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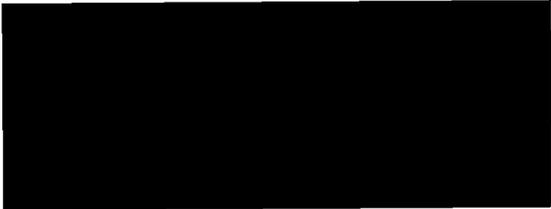
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: MAY 14 2010
LIN 06 224 52668

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:
[REDACTED]

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to permanently employ the beneficiary in the United States as a cook. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

As set forth in the director's June 15, 2007 denial, the primary issue in this case is whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also consider whether the petitioner has established that the beneficiary is qualified to perform the duties of the offered position.²

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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 pertinent evidence in the record, including new evidence properly submitted upon appeal.³

In order to obtain classification the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

²An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

³The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

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

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the April 13, 2001 priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is \$11.99 per hour (\$24,939.20 per year). The labor certification states that the position requires a high school diploma and two years of experience in the job offered. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$4 million, and to employ 85 workers.

The petition was filed on July 28, 2006. On March 5, 2007, the director issued a request for evidence (RFE), instructing the petitioner to provide evidence of its ability to pay the proffered wage, including the petitioner's Forms W-3, Transmittal of Wage and Tax Statements; the petitioner's tax returns, annual reports or audited financial statements; all Forms W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary; and all paystubs issued to the beneficiary by the petitioner since 2006.

On May 29, 2007, the petitioner responded to the RFE. The response included the *beneficiary's* individual federal income tax returns for 2001, 2002, 2003, 2004, 2005, and 2006; annual reports for [REDACTED] for 2001, 2002, 2003, 2004, and 2005; and a 2006 income statement for [REDACTED] from its website. The beneficiary's tax returns contained the beneficiary's Forms W-2, issued by [REDACTED], for 2001, 2002, 2003, 2004 and 2005. The RFE response contains a claim by counsel that the petitioner is a multimillion dollar company with annual sales exceeding \$2 billion and annual net income of over \$100 million.

On June 15, 2007, the director denied the petition. The decision states that the petitioner appeared to be an independent franchise of [REDACTED]. Accordingly, the director did not accept the submitted annual reports of [REDACTED] as evidence of the petitioner's ability to pay the proffered wage, and concluded that the petitioner had failed to establish its ability to pay the proffered wage.

On appeal, counsel claims that [REDACTED] is an international restaurant company with 1000 restaurants. Counsel claims that the petitioner "is a minority owned franchise, but is wholly owned and controlled by [REDACTED], the parent company." Counsel also claims that the petitioner has a gross profit of \$4.4 million and a payroll in excess of \$500,000.00 dollars. Counsel further states:

The proprietor ownership is minority owned revenue, payroll and cost under the auspices of [REDACTED]. . . The petitioner's financial resources and ability to pay the proffered wage are completely tight [sic] in with parent company's obligation to pay the wage.

In support of these statements, the record includes a letter from [REDACTED], dated July 27, 2007. The letter states:

[The petitioner] is operated under the full auspices of [REDACTED]. Even though there is a minority franchisee, [the petitioner] is backed entirely by the parent company, [REDACTED] which consists of 800 restaurants domestically, and 100 internationally, employing some 50,000 employees. In 2006, this restaurant alone boasted sales of 4.4 million dollars. . . . If you need any further assistance in this matter, please feel free to contact me, or any of the corporate offices listed on the accompanying pages.

Attached to [REDACTED] letter is a sheet containing information for [REDACTED]. Also attached is a Food & Beverage Sales Report for Outback restaurants, including the petitioner's [REDACTED], for 2001, 2002, 2003, 2004, 2005, 2006 and 2007.

On appeal, neither [REDACTED] nor counsel make any mention of [REDACTED].

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first determine whether the petitioner has established that it employs 100 or more workers. If so, USCIS *may* accept a statement from a financial officer that the petitioner has the ability to pay the proffered wage as sufficient evidence its ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2).

In the instant case, the record contains a letter from [REDACTED] dated July 24, 2006, claiming that the petitioner employs over 100 people. However, the petition, signed by [REDACTED] under penalty of perjury, states that the petitioner employs 85 workers. 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). There is no evidence in the record establishing the number of workers employed by the petitioner. Accordingly, the RFE instructed the petitioner to provide Forms W-3 in order to resolve the inconsistent information in the record. The petitioner's RFE response did not contain any Forms W-3 or any other evidence of the number of workers it employs. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Further, 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)). Accordingly, [REDACTED] letter claiming that the petitioner has over 100 employees and has the ability to pay the proffered wage is not sufficient to establish the petitioner's

ability to pay the proffered wage.

