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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, Rm 3042
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

JAN 21 2004

File: WAC 02 040 54625 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 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 law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

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

ClinicShare or ClinicShare, Inc./San Gabriel Dialysis Center or Association (the petitioner) was a medical office and service providing home dialysis. It sought to employ the beneficiary permanently in the United States as a medical assistant for dialysis. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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

Eligibility in this matter turns on the petitioner's ability to pay the proffered wage as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is June 19, 1996. Counsel asserts other parties' claims as the petitioner, and they will be considered. The beneficiary's salary as stated on the labor certification is $1,980 per month, or $23,760 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated February 27, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax returns for 1996-1999 and quarterly wage reports for the last four (4) quarters.

Counsel responded with the joint 1996-1999 U.S. Individual Income Tax Returns (Forms 1040) of RRM and EOM, but tendered no federal income tax return of the petitioner. The payroll information from a payroll service pertained to another party, Glendale Kidney Center (GKC) for one (1) quarter, and it did not include any quarterly wage reports of the petitioner.

The director reviewed the evidence that GKC was a successor in interest to the petitioner, found no business relationship, determined that the record did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel states of the petitioner that:

> Clinishare-San Gabriel Dialysis was a California limited partnership (the "partnership") that owned a dialysis center called "West San Gabriel Dialysis Center," located at 1801 West Valley Boulevard, Alhambra, California [the Alhambra property]. This is where the Beneficiary was to work. *See* [Form ETA 750].
>
> …. The Partnership was comprised of Clinishare, West San Gabriel Dialysis Association, Lakhi M. Sakhrani, M.D. [LMS] and [RRM]….
>
> On December 8, 1997, prior to DOL's [Department of Labor's] approval of the [Form ETA 750], Bio-Medical Applications of California, Inc. [BMA] and Renal Acquisition Trust [RAT] purchased [the Alhambra property] from [the petitioner].

Counsel for LMS and RRM offers to testify that the petitioner, at the priority date, was composed of interests of Clinishare, Inc. (20%), the Center (78%), LMS (1%), and RRM (1%). *See* appeal brief, exhibit D. LMS and RRM are said to have owned the Association in amounts of 75% and 25%, respectively, and, thus, to have owned 59.5% (LMS) and 25.5% (RMM) of the petitioner. *Id.*

The assertions of counsel do not constitute evidence. *Matter of*

Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

The brief on appeal urges a Development Agreement, dated December 8, 1997, [development agreement]. Counsel advises that it incorporates the contract for the sale of the petitioner to Glendale Nephrology Services, LLC [GNS]. Its confidentiality clause, avowedly, prohibits access to the whole, except by counsel's testimony and summary. Appeal brief at 2. As to the petitioner, CliniShare, Inc., RRM makes a self-serving declaration, dated May 14, 2002 (RRM letter). It states that the petitioner's corporate income tax returns are "irrelevant and immaterial" and, anyway, not within his control and ability to obtain. Appeal brief, exhibit E, page 2, 7a. Thus, RRM explains why the petitioner produced no federal tax return in response to the RFE. He admitted in the next sentence, however, that he had owned 80% of the petitioner. *Id.*, 7b.

Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The RRM letter in 7c admits that GKC has not filed an income tax return pursuant to the development agreement of 1997 and states of unspecified individuals:

> It was our decision to hire [the beneficiary], to sponsor her for Labor Certification, and then to transfer her to, and continue our sponsorship by [GKC] of which we are 100% owners.

Nothing in the Form ETA 750 defines "our decision" except as one by the petitioner, Clinishare, Inc. and the Center. Nothing documents the shareholders of GKC. The entities are corporations, as far as the claims in the brief on appeal go. Contrary to the assertion which THAT's letter implies, Citizenship and Immigration Services (CIS), formerly the Service or the INS, may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy 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.

This record supports only the petitioner as the one with the priority date for Form ETA 750. Counsel's contentions obscure the identity of the group who made "our decision."

The petitioner, likewise, shrouds the sale of the Alhambra property and the concurrent development agreement with the veil of a confidentiality clause. Appeal brief at page 2, footnote 3. Counsel relies on self-serving descriptions of the sale, development agreement, business arrangements, and ownership proportions of parties other than the petitioner partnership at various times.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

> It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Without the development agreement, the record lacks independent and objective evidence for the offers of proof of counsel and other hearsay. Moreover, the withholding of the contract leaves CIS without the means to resolve the considerable ambiguity surrounding the claimed status of BMA, GKC or GNS, as the successor in interest of the petitioner.

Counsel and selected shareholders offer expositions of partnership interests, summaries of changing proportions, and attempts to pierce the corporate veil, but they do not address the point of *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). That authority requires a copy of a contract between the predecessor and successor entities for CIS to evaluate. The status of a successor requires documentary evidence that a named and unambiguous party has assumed all of the rights, duties, and obligations of the petitioning corporation, i.e. the predecessor company. In this case, RRM has declared the petitioning corporation's tax returns irrelevant, shrouded the development agreement with a veil of confidentiality, and admitted that the avowed successor in interest has never file a tax return.

Counsel argues that a "mere continuation of business" suffices to prove a successor in interest from *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d (11th Cir. 1996). Counsel correctly notes that this conclusion applied to a finding of the minimum contacts with Florida to support jurisdiction for personal service of process in Florida courts for a patent infringement action. The court listed a number of factors to support a "mere continuation

of business" for purposes of personal jurisdiction. State statutes reflect a tendency to expand personal jurisdiction in their courts on behalf of their citizens.

The holding on the reach of the Florida statute for personal service is unrelated to the issue in this petition and the *Matter of Dial*. The present matter concerns the assumption of rights, duties, and obligations of a business under a contract between the predecessor and successor. The contract, however, is not even available to inspect.

Counsel concludes,

> The sale of [the petitioner] and subsequent development of [GKC] should not require a new labor certification application to be filed just as [CIS] does not require a new investor visa petition to be filed if an alien investor changes her initial investment after filing her visa petition (I-526) but prior to the adjudication of the petition. *Mawji v. INS*, 671 F.2d 342 (9th Cir. 1982), attached hereto as Exhibit "K."
>
> In *Mawji (supra)*, Mawji submitted a new application for investor status at his deportation hearing, claiming $12,000 was invested in a fast food restaurant. Before the deportation hearing reconvened after [CIS] had investigated the investment, Mawji had sold the restaurant and re-invested the proceeds from the sale into a grocery store.

No labor certification affects the circumstances which counsel discusses. The record in *Mawji*, evidently, included contracts and transactions to interpret the reinvestment. The proceedings in the instant case do not contain the development agreement and documentary evidence to establish whether BMA, GKC, or GNS was the successor in interest of the petitioner. No contract term identifies any successor with rights, duties, and obligations as to the beneficiary. The record for this petition lacks precisely the essential attributes described in the *Mawji* case.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

In order to maintain the original priority date, a successor in interest must demonstrate that the predecessor had the ability to pay the proffered wage. Assets of the petitioning corporation's shareholders and of other enterprises are not available to satisfy its obligation to pay the proffered wage. The RFE explicitly requested the petitioner's federal tax return for 1997, and RRM admits there was one.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the federal tax returns, statements, briefs, and cases in this record, the evidence does not establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.