



U.S. Citizenship  
and Immigration  
Services

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

B6

DATE: NOV 01 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]  
[REDACTED]

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]  
[REDACTED]  
[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a specialty food market. On March 10, 2009, the petitioner filed a petition seeking to permanently employ the beneficiary as a chef. 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).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL). The priority date of the petition is April 30, 2001.<sup>2</sup>

On May 12, 2009, the director issued a request for evidence (RFE), instructing the petitioner to submit evidence of its ability to pay the proffered wage starting from the April 30, 2001 priority date, to include one of the following for each of the years 2001 through 2008:

- The petitioner's annual federal corporate tax return,
- An audited or reviewed financial statement,
- An annual report, or
- A statement from the financial officer if the petitioner employs 100 or more workers.

In response, the petitioner submitted a letter from [REDACTED] CPA, stating that his firm has been preparing the tax returns for the two corporations, [REDACTED] and [REDACTED] for the past five years. Mr. [REDACTED] also stated that the income of the owners from the eateries, plus their K-1 distributions have been in excess of \$150,000 for each year. Mr. [REDACTED] further stated that the entities employ annually over 110 employees.

The director denied the petition on November 18, 2009. The decision stated that the evidence submitted by the petitioner failed to establish its ability to pay the proffered wage.

Counsel filed the instant appeal on December 21, 2009. On appeal, counsel submitted another copy of the above-referenced letter from Mr. [REDACTED] and stated that the director either overlooked the accountant's statement or purports to require more that is allowed by regulation.

---

<sup>1</sup> Section 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.

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

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

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The 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).

The petitioner failed to submit the federal tax returns, annual reports, or audited financial statements from 2001 through 2008 as requested by the director. The statement submitted is by a certified public accountant does not meet the requirements of 8 C.F.R. § 204.5(g)(2), as a certified public accountant is not a financial officer of the petitioner.

Even if the letter from the CPA were to be considered, the financial viability of the owners of the petitioner, or the financial viability of another company, [REDACTED], cannot be considered. A corporation is a separate and distinct legal entity from its owners and shareholders. The assets of a company's shareholders 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'r 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."

Finally, based on the record, the petitioner does not employ 100 or more workers. The Form I-140 states the petitioner employs forty-five workers. Additionally, the W-3 Forms submitted belong to [REDACTED], and [REDACTED]. None of the petitioner's W-3 forms show the petitioner employed 100 or more workers in any given year. The W-3 Forms may include part-time employees and employees who are no longer employed by a company. Therefore, the W-3 Forms, by themselves, do not establish the number of full-time workers employed by the petitioner in the instant case.

Therefore, it is concluded that the petitioner failed to submit evidence establishing its continuing ability to pay the proffered wage from the priority date until the present as required by 8 C.F.R. § 204.5(g)(2).

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. The petitioner has not met this burden.

**ORDER:** The appeal is dismissed.