

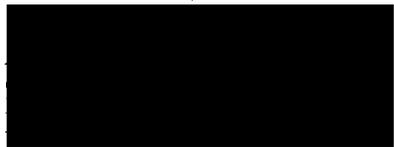
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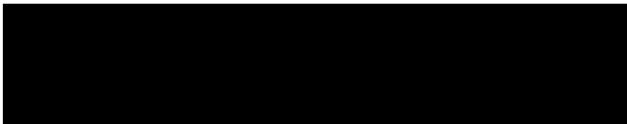
Date: FEB 20 2007

IN RE: Petitioner:
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:



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

The petitioner is a memory solution provider and PC [personal computer] system builder. It seeks to employ the beneficiary permanently in the United States as an electronic technician, computer, peripherals and memory chips. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the 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. Specifically, the petitioner did not submit requested evidence as requested by the director within the allotted time period. 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.¹

As set forth in the director's denial dated May 23, 2005, 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.

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 CFR § 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).

¹ Found in the record of proceeding is an I-140 petition submitted by CST Environmental Inc. for the beneficiary accompanied by a labor certification with all exhibits as filed February 10, 2006 that was approved by the director on July 7, 2006. The CIS records identification number is WAC 06 103 51082.

Here, the Form ETA 750 was accepted on April 16, 2001. The proffered wage as stated on the Form ETA 750 is \$48,027.00 per year. The Form ETA 750 states that the position requires two years experience or two years of experience in the related occupation, technician, computer and peripherals.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

With the petition, counsel had submitted copies of the following documents: the Form ETA 750 Application for Alien Employment Certification with its amendments; a letter from Shecom Computers dated February 23, 2004; two U.S. federal tax returns Form 1120 for Shecom Corporation for years 2001 and 2002 as well as documentation concerning the qualifications of the beneficiary.

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 February 7, 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 signature(s), and audited financial statements from April 16, 2001, to present. The director informed the petitioner that Shecom Corporation "has lost all corporate rights and powers," and, that the petitioner, Shecom Computers must demonstrate it has "independently" the ability to pay the proffered wage.

In response to the director's request of February 7, 2005, on May 25, 2005, counsel submitted copies of the following documents: a letter requesting an extension to submit evidence dated May 2, 2005; an explanatory letter dated May 17, 2005; and, a U.S. federal tax return Form 1120 for [REDACTED] for tax year 2003.

Counsel had submitted two items of correspondence in this matter both dated May 12, 2005 (that were apparently received after the request for evidence deadline date for response). In one letter, counsel informed the director that [REDACTED] had initiated bankruptcy proceedings. Further, among other information, counsel informed the director that CST Environmental Inc. has offered the beneficiary a "new job for the same position" and, that according to *American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)*, counsel stated that "we are filing a substitution of employer." A job offer letter from CST Environmental Inc., also dated May 12, 2005, is enclosed with this correspondence.

In the second letter also dated May 12, 2005, counsel again recounted the information and requests stated above in the first letter. In this second letter counsel submitted the following documents: an attorney's certification of the attached documents dated May 12, 2005; Form I-797C, notice of receipt evidencing the filing of the Form I-140 petition by [REDACTED] for the beneficiary along with a copy of the petition; the original labor certification with a priority date of April 16, 2001; the original exhibits submitted with the petition; Form I-797C, notice of receipt evidencing the filing of the Form I-485 application by the beneficiary along with that form; and, a job offer letter from [REDACTED] c., also dated May 12, 2005.

² 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 evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on November 6, 1984, to have a gross annual income of \$9,724,508, and to currently employ twenty workers.

The director denied the petition on May 23, 2005, 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. Specifically, the director found that the petitioner failed to submit the requested evidence, and, that on the evidence submitted, [REDACTED] were separate entities.

On appeal, counsel asserts that the director erred in holding that [REDACTED] [sic] Corporation are two separate entities." According to counsel the information stated on the I-140 petition filed was in whole or in part for [REDACTED] specifically the Internal Revenue Service Federal Employer Identification number (FEIN) and also information included in part 5, section 2 of that form.

Counsel asserts that [REDACTED] was doing business as [REDACTED] and implied on appeal, although he did not assert, that both corporations were actually the same entity.

Counsel contends that the director fails to take into consideration AC21 and his request to "substitute an employer."

