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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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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAR 08 2011**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as Any Other Worker, Unskilled (requiring less than two years of training or experience), 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 Director, Texas Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and the AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO decision. The motion to reopen is granted. The appeal will be dismissed.

The petitioner is a residential care facility for developmentally disabled residents. It seeks to employ the beneficiary permanently in the United States as a caregiver, pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii).¹ 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 (DOL). The director dismissed the petition, finding that the petitioner did not have sufficient net income or net current assets to pay the proffered wage from the priority date, specifically in 2004 and 2006. In a decision dismissing the appeal dated June 4, 2010, the AAO agreed. The AAO additionally found that the beneficiary did not have the requisite work experience to perform the duties of the position.

On motion, counsel for the petitioner asserts that the petitioner has the ability to pay the proffered wage from the priority date and that the beneficiary is qualified to perform the duties of the position and submits new evidence.

The record shows that the motion is properly filed, timely, states the new facts to be provided in the reopened proceeding, and is supported by documentary evidence. The motion to reopen is granted, and the appeal will be reconsidered. 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.

The issues in this case are whether the beneficiary has the requisite work experience to perform the duties of the position, and 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.

As noted earlier, 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as 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).

Here, the Form ETA 750 was filed and accepted for processing by the DOL on January 30, 2004. The rate of pay or the proffered wage stated on that form is \$10 per hour or \$20,800 per year.

¹ Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 not available in the United States.

The position as set forth on the Form ETA 750 specifically requires the beneficiary to have a minimum of six months work experience in the job offered. The beneficiary stated on the Form ETA 750, part B, that he worked as a caregiver for [REDACTED] in the Philippines from April 1998 to April 1999. The Form ETA 750 was approved by the DOL on May 29, 2007.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

To demonstrate that the beneficiary has the minimum requirements to qualify for the position, the petitioner originally submitted a signed statement from [REDACTED], who stated that the beneficiary was a caregiver of [REDACTED] from April 1998 to April 1999. [REDACTED] also stated that [REDACTED] suffered from a cardiovascular accident or stroke with embolism.

Upon review, the AAO found [REDACTED] signed statement insufficient evidence that the beneficiary worked as a caregiver for [REDACTED]. The AAO indicated that the relationship between [REDACTED] and [REDACTED] was not clear, that the evidence did not show how [REDACTED] was authorized to attest to the beneficiary's employment for [REDACTED], and that the petitioner had not complied with the regulation at 8 C.F.R. § 204.5(g)(1).

On motion, the petitioner submits the following evidence to show that the beneficiary worked as a caregiver for at least six months prior to the priority date:

- A signed statement from [REDACTED] stating that the beneficiary worked as a caregiver for him from April 1998 to April 1999, that the beneficiary was responsible for administering prescribed medications, bathing, cooking, and serving food, and that [REDACTED] was his friend and co-worker; and
- A signed statement from [REDACTED] stating that the beneficiary worked as a caregiver for [REDACTED] from April 1998 to April 1999, when [REDACTED] was recovering from a stroke and that he and [REDACTED] were friends and co-workers during that time.

Upon *de novo* review, the AAO determines that the beneficiary has the requisite work experience to qualify for the position. The signed statements of [REDACTED] and [REDACTED] are sufficiently detailed and consistent with the beneficiary's claim. Further, [REDACTED] the beneficiary's former employer has provided his name, address, title, and described the beneficiary's job duties, in accordance with 8 C.F.R. § 204.5(g)(1). Therefore, the AAO's previous finding that the beneficiary is not qualified to perform the duties of the position is withdrawn.

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).

Nevertheless, the petition may not be approved, as the evidence does not establish that the petitioner has the continuing ability to pay the proffered wage from the priority date.

On motion, counsel for the petitioner urges the AAO to consider the officers' compensation as evidence of the petitioner's ability to pay. Counsel states that the officers' compensation is not fixed, and that it can be adjusted to meet the business needs of the petitioning corporation. Counsel further claims that the owners of the petitioning corporation – [REDACTED] – are able and willing to reduce their compensation to pay the proffered wage of the beneficiary. Counsel states that [REDACTED] could have foregone some of their salaries to pay the beneficiary's wage. In a letter dated June 24, 2010, the petitioner's certified public accountant indicates, "It is the corporation's regular accounting practice to pay the owners and officers of the corporation as much compensation as possible to minimize taxable income to the corporation and avoid double taxation." In a declaration dated June 24, 2010, [REDACTED] stated that she would be willing to forego her share of the officer's compensation to pay the beneficiary's proffered wage from the priority date and onward.³

A review of the petitioner's tax returns, however, as noted in the previous AAO decision, reveals that the officers' compensation between 2004 and 2008 is always \$69,600, regardless of the petitioner's taxable income. For instance, when the petitioner had \$4,495 taxable income in 2004, the officers' compensation was \$69,600; on the other hand, when the petitioner had \$28,422 taxable income in 2005, the officers' compensation was still \$69,600. The evidence suggests that the officer's compensation is a fixed salary, and does not support counsel's contention that the officers' compensation is adjustable and that it serves as a tool to minimize the petitioner's taxable income.

In addition, the evidence in the record does not show whether [REDACTED] is able to forego all or part of her compensation to pay the beneficiary's wage despite her willingness to do so. The record includes no evidence of her monthly household expenses, for instance, how many dependents she has to support, if any, and no showing that she has other sources of income, e.g. IRS Form 1040 individual tax returns, statement of household expenses and/or other reliable documentation.

On motion, counsel also asserts that the petitioner had a substantial gross income and paid a significant amount for employees' wages and for services performed by independent contractors from 2004 to 2008. [REDACTED], the President of the petitioning corporation, claims in her statement dated June 24, 2010 that she and her husband now have four residential facilities and are planning to expand their business. She states, "Due to the expansion of the business, we need to hire additional employees." The prospect of expanded future earnings, however, does not establish the petitioner's ability to pay. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not

³ As there is no statement from [REDACTED] expressing his willingness to forego his compensation for the relevant period, only [REDACTED] offer to forego her compensation will be analyzed.

qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

The other five facilities owned by [REDACTED]

[REDACTED] – are separate and distinct organizations from the petitioning corporation in this case. Since the petitioner, as noted earlier, is a corporation, the AAO cannot pierce the corporate veil and look into the owners' personal assets or their other enterprises or corporations. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, 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." For these reasons, the AAO may not consider any evidence submitted from these other enterprises or organizations, even though they may all be owned by the same individuals.

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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, no evidence has been presented to show that the petitioning corporation has as sound and outstanding reputation as in *Sonegawa*. Further, the evidence submitted does not reflect a pattern of significant growth or the occurrence of an uncharacteristic business expenditure or loss that would explain its inability to pay the proffered wage from the priority date, specifically in 2004 and 2006. As noted in the AAO's previous decision, while the petitioner has gross receipts averaging approximately \$312,000 over the four year period from

2004-2007, its net income is low. The petitioner has not shown that it is profitable enough to be able to consistently pay \$20,800 annually from the priority date and onward.

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall, supra*. After a review of the petitioner's tax returns and other evidence, this office concludes that the petitioner has not established that it had the ability to pay the salary offered as of the priority date and continuing to present.

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.