

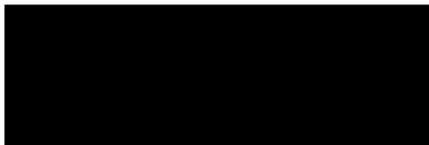
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



B6

FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 09 2011

IN RE:

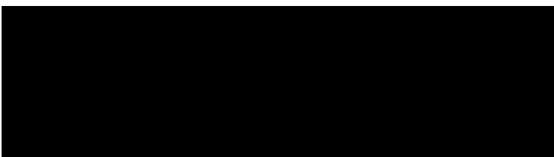
Petitioner:

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner¹ is a restaurant. It seeks to employ the beneficiary permanently in the United States as an assistant manager. The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL) for [REDACTED]. The director determined, *inter alia*, that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

According to counsel, the petitioner is a "store" which is part of a national restaurant chain of 600 restaurants with no independent existence apart from its parent. The parent is not identified by counsel in his brief dated March 25, 2009, but it is reputed to be [REDACTED] FEIN [REDACTED] according to the record.

By implication, counsel is stating that "[REDACTED] and subsidiaries," is the petitioner and employer. [REDACTED] and subsidiaries" is not identified in the Form ETA 750 accepted by the DOL on January 10, 2005, and certified on September 13, 2007, or the I-140 petition filed on January 29, 2008.

No evidence was submitted with the petition to establish from the priority date onwards that any entity other than the petitioner would have been the beneficiary's actual employer, in control of the proffered position, had the beneficiary accepted the position. Consequently, only the petitioner is eligible to file a visa preference petition on its behalf.² 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)). A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under

¹ The petitioner is identified in the petition by the federal Employer Identification Number (EIN) [REDACTED]. According to 20 C.F.R. § 656.17(5)(i), "the term "Employer" means an entity with the same Federal Employer Identification Number (FEIN or EIN)." The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. See <http://www.irs.gov/businesses/small/article/0,,id=169067,00.html> accessed November 19, 2009. According to the State of Delaware, Department of State, Division of Corporation website <http://delecorp.delaware.gov/fin/controller> accessed on December 13, 2010, [REDACTED] (file number [REDACTED]), is a domestic State of Delaware corporation established on September 11, 1991. According to the Commonwealth of Massachusetts, Secretary of the Commonwealth, Corporations Division website accessed at <http://corp.sec.state.ma.us/corp/corptest/> ... on December 13, 2010, [REDACTED] is a foreign corporation organized in the State of Delaware, with identity number [REDACTED] and registered in Massachusetts on December 24, 1991. According to that site, [REDACTED] name was changed from [REDACTED] on January 5, 1993.

² Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i). See 8 C.F.R. § 204.5(c).

a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services (USCIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

On November 26, 2008, the director requested additional evidence (RFE). The director requested the following evidence: the beneficiary's Wage and Tax Statements (W-2) for 2005, 2006, and 2007; the petitioner's federal income tax returns with all schedules and attachments, audited financial statements, or annual reports for 2005, 2006, and 2007; evidence to demonstrate that the location of the petitioner noted on the petition "is still within the same metropolitan statistical area (SMSA) as the location listed in the labor certification;" and evidence that [REDACTED] is the successor-in-interest to [REDACTED] and the current status of [REDACTED].

The petitioner's tax returns were not submitted and incomplete tax returns were submitted by counsel for a corporate entity, [REDACTED] and subsidiaries." Although the [REDACTED] tax returns make reference to a schedule which identifies subsidiaries, copies of the schedules were not submitted. No audited financial statements, or annual reports were submitted. Although the petitioner submits unaudited financial spreadsheets, these are both incomplete and unaudited. The regulation makes clear that financial statements must be audited. *See* 8 C.F.R. §204.2(g)(2). No W-2 statements, or other wage/salary/compensation evidence was submitted. No response was made by counsel to the inquiry concerning the SMSA area. No evidence was submitted to show successorship. Overall, the record is devoid of evidence connecting the petitioner, [REDACTED] Inc., EIN [REDACTED] to the tax return evidence submitted for the record. Accordingly, the record is devoid of evidence establishing the petitioner's ability to pay the proffered wage. *See* 8 C.F.R. §204.5(g)(2).

The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The AAO is unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry set forth in the director's request for evidence.

On appeal, counsel makes the contention that an un-named "parent" rises to the status retroactively of both petitioner and employer. It is clear that counsel is asserting that another corporation's assets should be considering in determining the petitioner's ability to pay. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders such as [REDACTED], 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). 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." Even if the petitioner is established to be a subsidiary of [REDACTED] the petitioner must still establish its ability to pay the proffered wage. It cannot rely upon its stockholder.

Because the petition and the labor certification were prepared in the names of [REDACTED] [REDACTED] respectively, the director instructed the petitioner to

provide documentation of a successorship between [REDACTED]
[REDACTED] In the event of successorship or otherwise, the director stated that the petitioner must submit evidence that the successor continues to operate the same type of business. There is no business ownership transition information found or alleged in this case, although the manner in which the petition and labor certification were prepared and submitted would give that impression.

Counsel does not address the director's denial which found the petitioner's failed to submit evidence of its ability to pay the proffered wage from the priority date, but instead counsel asserts in his brief that the petitioner's "store" revenue and expenses are reported up to the parent corporation. On appeal, counsel does not address or submit evidence related to the petitioner's ability to pay but interposes another entity, [REDACTED] and subsidiaries as both the employer and petitioner. Assuming for the sake of argument that the AAO could consider the [REDACTED] tax returns, the 2007 tax return submitted in the record of proceeding shows substantial negative net income and net current assets. The appeal must therefore be dismissed for this reason.

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.