Counsel's assertion on appeal that the petition is still "approvable" due to the terms of AC21 is incorrect. The AAO does not agree that the terms of AC21 make it so that the instant *immigrant petition* can be approved despite the fact that the petitioner has not demonstrated its eligibility. As noted above, AC21 allows an *application for adjustment of status*³ to be approved despite the fact that the initial job offer is no longer valid. The language of AC21 states that the I-140 "shall remain valid" with respect to a new job offer for purposes of the beneficiary's application for adjustment of status despite the fact that he or she no longer intends to work for the petitioning entity provided (1) the application for adjustment of status based upon the initial visa petition must have been pending for more than 180 days and (2) the new job offer the new employer must be

³ The AAO notes that after the enactment of AC21, CIS altered its regulations to provide for the concurrent filing of immigrant visa petitions and applications for adjustment of status. This created a possible scenario wherein after an alien's adjustment application had been pending for 180 days, the alien could receive and accept a job offer from a new employer, potentially rendering him or her eligible for AC21 portability, prior to the adjudication of his or her underlying visa petition. A CIS memorandum signed by William Yates, May 12, 2005, provides that if the initial petition is determined "approvable", then the adjustment application may be adjudicated under the terms of AC21. See *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twentifirst Century Act of 2000 (AC21) (Public Law 106-313)* at 3. The AAO notes that even under the guidance set forth in this memorandum, the initial petition is reviewed on its own merits, without consideration of the new job offer or the *bona fides* of the new prospective employer. Since this consideration takes place in the context of an the adjudication of an alien's application for adjustment of status, the proper venue for making such an argument is with the CIS official with jurisdiction over the application for adjustment. Further, private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

for a "same or similar" job. A plain reading of the phrase "will remain valid" suggests that the petition must be valid *prior* to any consideration of whether or not the adjustment application was pending more than 180 days and/or the new position is same or similar. In other words, it is not possible for a petition to remain valid if it is not valid currently. The AAO would not consider a petition wherein the initial petitioner has not demonstrated its eligibility to be a valid petition for purposes of section 106(c) of AC21. This position is supported by the fact that when AC21 was enacted, CIS regulations required that the underlying I-140 was approved prior to the beneficiary filing for adjustment of status. When AC21 was enacted, the only time that an application for adjustment of status could have been pending for 180 days was when it was filed based on an approved immigrant petition. Therefore, the only possible meaning for the term "remains valid" was that the underlying petition was approved and would not be invalidated by the fact that the job offer was no longer a valid offer.

Turning to the subject case, 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, Citizenship and Immigration Services (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).

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. There is no record of evidence that the petitioner employed 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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Counsel has submitted tax returns of [REDACTED]⁴ since bankrupt according to counsel, to prove the petitioner'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.

As already stated, on appeal, counsel asserts that the director erred in holding that "[REDACTED] and [REDACTED] Corporation are two separate entities." According to counsel the information stated on the I-140 petition filed was in whole or in part for Shecom Corporation, specifically the Internal Revenue Service Federal Employer Identification number (FEIN) and also information included in part 5, section 2 of that form. Counsel asserts that [REDACTED] was doing business as [REDACTED], and implied on appeal, although he did not assert, that both corporations were actually the same entity.

There is no information such as a coincident of business addresses between [REDACTED] Corporation, or a fictitious name filing to tie the two entities as named together, that would be independent objective evidence of counsel's contention that the corporation did business in the fictitious name of Shecom Computers. We find that there is insufficient evidence presented, as aforesaid, to determine whether or not the two named organizations are one and the same. If counsel asserts that [REDACTED] was doing business as [REDACTED] is [REDACTED] included in the bankruptcy? Counsel has failed to provide evidence on this issue. Counsel contentions are inconsistent and contradictory on their face. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Taking counsel assertions on their face, if counsel states that [REDACTED] is now in bankruptcy, counsel must provide information concerning this bankruptcy to adjudicate this case. For example, counsel has not indicated if [REDACTED] is in Chapter 7 or 11 bankruptcy (reorganization or liquidation); whether a court appointed trustee or the owner-in possession is the true party of interest in this matter; or, even if the bankruptcy court has assumed the obligation to employ the beneficiary and pay the proffered wage. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

⁴ Shecom Corporation stated net incomes of \$990,027.00 and \$2,175,835.00 for tax years 2001 and 2002, and for tax year 2003, a loss of \$5,640,739.00.

Counsel's assertions on appeal cannot be concluded to outweigh the lack of evidence present in this matter regarding the financial ability of the petitioner to pay the proffered wage.

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.