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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC 04 022 51795

Date: **APR 13 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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, [REDACTED], is a night club entertainment theatre. It seeks to employ the beneficiary permanently in the United States as a set designer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director concluded that the petitioner had failed to demonstrate that the beneficiary possessed the requisite qualifying work experience as of the visa priority date. The director also determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner,¹ through its owner, maintains that the petitioner has demonstrated that the petition is eligible for approval and alleges that former counsel's negligence was responsible for deficiencies contained in previous submissions. The petitioner claims on the notice of appeal that former's counsel's law office did not inform the petitioner's owner about the director's request for evidence until the last week of September and told him that the only documents needed were "my Federal Income Tax declaration for years 2001-2003." The owner also claims that he was not informed about annual reports or audited financial statements, copies of state quarterly wage reports or evidence that established that the beneficiary had the foreign experience claimed on the ETA 750.

On the notice of appeal, the petitioner requested an additional thirty (30) days to submit a brief and/or additional evidence. The petitioner subsequently submitted additional evidence and a brief. This decision will be rendered on the record as it currently stands.

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).

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 at 8 C.F.R. § 204.5(1)(3) further provides:

¹ The petitioner filed this appeal representing itself. The petitioner also filed a subsequent I-140 on October 5, 2005, through current counsel, sponsoring the same beneficiary on the same ETA 750.

(ii) *Other documentation—*

(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.

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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on January 29, 2001.² The proffered wage is set forth as \$23.40 per hour annualized to \$48,672 per annum.

On Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on October 31, 2003, the petitioner claimed that it was established on February 5, 1995, and currently employed 16 workers.

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

Part 14 of the ETA 750 specifies the education and experience required for the certified position. The only requirement is two years of employment experience in the job offered of set designer.

On Part 15 of the ETA 750B, originally signed by the beneficiary on December 14, 2000 and as amended on May 5, 2001, he claims to have worked as a set designer for [REDACTED] in Beirut, Lebanon, from April 1996 to December 2000. A name of "[REDACTED]" appears under the name of the night club on Part 15 of the ETA 750B relevant to this job. The beneficiary does not identify any other jobs held on the ETA 750B.

Relevant to the employment experience gained in the certified position of a set designer, with the petition and in response to the director's request for evidence issued on August 12, 2004 with response due on November 4, 2004, the petitioner, through former counsel, provided a letter, dated October 1, 2004, under a letterhead identifying it as from the "[REDACTED]" located in Anaheim, California and signed by "[REDACTED]". He states that the beneficiary has been an employee of the [REDACTED] as a set designer since April 1996 to the present. This letter additionally states that the beneficiary's hours are 40 per week and that his prevailing wage is \$23.40 per hour.

The director's decision refers to this letter as provided in response to the director's request for evidence issued on August 12, 2004. The director then based his denial, in part, on the fact that this letter documented work experience obtained in Lebanon not in California and no connection with the U.S. petitioner was established. It is noted that based on mailing envelopes contained in the record, this letter other documents appear to have been submitted by another law firm that is not associated with either former or current counsel.³ The other documentation submitted is a copy of [REDACTED] individual state income tax return for 2002; copies of their individual income tax return (Form 1040) for 2003; a copy of "[a]n agreement for purchase of shares of [REDACTED]" signed on October 8, 2002 by [REDACTED] as vice-president and by [REDACTED] as president; a copy of the 2003 Form 1120S, U.S. Income Tax Return for an S Corporation filed by [REDACTED] and a copy of a 2003 Form 1065, U.S. Return of Partnership Income for 2003 filed by [REDACTED]."

On appeal, the petitioner's owner submits a letter dated November 15, 2000, from [REDACTED] located in Tabarja, Lebanon. It is signed by [REDACTED] as general manager who claims that the beneficiary worked for this business designing, installing and maintaining the lighting and sound equipment as well as decorations from April 1996 to November 2000.

The petitioner's owner submitted an unsigned statement in the style of a "brief/motion/evidence" on appeal. This statement alleges that the former counsel's law firm fabricated the letter stating that the

³ The envelopes identify the sender as "[REDACTED]" located in Monterey Park, CA 91754. No entry of appearance (G-28) referring to this attorney is contained in the record.

beneficiary had worked for the petitioner as a set designer “since April 1966 [sic] to present.” The statement also mentions advice received from former counsel’s law firm that the petitioner should not be working for the petitioner until he received employment authorization and that was why his name does not appear on state quarterly wage reports. As noted above, this letter appeared to have been submitted by a law firm that was not associated with former counsel. No explanation clarifying these submissions has been offered. As the petitioner’s statement is not signed, it carries little evidentiary weight of the truth of the matter asserted.

