redacted]s claimed role as [redacted] payroll agent. 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. It is incumbent upon 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. *See Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988).

[11] On Part 5 of the Form 1-140, it is stated that the petitioner was established in 1995, employs eleven workers, and claims a gross annual income of $3,456,985 (Unaudited) and an annual net income of $183,019 (Unaudited). This information does not appear to apply to [redacted]

ORDER: The motion to reopen is granted. The AAO affirms its prior decision dated December 7, 2010. The petition remains denied.