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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**



**PUBLIC COPY**

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FILE:

Office: TEXAS SERVICE CENTER

Date:

MAR 21 2011

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Other Worker or Professional pursuant to Section 203(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)

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,

*Elizabeth McCormack*

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen. The motion to reopen will be granted and the proceeding will be reopened. The previous decisions of the director and the AAO will be affirmed.

The petitioner is a landscape contractor. It seeks to employ the beneficiary permanently in the United States as a landscape gardener ("foreman"). The director determined 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 as the petitioner failed to submit any evidence. The AAO affirmed this determination on appeal. The AAO also found that the petitioner had not established that the beneficiary met the other special requirements of the labor certification at the time of filing, April 30, 2001.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part: "A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision."

The motion to reopen and for reconsideration will be considered because the petitioner provides supporting documents relating to the ability to pay the proffered wage not previously considered; and because the petitioner's counsel asserts that the AAO made an erroneous decision concerning the special requirements on the labor certification application. The AAO incorporates by reference its previous decision and will not repeat the discussion in that decision.

On motion, counsel submits a copy of the Employee Summary Report dated January 1, 2007–April 30, 2007; a copy of the petitioner's 2004–2006 Worker's Comp Worksheets and the 2003-2007 Internal Revenue Service (IRS) Forms W-2 of the petitioning entity's owners, [REDACTED],<sup>1</sup> to address the findings of the AAO. The summary report for the period January 1<sup>st</sup> to April 30, 2007 and the worksheets showing wages paid by the petitioner to the beneficiary for the years 2004 through 2006 do not demonstrate the petitioner's ability to pay the proffered wage from the priority date, April 30, 2001, and onwards. The petitioner has not submitted new documentation showing that the petitioner had the ability to pay the beneficiary in 2003 and throughout 2007. Further, neither the report nor the worksheet has been audited. 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. Nor has the petitioner addressed on motion its ability to pay both the beneficiary and its other sponsored workers from 2001-2009.

Counsel states on motion that he is providing the petitioner's personal Forms W-2 as proof that there is enough income to pay the beneficiary the required wage. However, USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy

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<sup>1</sup> The 2004 Form W-2 was not submitted for [REDACTED]

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.

Thus, the petitioner has not established on motion its ability to pay the beneficiary's proffered wage and the wages of its other sponsored workers from the priority date forward.

Counsel also states on motion that the beneficiary is qualified to perform the services of the position as of the filing date of the labor certification. Counsel states that the Form ETA 750, item 14, was corrected to reflect that no previous experience was required. However, the requirements listed under item 15, Form ETA 750, were not changed by the DOL. Under "Other Special Requirements," item 15 on the labor certification, the applicant must have "knowledge of some construction and keystone work, blue print reading, be responsible, have leadership skills, be reliable and dependable."

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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). 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. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner has not provided a letter or any other evidence to show the beneficiary had the requisite special requirements at the time of filing the labor certification on April 30, 2001.

In conclusion, the petitioner has not established its continuing ability to pay the proffered wage and has not established that the beneficiary met the other special requirements of the labor certification at the time the labor certification was accepted for processing, April 30, 2001.

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 sustained that burden. Accordingly, the previous decisions of the director and the AAO will not be disturbed.

**ORDER:** The previous decisions of the director and the AAO will not be disturbed. The petition is denied.