As the record stands, the AAO does not find that the letter dated November 15, 2000, establishes that the beneficiary acquired the requisite two years of experience as a set designer as set forth on the ETA 750B. It is noted that the I-140 and accompanying arrival and departure records indicate that the beneficiary arrived in the United States on November 17, 2000. Part B of the ETA 750, as signed by the beneficiary, however, indicated that the beneficiary’s employment in Lebanon did not end until December 2000 and this letter from [REDACTED] purportedly dated two days before the beneficiary’s departure, has not been provided until the appeal filed by the petitioner. Additionally, it is noted that the letter does not affirm full-time employment and is not accompanied by a translation that complies with the terms of 8 C.F.R. § 103.2(b)(3). This regulation requires a foreign language document to 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. 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 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). The record does not clarify these inconsistencies. Therefore the petitioner has not established that the beneficiary had two years of experience as a set designer as of the January 29, 2001, priority date.

Relevant to the petitioner’s ability to pay the proffered wage, it must be noted that the ETA 750 identifies the [REDACTED] as the employer. The federal employer identification number (FEIN) appears on both the ETA 750 (Item 4) and the I-140 (Part 1) as [REDACTED]. Besides the financial documentation mentioned above, the petitioner has provided:

1. Unaudited financial statements covering 2001 identified as prepared for [REDACTED] [REDACTED]” with [REDACTED] listed underneath;
2. Copies of the [REDACTED] individual federal income tax return for 2001, 2002, and 2003 identifying business income on Schedule C, Profit or Loss from Business as derived from the [REDACTED] located at the petitioner’s address as set forth on the I-140;
3. Copies of the petitioner’s state quarterly wage reports for the third and fourth quarters of 2003 and the first two quarters of 2004.

It is noted that the 2001 financial statements provided indicate that they were prepared without audit as an accrual basis compilation. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a

petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted are not persuasive evidence. The notation appearing at the bottom of the pages makes clear that they were produced pursuant to a compilation rather than an audit. Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.⁴

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets as shown on its federal tax return, audited financial statement, or annual report during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary during the relevant period. As indicated above, no evidence of employment or payment of wages to the beneficiary has been provided.

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, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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). *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In this case, having reviewed the tax returns and other documentation submitted with this case, we can find no evidence that they should be considered as supporting the petitioning business' ability to

⁴ Reviewing the documentation submitted thus far in the petitioner's 2005 I-140, it is also noted that none of the financial statements are audited.

pay the proffered wage because none of them are identified with the petitioner's FEIN number. [REDACTED] number begins with [REDACTED]. Although the 2002 share purchase agreement between [REDACTED] and [REDACTED] mention an adult entertainment business having been established in 1996, neither the petitioner's name nor its organizational structure is stated and the relevance of such an agreement has not been demonstrated. [REDACTED] number begins with [REDACTED]xxxx. Other corporations' financial information included in the supporting documentation submitted thus far in the petitioner's 2005 I-140, such as that for [REDACTED], [REDACTED],” have also been reviewed and provide no information connecting the petitioner's FEIN or organizational structure to those entities.

It is noted that the regulation at 8 C.F.R. § 204.5(c) does not provide for multiple or co-employers to seek to be classified as a prospective U.S. employer for the purpose of obtaining an employment-based visa for a designated beneficiary. Here, it is unclear whether these various corporate entities are claiming to be the successor-in-interest to the petitioner within the meaning of *Matter of Dial Auto Repair Shop, Inc.* 19 I&N Dec. 481 (Comm. 1981). That case provides that, the successor-in-interest must submit proof of the relevant change in ownership and of how the change in ownership occurred. It must also demonstrate that it assumed all of the rights, duties, obligations, and assets of the original employer. It must further show that its predecessor had the ability to pay the proffered wage beginning on the priority date and continued throughout the period during which it owned the petitioning company. The successor-in-interest must also show that it has had the continuing ability to pay the proffered wage beginning on the date it acquired the business. If a successor-in-interest relationship is not demonstrated, then the new employer must seek its own alien labor certification if it wishes to sponsor a beneficiary for an employment-based visa.

This office also notes that 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. 1980). Additionally, 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.”

