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U.S. CITIZENSHIP AND IMMIGRATION SERVICES



U.S. Citizenship
and Immigration
Services

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FILE: WAC 02 189 51538 Office: CALIFORNIA SERVICE CENTER

Date: AUG 19 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

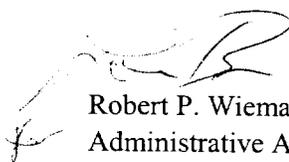
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker. The petitioner is described as an import/wholesale firm on the individual labor certification approved by the Department of Labor accompanying the petition and on the visa petition. It seeks to employ the beneficiary permanently in the United States as an import agent. The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has established its ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of 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.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides 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. . . . 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 [Citizenship and Immigration Services (CIS)].

Eligibility in this case is based upon the petitioner's continuing financial ability to pay the wage offered as of the petition's priority date. The regulation at 8 C.F.R. § 204.5(d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is October 23, 1995. The beneficiary's salary as stated on the labor certification is \$2,500 per month or \$30,000 per year, based on a 40-hour week. The visa petition indicates that the petitioner was established in 1989 and has one employee.

As evidence of its ability to pay, the petitioner initially submitted copies of its 2000 and 2001, Form 1120S, U.S. Income Tax Return for an S Corporation. They indicate that the petitioner files its returns using a standard calendar year. On its 2000 corporate tax return, Schedule B, Line 2, the petitioner states that its principal business activity is "coffee" and that its product or service is a "coffee shop." It reported ordinary income of \$44,604. The petitioner's current assets and liabilities are shown on Schedule L. Net current assets are the difference between current assets and current liabilities. CIS will consider a petitioner's net current assets as part of an examination of a petitioner's ability to pay a proffered salary because it represents the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to

pay a proffered salary during the year covered by the Schedule L balance sheet.¹ On the 2000 tax return, the petitioner declared \$270,564 in current assets, \$2,739 in current liabilities, resulting in \$267,825 in net current assets.

On its 2001 corporate tax return, the petitioner describes its principal activity as “retail & wholesale” and that its product or service is “coffee.” It declared -\$3,462 in ordinary income. Schedule L shows that it had \$529,710 in current assets and \$1,087 in current liabilities, producing \$528,623 in net current assets. The record also contains a statement by the president of the petitioning business, Sang Man Lee, dated May 15, 2002. Mr. Lee states that his business consists primarily of international trade between the United States and Korea. He adds:

From February 1999 to January 2001, we also operated a coffee wholesale business at 5885 Haven Avenue, Rancho Cucamonga, California. This business lost substantial money for which we deducted \$122,334 in abandonment losses from our 2001 corporation return. Otherwise, our taxable income would have been \$120,000

On August 1, 2002, the director requested that the petitioner provide additional evidence of its ability to pay the proffered wage from the priority date to the present. The director instructed the petitioner to submit either annual reports, federal tax returns, or audited financial statements from October 23, 1995 to the present. The director also requested that the petitioner provide an explanation why the address on its 2000 and 2001 tax returns was different than the one given on the visa petition.

In response, the petitioner stated that its business address changed in 2002 after filing the 2001 corporation tax return. It also provided its corporate tax returns for 1995 through 1999. In 1995 and 1996, the tax returns described its principal business activity as “import” and that its product or service was “general goods.” In 1997, the tax return states that the petitioner’s principal business activity was manufacturing. No product or service was stated. In 1998, the petitioner stated that its principal business activity was “rental” and its product or service was “sublease.” In 1999, the principal business activity was “coffee” and the product or service was “coffee shop.” The petitioner’s corporate tax returns also contained the following information relevant to its net income and its net current assets:

Year	Ordinary Income	Current Assets	Current Liabilities	Net Current Assets
1995	-\$1,223	\$370,180	\$ 0	\$370,180
1996	-33,983	281,992	850	281,142
1997	-241,887	176,108	-75	176,183
1998	7,927	180,665	0	180,665
1999	-16,522	187,844	1,401	186,443

The director denied the petition, concluding that the petitioner’s corporate tax returns failed to show its financial ability to pay the beneficiary’s proffered salary.

¹ According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, counsel provides a copy of the petitioner's corporate tax return for 2002, which shows that the petitioner reported \$76,543 in ordinary income. Counsel also submits copies of the sole shareholder's individual tax returns. Counsel asserts that the owner operates another profitable wholesale clothing business as a sole proprietorship, which is reported on his individual tax returns, and that these assets were available to pay the proffered wage. Counsel's assertion is not persuasive. The petitioner is a corporation. Corporations are separate and distinct legal entities and the assets of a corporation's shareholders or of other corporations or enterprises cannot be considered in evaluating a petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 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 [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

In examining a petitioner's ability to pay a proffered wage, CIS will review the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by 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. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, except in 2000, and as shown on its 2002 tax return submitted on appeal, the petitioner's corporate tax returns show insufficient net income to have covered the beneficiary's proposed wage offer of \$30,000, beginning as of the priority date of October 23, 1995 and continuing forward. As discussed above, however, net current assets can also be considered in evaluating a petitioner's ability to pay the proffered wage. At first glance, this petitioner's net current assets show more than enough funds to cover the proffered wage during each of the relevant years. Upon further examination, however, it appears that most of the petitioner's funds reported as current assets on Schedule L in 1997, 1998, and 1999 consisted of "investments in China," raising a question as to the nature and liquidity of such assets and whether they would have been readily available to pay the proffered wage. Moreover, had any net current assets been used to pay the proffered wage in a given year, they would not then have been available the following year.

More troubling about this petition are the various descriptions that the petitioner provided about its principal business activity on its tax returns. In 1997, as mentioned above, the tax return stated that the petitioner was a manufacturer. In 1998, it apparently became some sort of rental firm. It reported only \$162 in gross receipts or sales that year. In 1999 and 2000, the tax return suggests that its principal activity was a coffee shop, which somewhat contradicts Mr. Lee's subsequent statement. A review of the tax returns as a whole raises questions as to whether the petitioner continued to operate as a viable import/wholesale firm after 1996 and whether its job offer for an import agent with Korean language skill, as specified on the labor certification, retained validity. It is incumbent on a petitioner to satisfactorily resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Based on the foregoing, and after consideration of the evidence submitted initially to the record and subsequently on appeal, it cannot be concluded that the petitioner has clearly established its continuing ability to pay the

proffered salary as of the visa 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.