



U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 08 2008
SRC 06 272 51910

IN RE: Petitioner: [REDACTED]
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:



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 director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Persian specialty chef. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor.¹ 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 2002 priority date of the visa petition. 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.

As set forth in the director's September 22, 2006 denial, 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. The AAO notes that the record also refers to the instant petitioner being a successor in interest to the petitioner's owner's former or current restaurant, Shirin Restaurant, Woodland Hills, California. Although the director did not address this issue in her decision, the AAO will examine whether the current petitioner is a successor in interest to the applicant that filed the ETA Form 750 for the beneficiary.

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.

¹ Part A of the ETA Form 750 identifies the employer of the beneficiary as Shirin Restaurant, 21826 Ventura Boulevard, Woodland Hills, California. Other documents in the record indicate the present petitioner was incorporated on March 17, 2005, and that the present petitioner's owner also owned Shirin Restaurant, a California corporation also operating as a restaurant. Copies of documents entitled "Asset Purchase Agreement" and accompanying amendments suggest that Shirin Restaurant was sold to [REDACTED] as of October 2003. The 2003 tax return submitted to the record for Shirin Restaurant also contains a Form 4797 that indicates the sale of business equipment, goodwill, leasehold improvement and license as of October 24, 2003. The AAO also notes that the state of California's Secretary of State Business Search database as of December 7, 2007 describes the Shirin Restaurant, Inc.'s current business status as suspended.

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 C.F.R. § 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).

Here, the Form ETA 750 was accepted on February 20, 2002. The proffered wage as stated on the Form ETA 750 is \$9.67 an hour, or \$20,113.60 per year. The Form ETA 750 states that the position requires two years of experience in the proffered job.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.² Relevant evidence submitted on appeal includes counsel's brief. The record also contains the Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2002 and 2003, for Shirin Restaurant, Woodland Hills, California; a copy of a new uncertified ETA 750 that indicates the instant petitioner is the employer, and that the beneficiary must have completed eight years of grade school, four years of high school and have two years of work experience in the proffered job; a copy of an Asset Purchase Agreement document and amendments with regard to the sale of Shirin Restaurant to [REDACTED];³ a copy of the instant petitioner's articles of incorporation as Club 41 Restaurant, Inc., as of March 17, 2005; a copy of a restaurant menu in English and another language with no identification as to the restaurant's name; a letter of work verification for the beneficiary with translation that does not identify the beneficiary's former employer's name, or address; and copies of lawsuits filed by both the instant petitioner's owner, his spouse and the initial petitioner, Shirin Restaurant, Inc. and by the apparent buyer of Shirin Restaurant, Inc., for breach of contract terms stipulated to in the Asset Purchase Agreement. These lawsuits were filed in the Los Angeles Superior Court on March 19, 2004 and May 14, 2004. The record contains no further evidence of the petitioner's ability to pay the proffered wage or the beneficiary's qualifications.

On appeal, counsel states that the current petitioner is a successor in interest to the original applicant, Shirin Restaurant, as it has taken over all rights and assets of the applicant with the same business activity being the operation of a mixed cuisine restaurant. Counsel states that on February 20, 2002, the predecessor filed a Form ETA 750 that was approved. Counsel states that the director's decision dated September 22, 2006 denied the I-140 petition solely based on the director's determination that the petitioner did not have the ability to pay the proffered wage.

With regard to the petitioner's ability to pay the proffered wage, counsel cites *Matter of Sonogawa*, I&N Dec. 612 (BIA 1967) for the proposition that the totality of the petitioner's circumstances should be considered.

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).

³ These documents are dated from April 29, 2003 to October 23, 2003.

Counsel states that the instant petitioner demonstrates an increase in gross profits each year in its tax returns, and that the petitioner is thriving since its inception. Counsel further notes that the petitioner's tax returns disclose several tax maneuvers designed to minimize taxation as a S Corporation, but that these legal and tax planning acts should not be construed to demonstrate the petitioner's financial instability. Counsel cites to an unpublished AAO decision in which a petitioner had established its financial viability through evidence of its existence for thirteen years, its prior outsourcing of work to be performed by the beneficiary in-house, its high gross receipts, its steady annual profits, its sustained balances in multiple bank accounts, and the fact that its adjusted gross income was consistently higher than the proffered wage.