USCIS will next examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary a salary equal to or greater than the proffered wage from the priority date, the evidence will be considered *prima facie* proof of the petitioner's ability to pay. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, the beneficiary claimed to have worked for the petitioner since January 2001. The record contains the beneficiary's Forms W-2 issued by [REDACTED], for 2001, 2002, 2003, 2004 and 2005. These documents state the following wages paid to the beneficiary:

| <u>Year</u> | <u>Wages Paid (\$)</u> | <u>Remaining Amount (\$)</u> | |
|-------------|------------------------|------------------------------|---|
| 2001 | 10,385.06 | 14,554.14 | |
| 2002 | 7,802.34 | 17,136.86 | (sum of two Forms W-2 issued by the same company) |
| 2003 | 14,400.49 | 10,538.71 | |
| 2004 | 18,063.03 | 6,876.17 | (sum of two Forms W-2 issued by the same company) |
| 2005 | 10,582.92 | 14,356.28 | |
| 2006 | 0.00 | 24,939.20 | |

Therefore, for the years 2001, 2002, 2003, 2004, 2005 and 2006, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage. Furthermore, the record is devoid of evidence establishing the connection, if any, between [REDACTED] and the petitioner. Accordingly, even if the Forms W-2 were probative of the beneficiary having been paid an amount equal to or greater than the proffered wage, the record fails to establish that the petitioner paid these wages to the beneficiary. As the record fails to establish the employer identification number of the petitioner, it is not clear that the beneficiary's employer and the petitioner are the same entity.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the petitioner's annual reports, tax returns, or audited financial statements to determine whether, from the priority date to the present, the petitioner possessed sufficient net income to pay the difference between the actual wage paid, if any, and the offered wage. *See* 8 C.F.R. § 204.5(g)(2); *see also River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). If the petitioner's net income is not sufficient, USCIS will examine its net current assets to determine whether the petitioner possessed sufficient net current assets to pay the difference between the actual wage paid, if any, and the offered wage.

The record contains the annual reports for [REDACTED] for 2001, 2002, 2003, 2004, and 2005; and the 2006 income statement for [REDACTED] as published on its website. As

is explained below, these annual reports do not establish the petitioner's ability to pay the proffered wage.

The record contains conflicting information and unsupported claims relating to the petitioner's corporate structure and finances in addition to the true identity of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. The submitted Forms W-2 establish that the beneficiary's employer was [REDACTED]. However, the attachment to [REDACTED] letter indicates that the petitioner is named [REDACTED]. Regardless of which entity is the actual petitioner, both [REDACTED] and counsel concede that the petitioner is a separate corporate entity from the parent company, although the record contains conflicting evidence as to whether the petitioner's parent company is [REDACTED] or [REDACTED]. 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. at 591-92. 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. *Id.* at 591.⁴

USCIS does not 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 its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. 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."

On appeal, counsel claims that the petitioner's parent company has an obligation to pay its payroll, but provides no evidence for this assertion. 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 Obaighena*, 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 letter from [REDACTED] states that the petitioner is "backed entirely by the parent company" but also provides no evidence in support of this claim. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Soffici*, 22 I&N Dec. at 165.

Therefore, there is no evidence in the record that would permit USCIS to perform an analysis of the petitioner's net income or net current assets.

⁴It is noted that, according to publicly available information maintained by the State of Maryland, the business license and alcohol license for the petitioner's address in [REDACTED], is [REDACTED]. Again, it is unclear whether this entity is the true petitioner and employer in this matter or whether this is an unrelated entity.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). 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 in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, on the petition, the petitioner claims to have been in business since 2001 and to employ 85 employees. The record contains unaudited Food & Beverage Sales Reports that include the petitioner's [REDACTED]. The reports state that the [REDACTED] had total sales of approximately \$2.5 million in 2007, \$4 million in 2006, \$4 million in 2005, \$4 million in 2004, \$4 million in 2003, \$3.5 million in 2002, and \$3.5 million in 2001. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonogawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. In fact, there is no evidence in the record which clearly identifies the petitioner or which establishes that entity's ability to pay the proffered wage.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. at 159; *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, the submitted labor certification states that the offered position requires an individual with a high school diploma and two years experience in the job offered.⁵ The record contains a letter claiming that the beneficiary was employed abroad as a cook from April 3, 1996 to November 28, 1998. However, there is no evidence in the record that establishes that the beneficiary's obtained a U.S. high school diploma or foreign equivalent degree by the priority date. Thus, the petitioner has not established that the beneficiary possesses the educational qualifications required to perform the proffered position. 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. at 165.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises*, 229 F. Supp. 2d at 1043.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.

⁵On Part A, Item 14 of Form ETA 750, the petitioner marked the box entitled "High School" with a "12". Accordingly, the position requires an individual with a high school diploma or foreign equivalent.