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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 107 51538 Office: VERMONT SERVICE CENTER Date: JAN 22 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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 the Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a dress manufacturer and retailer. It seeks to employ the beneficiary permanently in the United States as a fashion designer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

8 CFR 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, in part, on the petitioner's ability to pay the wage offered 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). Here, the petition's priority date is September 16, 1996. The beneficiary's salary as stated on the labor certification is $50,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On August 23, 2000, the director requested additional evidence (herein the RFE) to establish that the petitioner had the ability to pay the proffered wage as of the priority date. The RFE specified both the petitioner's federal income tax returns and its records of wage payments to the beneficiary, if any, for 1996 and 1997.

Counsel submitted, in response, the petitioner's 1996 and 1997 Forms 1120S U.S. Income Tax Returns for an S Corporation. They reflected, respectively, an ordinary (loss) of ($18,959) and ordinary income of $7,783, less than the proffered wage. Counsel submitted a CPA's letter dated September 11, 2000 (CPA letter). It advised that the petitioner opened its first store in 1996, had

sales of over $720,000 in 1998, and generated profits from six (6) stores. The CPA letter does not evidence financial ability at the priority date.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

On appeal, counsel submits the petitioner's 1998 and 1999 Form 1120S U.S. Income Tax Return for an S Corporation with her brief and a letter and affidavit of a shareholder of the corporate petitioner. In addition to the federal tax returns of the corporate petitioner, counsel also offers the shareholder's Form 1040, U.S. Individual Income Tax Returns for 1996-1999, inclusive, and claims they represent income from a Palm Beach store. 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 returns are unsigned, undated, and incomplete as to any schedules. The shareholder's letter of August 22, 2001 maintains that he set up his stores as separate corporations, rather than on his Form U.S. 1040.

Counsel's appeal of September 4, 2001, nonetheless, characterizes the thrust of the submissions:

> Petitioner can easily pay the salary offered at the time of filing his I-140 petition and in fact would have paid that salary in 1996 and 1997 by transferring funds from one store to another if needed to meet the payroll, as explained in the attached affidavit and as evidence in the tax returns submitted from 1996 through 1999 from Southampton and Palm Beach stores. He would have taken a minimum or no salary if necessary to cover [the beneficiary's] salary.

The priority date of the petition, as stated in the Form ETA 750, is September 16, 1996, and the petitioner had a loss in 1996. The petitioner must show that it has the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. *See* Matter of Great Wall, 16 I & N Dec. 142, 145; Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); Chi-Feng Chang v. Thornburgh, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require the same result. 8 CFR 204.5(g)(2). 8 CFR 103.2(b)(1) and (12).

The corporation is a separate and distinct legal entity from its

owners and shareholders. 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. *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).

A careful review of the federal tax returns reveals that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition 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.