Counsel then states that the director's analysis of the petitioner's tax return for tax year 2002 contains several inconsistencies. Counsel states that while the petitioner's taxable income is accurately described as \$7,153, the petitioner's total assets are \$43,410.⁴ Counsel further asserts that the petitioner's liabilities, excluding capital stock in the amount of \$100 and retained earnings in the amount of \$31,837, are \$10,573, and that the petitioner's net assets thus are \$32,337, which is sufficient to pay the proffered wage of \$20,113.60. Counsel states that both capital stock and retained earnings should be excluded as true liabilities because of the nature of these two items, and provides definitions for both capital stock and retained earnings from websites, including Investopedia.com, Barron's, and wikipedia.com.

With regard to the petitioner's tax return for tax year 2003, counsel notes some changes in the petitioner's corporate structure, namely the sale of property and equipment, that resulted in a gain for the petitioner of \$313,830.⁵ Counsel states that the sale profits support the assertion that the petitioner is able to pay the proffered wage in tax year 2003.

The evidence in the record of proceeding does not indicate how the instant petitioner is structured, as there are no tax returns submitted to the record for the instant petitioner. On the petition, the petitioner claimed to have been established on March 17, 2005, to have a gross annual income in excess of \$100,000, a net annual income in excess of \$30,000, and to currently have five employees. On the Form ETA 750, signed by the beneficiary on February 12, 2002, the beneficiary did not claim to have worked for the original applicant.

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).

On appeal, counsel states that the petitioner who submits the instant petition is a successor-in-interest to the applicant that filed the Form ETA 750; however, counsel submits no further evidentiary documentation to support this assertion. The assertions of counsel do not constitute

⁴ The AAO notes that this figure is the petitioner's total assets, identified on line 15, Schedule L.

⁵ The AAO notes that this sum is reflected as additional income on Shirin Restaurant's Schedule K for tax year 2003, and would have affected positively the S Corporation's taxable income for tax year 2003.

evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, the AAO notes that the record contains no evidence that the petitioner qualifies as a successor-in-interest to Shirin Restaurant, the original applicant. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The record, based on the original applicant's tax return for tax year 2003, only supports the fact that the equipment, good will, license and leasehold of Shirin Restaurant were sold to [REDACTED] in October 2003. If this is indeed the case, [REDACTED] would be the successor in interest, not the current petitioner.

Moreover, the petitioner must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The AAO further notes that if the instant petitioner could establish that it is the successor-in-interest to the original applicant on the Form ETA 750, it would still have to establish its ability to pay the proffered wage as of tax year 2004, and until the beneficiary obtains lawful permanent residence.

The AAO notes that the only tax returns found in the record are those of the original applicant. As a result, counsel's comments on the tax returns submitted to the record are applicable only to the original applicant, and not to the instant petitioner. The record contains no evidentiary documentation as to the instant petitioner's ability to pay the proffered wage. In fact, the record contains no evidence that establishes any current financial relationship between the current petitioner and Shirin Restaurant, the original applicant. The AAO notes that both businesses have distinct Employer Identification Numbers (EIN) which establishes they are two distinct businesses.

Even if the current petitioner's owner could establish that he is still the owner of Shirin Restaurant, the original applicant, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation'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 the current petitioner's shareholders or of other enterprises or corporations owned by the petitioner's shareholders or owners cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Thus, the AAO determines that the current petitioner, Club 41 Restaurant, Inc., is not a successor in interest to the original applicant, Shirin Restaurant. Therefore, the tax returns for Shirin Restaurant, the business that submitted the ETA Form 750 for the beneficiary, for tax years 2002 and 2003 are irrelevant to these proceedings. The petitioner has submitted no regulatory-prescribed evidence to establish its continuing ability to pay the proffered wage. Therefore, the petition shall be denied.

On appeal, counsel cites an unpublished AAO decision for the proposition that other factors in addition to the petitioner's net income can be examined in determining whether a petitioner has the ability to pay the proffered wage. Counsel does not provide a published citation for this previous AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, the circumstances of the petitioner in the unpublished AAO decision are not analogous to the circumstances of the instant petitioner, with regard to longevity, gross profits, and steadily increasing profits. In addition, counsel's reference to the petitioner's adjusted

gross income suggests that the petitioner in the unpublished AAO decision is a sole proprietorship. The instant petitioner has not established that it is a sole proprietorship.

