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U.S. Citizenship and Immigration Services

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[redacted]

FEB 24 2004

FILE: EAC 02 028 51489 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

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]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a glazing company. It seeks to employ the beneficiary permanently in the United States as a glazier. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor. 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.

On appeal, counsel for petitioner submits a letter in support of the appeal and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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 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.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted on March 15, 2001. The proffered wage as stated on the Form ETA 750 is $15.37 per hour, which equals $31,969.60 per year. With the petition filed October 19, 2001, counsel submitted only the Form ETA 750.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, or the beneficiary's qualifications for the position, the Vermont Service Center requested additional evidence pertinent to those issues. Specifically, on December 28, 2001, the Service Center requested evidence related to the beneficiary's experience, to include a specific description of the duties performed by the alien and evidence regarding petitioner's ability to pay the proffered wage. In particular, the petitioner was asked to submit the its 2000 Federal Income Tax Return, with schedules and attachments, or alternatively, annual reports for 2000, accompanied by audited or reviewed financial statements.

In response, counsel for petitioner submitted the following documentation:

> -Two letters from employers; one from Vision Systems dated February 9, 2002, stating simply that the beneficiary was an employee from February 25, 1999 through August 28, 1999, and worked 8 hours on September 21, 1999, and a letter dated January 17, 2002, from

petitioner's office manager stating that the beneficiary was employed by the petitioner, as a glazier/mechanic, and had been employed since October 4, 1999.[1]

-Copies of W-2 Wage and Tax Statements issued to the beneficiary and his wife for the year 2000, along with their 2000 Form 1040 Individual Tax Return. The beneficiary's W-2 reflected that the beneficiary had been paid wages of $33,088.76 by an employer identified as ADP TOTALSOURCE, with Employer ID No. 02-0418526.

-Copies of three W-2 Wage and Tax Statements issued to the beneficiary for the year 2001, along with the 2001 Form 1040 Individual Tax Return for the beneficiary and his wife. The beneficiary's W-2s reflected that the beneficiary had been paid wages as follows: 1)$30,348 from ADP TOTALSOURCE, with employer ID No. 02-0418526; 2) $2,507.50 from UNNICO SERVICE COMPANY with employer ID No. 04-2872501 of $33,088.76 by an employer named ADP TOTALSOURCE, with Employer ID No. 02-041856; and 3) $360.00 from PRITCHARD INDUSTRIES, with employer ID No. 0013384101.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 22, 2002, denied the petition.

On appeal, counsel asserts that the denial was erroneous as the record reflected that "the company" paid the beneficiary $33,088.76 in the year 2000, an amount in excess of the $31,969.60 required. Counsel asserts that ADP TOTALSOURCE is acting as a *co-employer* with ADP's client, Galaxy Glass & Aluminum, Inc., with ADP TOTALSOURCE responsible for all payroll and tax functions. Counsel alternatively argues that evidence was in fact submitted showing that petitioner established the petitioner's ability to pay. Counsel relies for this assertion on the information contained in Part 5 of the Form I-140 which reflects that the company grossed $10,524,000, had 70 employees, had been in business since 1990. Counsel additionally argues that the company's tax forms have already been submitted demonstrating that it is paying the employee more than the required wage. In support of the appeal counsel has submitted a letter dated August 19, 2002, signed by [redacted] Payroll Administrator from ADP TOTALSOURCE, stating that ADP TOTALSOURCE was acting as a co-employer with its client Galaxy Glass & Aluminum. Inc. The letter indicates that the beneficiary had begun work with the petitioner on October 1999 and that such work was still ongoing.

There are numerous problems with the position taken by petitioner's counsel. First, it assumes that the Service must recognize a "co-employer" situation yet provides no authority to support such a requirement, and even assuming such an arrangement could be recognized, counsel submitted insufficient evidence in support of the alleged "co-employer" arrangement[2]. Second, the record clearly reflects that counsel and the petitioner have submitted the ETA 750 and the Form I-140 on behalf of a specific, named employer. That employer is Galaxy Glass & Aluminum, Inc. There is no mention in any of those key documents related to the petition that ADP TOTALSOURCE is acting as an employer seeking to petition for the beneficiary. Third, the entity which must demonstrate ability to pay is the petitioner as the identified employer. Petitioner's counsel, while asserting that petitioner has more than sufficient assets to pay petitioner's salary,

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[1] The letter addressed dates of employment it did not provide any specific description of the duties performed by the beneficiary.

[2] Although counsel has submitted a letter from the payroll administrator of ADP TOTALSOURCE, this evidence is conclusory and provides no authoritative explanation either in terms of its description of the employment arrangement between the two companies or with the beneficiary and does not appear to be from an authoritative source within the companies regarding employment arrangements.

has submitted nothing related to the petitioner's ability to pay the proffered wage, despite being requested to do so by the Service Center. The fact that counsel can produce a W-2 wage statement demonstrates that beneficiary was paid wages, but says nothing about whether it was actually the petitioner paid that wage or whether the petitioner had the ability to pay the wage. If anything, the W-2 wage statements clearly demonstrate that it was an entity other than the petitioner that paid the wage. Fourth, even assuming that ADP TOTALSOURCE was simply acting as the conduit through which payment flowed to the beneficiary, there is no evidence demonstrating that the wages reflected in the W-2 to the beneficiary were paid to the beneficiary by ADP TOTALSOURCE, solely for work performed exclusively for petitioner. If ADP TOTALSOURCE, as it appears, is an employment agency, it is entirely possible that the wages reflected in the W-2 represent wages paid to beneficiary by various different employers. Alternatively, ADP TOTALSOURCE may be the actual employer as reflected in the W-2 wage report. No evidence has been submitted that demonstrates what portion of the wages are derived from petitioner as opposed to a combination of wages from different employers. Fifth, assuming that the entire amount reflected in the W-2 came from petitioner, the 2000 tax records requested by the Service Center presumably could have established petitioner's ability to pay the proffered wages. However, counsel for the petitioner did not comply with the request to submit the records. Although counsel asserts in his brief that "the company's tax forms" have already been submitted, this is not the case. The record contains no tax returns from the petitioner, but only those of the beneficiary. Counsel is likely referring to the W-2 forms, but for the reasons noted above, those documents are insufficient.

Petitioner, having sought to file a petition on the beneficiary's behalf under its own name, cannot now seek to avoid satisfying the requirements related to the petition by interjecting another entity to satisfy its requirements. Although it is likely that ADP TOTALSOURCE is acting in the role of a temporary worker agency and pairing up a worker needing employment with an business needing a worker, the fact remains that the employer/employee relationship from the standpoint of the entity which pays the wages in exchange for the services provided, exists between ADP TOTALSOURCE and the beneficiary.

It is reasonable for the director to have sought petitioner's tax records as evidence of ability to pay the wage. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983).

Therefore, the petitioner has not established through the submission of sufficient evidence that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.