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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 21 2004

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.

The petitioner is a rubber stamp and accessories firm. It seeks to employ the beneficiary permanently in the United States as an importer assistant. 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 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. The petition's priority date in this instance is November 14, 1997. The beneficiary's salary as stated on the labor certification is $52,624.00 per year.

It should be noted at the outset that on the Form ETA 750 submitted by the petitioner [redacted] is listed as "owner" of the petitioner. When that form was submitted, in November 1997, the petitioner was not yet a corporation. On the Form I-140 submitted by the petitioner, signed on December 9, 2002, the petitioner's signature is that of [redacted] who states her title as "owner." As of that date the petitioner was a corporation. This information, and the fact that [redacted] and [redacted] submitted joint tax returns from 1997 through 1999 which included the financial matters pertaining to the petitioner [redacted] ndicate that prior to incorporation the petitioner was jointly owned by [redacted] and by [redacted] The record contains a copy of articles of incorporation of [redacted] signed February 25, 1999 and stamped as filed by the California Secretary of State on March 3, 1999.

With the filing of the Form I-140 in December 2002, counsel initially submitted insufficient evidence of the beneficiary's experience and of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 17, 2003, the director required additional evidence to establish the beneficiary's experience and 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 acknowledged receipt of a copy of the petitioner's tax form 1120 for the tax year 2001, but it noted that that copy was unsigned and therefore was unacceptable evidence of ability to pay. The RFE requested certified IRS computer printouts for the petitioner for the tax years 1997, 1998, 1999, 2000 and 2001 and copies of the beneficiary's W-2 forms from 1992 through 1997. The RFE also requested documentation on the petitioner's business activities, including articles of incorporation, a master payroll list and copies of documents reflecting at least three business transactions.

In response to the RFE counsel submitted IRS Form 1040 computer printouts for the years 1997, 1998, 1999 and 2000 for the proprietors of the petitioner, [redacted] and [redacted] The business documentation submitted by counsel included the copy of articles of incorporation of [redacted] which was mentioned above. The articles of incorporation were signed February 25, 1999 and were stamped as filed by the California Secretary of State on March 3, 1999.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage. The director found that the Form 1040 for Tax Year 1998 showed taxable income of $46,254.00, or $6,370.00 less than the proffered wage. The director found that the Form 1040 for Tax Year 1999 showed taxable income of $55,833.00. The director made no comment on this figure, apparently because it was greater than the proffered annual wage of $52,624.00. The director found that the petitioner converted from a sole proprietorship to a corporation on January 1, 2000. The director then noted that since certified IRS computer printouts of U.S. corporation income tax returns for 2000 and 2001 were not provided, it could not be determined that the petitioner had established the ability to pay for those tax years.

With regard to the qualifications of the beneficiary, the director found that the petitioner had failed to provide the documentation requested in the RFE. The director noted that counsel had explained in a letter that the beneficiary was relying on prior experience with a firm in Bangkok, Thailand, but that that firm was no longer in business at its prior location. Counsel stated that the beneficiary's sister had visited the former business location, but had been unable to locate the prior employer.

Following an analysis of the above evidence in the record, the director then denied the petition.

On appeal, counsel submits additional evidence regarding the issue of the petitioner's ability to pay the proffered wage and regarding the issue of the beneficiary's qualifications.

On the issue of the petitioner's ability to pay the proffered wage, counsel submits copies of line of credit documents from June, September, October and November 1997 issued by Wells Fargo Bank to [redacted] doing business as [redacted] and to [redacted] and [redacted] The line of credit issued in June 1997 had a credit limit of $40,000. A loan statement issued to [redacted] and [redacted] in October 1997 records an original credit limit of $13,000.00, of which $12,700.00 had been used, leaving $300.00 in available credit as of the October 24, 1997 closing date of the statement.

With regard to the issue of the beneficiary's qualifications, counsel submits on appeal a letter from the beneficiary's former employer in Bangkok, Thailand. The letter states that the beneficiary worked for the former employer from March 18, 1981 until November 30, 1989, for 40 to 50 hours per week, handling matters relating to the employer's business of retail silk sales, including negotiating price and quantities with suppliers and preparing invoices and tax documents for shipments outside of Thailand.

Counsel submits no brief on appeal, but counsel offers legal arguments on the Form I-290B. Counsel argues that the petitioner's business carried significant inventory, accounts receivable and other assets which were at all times available to pay the beneficiary's salary. On the issue of the beneficiary's qualifications, counsel explains the reasons for the delay in the submission of the letter from the beneficiary's former employer in Thailand and urges that the letter submitted on appeal be considered.

A review of the evidence upon which the director based his decision indicates that the decision of the director on the issue of the petitioner's ability to pay the proffered wage was correct. The tax transcript submitted by the petitioner for 1997 showed adjusted gross income of the proprietors [redacted] and his wife [redacted] of $34,441.00. This amount was $18,183.00 less than the proffered annual wage of $52,624.00. The tax transcript submitted for 1998, as noted above, was found by the director to show an adjusted gross income which was $6,370.00 less than the proffered annual wages. The director's analysis on this point was correct. Only the transcript for the year 1999 showed a figure for adjusted gross income which was higher than the proffered annual wages.

The director did not further analyze the above figures, but it should be noted that since the petitioner was individually owned until 1999, rather than being a corporation, the figures for adjusted gross income would not be sufficient to show the petitioner's ability to pay the proffered wage without first taking into account the personal expenses of the proprietors. Therefore, even though in the year 1999 the adjusted gross income figure of $55,833.00 was higher than the proffered annual wage of $52,624.00, this fact was not sufficient to establish the petitioner's ability to pay the proffered annual wage, since the difference of $3,209.00 would be clearly insufficient to pay the personal living expenses of the proprietors for that year.

The director found that the failure of the petitioner to submit certified IRS tax transcripts for the years 2000 and 2001 prevented a determination that the petitioner had established the ability to pay the proffered wages for those years. The director's decision was correct, based on the evidence which was then in the record. As noted above, counsel on appeal submits additional business documents pertaining to a business line of credit or lines of credit issued to the proprietors 1997. However, nothing in those additional documents addresses the evidentiary deficiencies noted by the director concerning the absence of certified IRS corporate tax transcripts for 2000 and 2001. Therefore, with regard to the issue of the ability to pay the proffered wages, the director's decision remains correct notwithstanding the submission of additional evidence on appeal.

With regard to the issue of the beneficiary's qualifications, the letter from the beneficiary's former employer submitted by counsel on appeal does respond to the specific points on that issue raised in the RFE dated March 17, 2003. The letter establishes the beneficiary's experience for eight years and eight months from March 1981 to November 1989 in a full-time position in Bangkok, Thailand. The responsibilities of that position as described in the letter were closely similar to the responsibilities of the position of Importer Assistant as stated on the Form ETA 750. With regard to this issue, therefore, the petitioner's evidence on appeal is found to have established that the beneficiary possessed the required experience as stated on the Form ETA 750 as of the priority date of November 14, 1997.

Although the petitioner's evidence is found to be sufficient with regard to the experience of the beneficiary, the petitioner's evidence is found insufficient to establish the ability of the petitioner to pay the proffered wages from the time the priority date was established and continuing until the beneficiary obtains lawful permanent residence, for the reasons discussed above.

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.