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). In this matter, the record does not contain any documentation from the Internal Revenue Service (IRS) or any other governmental entity that documents when the petitioning business acquired its FEIN number, or identifies what kind of organizational structure it was and is presently. No evidence other than a copy of a 2002 share purchase agreement substantiates any transfer of ownership. The evidence does not support consideration of any of the tax returns as probative of the petitioner's ability to pay the proffered wage of \$48,672. No connection based on the FEIN numbers identified with the various entities has been demonstrated through federal, state or local documentation or pertinent corporation records establishing that a merger or buyout occurred which demonstrates that petitioner

may be a successor-in-interest within the meaning of *Matter of Dial Auto Repair Shop, Inc.* It is noted that the purchase agreement relating to [REDACTED], a corporation, suggests that if the petitioner was the adult entertainment entity operated by [REDACTED] since 1996,⁵ then [REDACTED] tax returns claiming income from the [REDACTED] as a sole proprietorship must be questioned.⁶ Based on the reasons herein set forth, the petitioner has not established its continuing financial ability to pay the proffered wage of \$48,672 per annum.

Regarding the petitioner's claim of ineffective assistance of former counsel, it is noted that the attorney general in *Matter of Compean*, 24 I&N Dec.710, Interim Dec. 3632, WL 47338 (BIA 2009)⁷ determined that although there is no constitutional basis to ineffective assistance of counsel claims, it may be considered as a discretionary matter but requires the aggrieved respondent to bear the burden of establishing that 1) his lawyer's failings were egregious; 2) that if filing is beyond the applicable time limit, due diligence was exercised to discover and cure the lawyer's alleged deficient performance; and 3) that prejudice was incurred by the lawyer's error, in that but for the deficient performance, it is more likely than not that the ultimate relief would have been awarded.⁸

⁵ Relevant state corporation records indicate that [REDACTED] is an active corporation and was registered on November 12, 1996. [REDACTED] is an active corporation and was registered on March 11, 2005. See <http://kepler.sos.ca.gov/corpdata/>.

⁶ If evidence were present that demonstrated that the petitioner was a sole proprietorship during a given period, then evidence related to the petitioner's household expenses during that period should also have been provided because a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay.

⁷ This decision overruled, in part, *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). *Lozada* was based on constitutional underpinnings and determined that any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

⁸ *Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005) determined that prejudice may be demonstrated as long as there is a "plausible" basis of relief.

Additionally, other evidentiary documents must be provided under this decision, but those provisions are not applicable here.⁹

In this case, the AAO does not find that the petitioner established a claim of ineffective assistance of counsel. The petitioner failed to establish that his former counsel's conduct was egregious and no prejudice to the petitioner has been established because the appeal has been timely filed and the petitioner submitted evidence that was thought to have been omitted by former counsel. It consisted of state quarterly wage reports, signed individual tax returns and a new employment verification letter. As noted above, the AAO finds that the petitioner failed to demonstrate the beneficiary's qualifying two years of work experience as well as the petitioner's ability to pay the proffered wage. As discussed above, this decision is based on consideration of all of the available documentation provided, including that directly provided by the petitioner. On appeal, the former counsel's alleged errors consist of failing to advise the petitioner of the alternative of providing audited financial statements or annual reports, although advising the petitioner's owner that tax returns for 2001-2003 were required, and failing to advise of the request for state quarterly wage reports and evidence to establish that the beneficiary possessed the required foreign experience listed on the ETA 750. Since these documents were submitted on appeal and considered as described above, the petitioner failed to show that the petition would have been approved or, given the deficiencies of the evidence as discussed above, that a plausible basis for relief was established.

Additionally, as set forth under *Matter of Lozada*,¹⁰ in this matter, the petitioner 1) failed to demonstrate that the claim was supported by a detailed affidavit setting forth any agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; 2) that counsel whose integrity or competence is being impugned was informed of the allegations leveled against him and given an opportunity to respond, and 3) that the appeal or motion reflected whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not. It is noted that the petitioner's "brief/motion/evidence" that was provided on appeal is not an affidavit as it was unsigned and not sworn to by a declarant before an officer that has confirmed the declarant's identity and administered an oath. See *Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion are not evidence and thus are

⁹This documentation is not applicable in the instant matter as this appeal arose prior to *Matter of Compean*. See *Matter of Compean* at *741-742. The additional evidence must include: a) a copy of the agreement, if any, with the attorney; b) a copy of a letter to the former counsel specifying the deficient performance and a copy of the attorney's response, if any; c) a completed and signed complaint addressed to, but not necessarily filed with the appropriate disciplinary authority or State bar; and d) a copy of any evidence or document or an affidavit summarizing any testimony, that is alleged to have been omitted by the attorney; d) a statement by new counsel expressing a belief that the performance of former counsel was below minimal standards of professional competence. An explanation must be offered if any of the documents are unavailable and if missing rather than nonexistent, the aggrieved respondent must summarize the document's contents in his affidavit.

¹⁰ See footnote 7.

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).

The petitioner has not established that the beneficiary possessed the requisite qualifying work experience as of the priority date or demonstrated its continuing ability 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.