On appeal, counsel also cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). *Matter of Sonogawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

As previously stated, the instant petitioner has not established that it is a successor-in-interest to the original petitioner that filed the Form ETA 750, and has not submitted any further evidence to establish its ability to pay the proffered wage. It also has not submitted any of its tax returns to the record to establish any of its own overall financial circumstances. Thus, the AAO does not find counsel's reference to *Matter of Sonogawa* to be relevant to the present proceedings.

Based on the lack of relevant evidence as to the current petitioner's relationship to the original ETA 750 applicant, Shirin Restaurant, the AAO will not examine the tax returns for Shirin Restaurant submitted to the record. Without further clarification of the record, the instant petitioner has not established its ability to pay the proffered wage, or to use the approved ETA Form 750. The appeal is dismissed.

The evidence submitted does not establish that the instant petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the instant petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Persian specialty chef. The applicant must have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his high school academic credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury on both February 12, 2002⁶ and August 3, 2006.

With regard to the duplicative uncertified Form ETA 750, if the petitioner had established it was a successor in interest to Shirin Restaurant, it could have submitted the initial certified Form ETA 750 with the instant petition. The record is not clear why the petitioner submitted an additional Form ETA 750 that is not certified.

The uncertified ETA 750 indicates the instant petitioner's name as the applicant. Both Forms ETA 750 indicate that the beneficiary had worked for Teraseh Restaurant, Valiasr Avenue, Tehran, Iran from January 1, 1999; however, the dates of actual employment differ between the two Forms ETA 750. In the certified Form ETA 750, the document indicates that the beneficiary worked for Teraseh Restaurant from January 1, 1999 to the date that the beneficiary signed the initial ETA 750 on February 12, 2002, while the uncertified Form ETA 750 states the beneficiary worked for the Teraseh Restaurant in Tehran from January 1, 1999 to August 3, 2006. In the initial Form ETA 750, Part A, Section 14, the applicant did not indicate that the beneficiary was required to have any education but did require the beneficiary to have two years of work experience in the proffered position. The uncertified 2006 ETA 750, Part A, Section 14, indicated that the beneficiary was required to have eight years of grade school, four years of high school and two years of work experience in the proffered position. On Section 11, Part B, both Forms ETA 750 indicated that the beneficiary had attended Koasar High School in Iran from September 1994 to June 1998 and obtained a high school degree.

The AAO notes that as the second Form ETA 750 is not certified by the Department of Labor, it is given no weight in these proceedings. With regard to the certified ETA 750 found in the record, it is also given no weight as the applicant is identified as Shirin Restaurant, and not as the instant petitioner, Club 41 Restaurant, Inc. Nevertheless the AAO will comment on the initial letter of work verification submitted to the record with the I-140 petition.

This letter of work verification states that the beneficiary worked as an employee at Teraseh Restaurant, Valiasr Avenue, Teheran, Iran, since January 1999. The letter-writer for this document is identified as "Restaurant Management Manosian." Although the original letter of work verification appears to have a letterhead, the translation of the letter does not identify the former employer's address, who wrote the letter of work verification, or any contact information for the letter-writer.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

⁶ This date is somewhat illegible on the first Part B submitted by the petitioner.

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Based on the translated version of the letter of work verification, the petitioner has not provided any information as to the name, address, or title of the beneficiary's former employer. Furthermore, the translation of the letter of work verification submitted to the record does not appear to comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Although the letter of work verification contains a certification that the translator is fully competent to translate from Farsi to English, and that the translation is accurate and complete to the best of the translator's knowledge, the translator does not appear to have translated the letterhead on the letter of work verification, and thus has not provided a full English language translation.

Based on either the omission of relevant information by the translator, or the actual lack of detail in the letter of work verification as to the employer's identification and location, the AAO gives no weight to the petitioner's initial letter of work verification. Thus, even if the certified Form ETA 750 has been filed by the instant petitioner, based on the letter of work verification submitted to the record, the instant petitioner would not have established that the beneficiary has the requisite two years of prior work experience as stipulated on the certified Form ETA 750. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.