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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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Date: Office: NEBRASKA SERVICE CENTER

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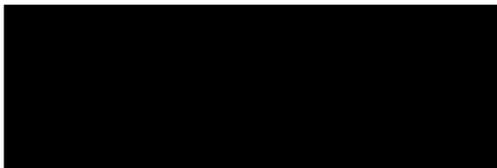
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IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be dismissed, and the petition will remain denied.

The petitioner<sup>1</sup> is a gas station/concession stand business. It seeks to employ the beneficiary permanently in the United States as a manager, food concession. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The AAO determined that there was insufficient evidence in the record to show that the petitioner had the continuing ability to pay the beneficiary the proffered wage in 2001, 2004, and in 2006. The AAO dismissed the appeal and affirmed the director's decision.

As set forth in the director's denial and the AAO decision, an issue in this case is whether the petitioner demonstrated its ability to pay the proffered wage in 2001, 2004 and 2006.

Beyond the decision of the director, and in addition to the issues discussed in the AAO's August 27, 2010 decision, an additional issue is whether the petitioner demonstrated 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

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<sup>1</sup> According to District of Columbia's official website (i.e. <http://mblr.dc.gov/corp/> ...) accessed on April 3, 2011, the petitioner is an active corporation registered on July 27, 1999.

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$ 19.50 per hour (\$35,490.00 per year<sup>2</sup>).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.

Accompanying the motion, counsel submits the following evidence and documentation: a “Purchase and Sale Agreement” dated September 2, 2005; an “Escrow Trust Disbursement Statement” dated December 9, 2005; a “Special Warranty Deed” dated December 9, 2005; and an unaudited “Confidential Personal Financial Statement” dated August 30, 2010.

On appeal, counsel has made the following statement:

Petitioner in this case had intended to preserve the confidentiality of his personal financial status through this process. However, in view of the fact that, even after appeal to the AAO, the company [i.e. the petitioner] is found lacking in financial capacity to pay the prevailing wage for some years, the Petitioner now opts to reveal to CIS his financial status, so that his assets can be considered to prove that his company has the financial capacity to pay the prevailing wage.

Although Petitioner already provided a statement regarding his willingness to subsidize the company in order to hire the beneficiary at the prevailing wage, USCIS need not rely on his statement, nor pierce the corporate veil, but simply rely on past actions by the Petitioner.

We [the petitioner] are enclosing Exhibits A through D, memorializing Petitioner’s 2005 purchase of the real estate where his gas station operates. Exhibit A, one of the closing transaction documents, clearly indicates that on 12/9/05 [the petitioner’s owners] invested \$2,189,45 [sic] to purchase the real estate where the sponsoring gas station operates. Out of this amount, \$364,240 represents cash from their savings, and \$1,825,225 represented funds from a loan they made in order to buy the property. In addition, Exhibit D represents the most recent Finance Statement provided to to [sic] their lender to confirm they continue in healthy financial capacity to repay their loan. That statement indicates a net worth of \$1,977,639.

Given the personal wealth of the owners of petitioners [sic], and given the evidence of their willingness to invest in their business such large sums, the amounts required

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<sup>2</sup> Based upon a 35 hour work week.

to pay above the amounts already paid to [the] beneficiary to meet the prevailing wage in some years pale in comparison.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1999 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 10, 2001, the beneficiary did not claim to have worked for the petitioner however, the record shows, that the beneficiary claimed when she filed an Application to Register Permanent Residence or Adjust Status, in her USCIS Form G-235, that she worked for the petitioner since April 2000.

Contrary to counsel's assertion, U.S. Citizenship and Immigration Services (USCIS) 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 its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. Although it appears that counsel submits this evidence on motion in an attempt to establish that the petitioner's owners could have sacrificed some or all of the officers compensation received in 2001, 2004, and 2006 to pay the proffered wage, this evidence is not persuasive in establishing that ability.

The documents do not establish these funds, either in the form of liquid assets held before the purported real estate purchase or equity after the purchase, were available to the petitioner's owner to sustain him in the event the officers compensation was in part directed to the beneficiary's proffered wage. The financial statement is also not persuasive evidence because it is unaudited and does not pertain to the years in question.

As made clear in the regulations, financial statements submitted as evidence of a petitioner's ability to pay the proffered wage must be audited. 8 C.F.R. § 204.5(g)(2). The proposition that the petitioner's owner could have redirected funds from his own corporation in three separate years in absence of any evidence that he had the ability to do so in any of those years has not been established.

An additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 states that the position requires one year of experience or one year of experience in the related occupation of manager, food service.

The beneficiary under penalty of perjury stated in Form ETA 750B that she was employed by the Almi Karya Restaurant, Jakarta, Indonesia (with no number of hours stated) from June 1996, to July 1999, as a restaurant manager. She stated her duties there as "Coordination of the food service activities of the restaurant." No other employment experience is stated.

The Form ETA 750, Part A, Line 13, describes the job duties of manager, food concession as follows:

Manages food concession stand at [the] gas station. Purchases refreshments, according to anticipated demand and familiarity with public taste in food and beverages. Directs storage, preparation, and serving of refreshments. Receives payments, tends cash register. Tabulates receipts and balances accounts. Inventories supplies on hand at end of each day or other designated period.

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

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

\* \* \*

(D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

Counsel submitted a letter dated July 30, 1999, from [redacted], director of human resources, of [redacted]. In pertinent part, [redacted] stated the beneficiary "has been employed at [redacted] since 1<sup>st</sup> Juny [sic] until 30<sup>th</sup> July 1999 as Restaurant Manager." The sole statement submitted in the record concerning the beneficiary's qualifications received from [redacted] is insufficient evidence under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position. The statement was not submitted on the business' letterhead, and the letter does not contain an address, telephone contact numbers, or description of the beneficiary's duties at Almi Karya Restaurant or the beneficiary's qualifications to meet the requirements of the labor certification.

Further the beneficiary prepared a USCIS Form G-325 dated May 3, 2007, in which she stated under penalty of perjury, that she was employed by the petitioner as a food concession manager from April 2000 to "present time" (i.e. May 3, 2007), and by the Ivy Place Restaurant, located in Washington, D.C. as a food preparer from September 9, 1999, to October 2002. This latter employment experience was not stated by the beneficiary when she signed the labor certification on April 10, 2001. 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).

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the reasons outlined in the AAO's decision of August 27, 2010, and for 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 motion is dismissed and the petition remains denied.