

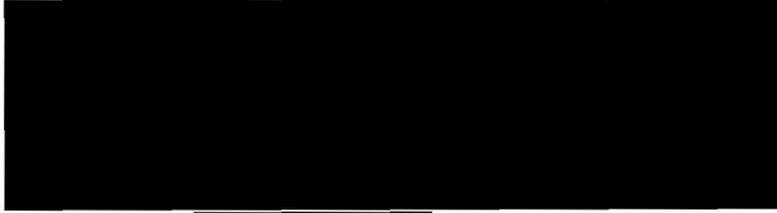
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U.S. Citizenship
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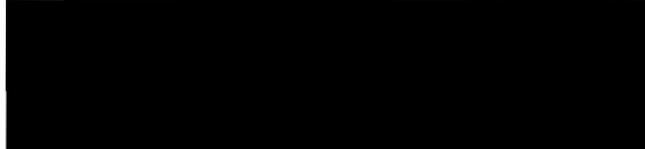
Office: VERMONT SERVICE CENTER

Date: **SEP 25 2006**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a retail business. It seeks to employ the beneficiary permanently in the United States as a manager. 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.

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 unavailable.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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. 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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$24.77 per hour (\$51,521.60 per year). The Form ETA 750 states that the position requires one year of experience.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; U.S. Internal Revenue Service Form tax returns for four different corporations [REDACTED] New

York, New York¹) and three other corporations not at the New York, New York address; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on October 18, 2005, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures and dates, and audited financial statements for 2001 and 2002, and, to explain how the various corporations for which tax returns were submitted were related.

The director also requested that the petitioner provide copies of the beneficiary's W-2 Wage and Tax Statements for 2001 until the present.

In response to the request for evidence, counsel submitted copies of the following documents: the beneficiary's the U.S. Internal Revenue Service (IRS) Form 1120 tax returns for different corporations.

The director denied the petition on March 26, 2006, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director found that the petitioner had not submitted documentation to show how the various companies indicated were interrelated or any documentation to show if any of the companies indicated were financially liable for another company (i.e. the petitioner, [REDACTED]).

On appeal, counsel asserts a brief would be submitted within 30 days, but no brief was submitted.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence was submitted to show that the petitioner employed the beneficiary. The labor certification stated that the petitioner employed the beneficiary from April 1996 to present (i.e. April 24, 2001). No wage information was submitted.

Counsel has submitted the following documents to accompany the appeal statement: a cover letter dated June 15, 2006; the original I-797C Notice of Action; an index; an affidavit; copies of share certificates; and the following tax returns:

In 2001, [REDACTED] reported a taxable income loss of approximately <\$8,900.00> (the figure is partially obscured on the return). The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero. [REDACTED] was not identified in the record of proceeding as the petitioner or employer of the beneficiary although the street address coincides with the address given in both the petition and labor certification.

- Form 1120 U.S. Corporation Income Tax return for 2004, for [REDACTED] New York, New York, incorporated July 20, 2004.
- Form 1120 U.S. Corporation Income Tax returns for 2000, 2002, and 2003 for World of [REDACTED] New York, New York, incorporated January 27, 1997.
- Form 1120 U.S. Corporation Income Tax returns for 2003 and 2004 for [REDACTED], New York New York incorporated April 11, 2003.
- Form 1120 U.S. Corporation Income Tax returns for 2000, 2001, 2002, and 2004 for [REDACTED] of [REDACTED], New York, New York 10019 incorporated January 8, 1995.
- Form 1120 U.S. Corporation Income Tax returns for 2003 and 2004 for [REDACTED] New York, New York 10016 incorporated August 23, 2004.
- Form 1120 U.S. Corporation Income Tax returns for 2000, 2003, and 2004 for World of [REDACTED] New York, New York 10021 incorporated April 26, 1994.
- Form 1120 U.S. Corporation Income Tax returns for 2002 and 2003 for Manhattan [REDACTED] New York, New York 10021 incorporated January 22, 1997.

Counsel also submitted the personal U.S. Income Tax returns for [REDACTED] and spouse for the years 2002, 2003 and 2004.

No tax returns were submitted for [REDACTED] located at [REDACTED] New York, New York as stated in the petition and the labor certification. This location was identified in the record of proceeding as the address of the employer. No address for the corporations mentioned above or the personal residence addresses noted in the personal tax returns submitted correspond to that address. According to a letter from [REDACTED] attested May 25, 2006, there was a [REDACTED] store located at that [REDACTED] New York location but it had been closed as its "...income ... was not sufficient to pay his salary, but the corporate group has a combined income that would be sufficient to pay his salary."

Based upon the corporate tax returns submitted by the petitioner, each retail store at each location is incorporated individually. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders (in this case the personal assets of [REDACTED] and his spouse²) 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.

Also, since the petitioner identified as the "[REDACTED] store located at that [REDACTED] New York, is closed and ceased doing business, it cannot have a successor in interest. In order for a "successor in interest" determination to be made, the following documentation should be submitted along with a new I-140 petition:

² However, there is evidence in the record of proceeding, share certificates, that ownership of the various within noted corporations devolved to [REDACTED] No financial evidence was submitted for Mr. [REDACTED]

a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). Since none of these necessary requirements have been met, for purposes of determining the ability to pay the proffered wage on and after the priority date, the AAO finds that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.