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U.S. Citizenship and Immigration Services

[redacted]

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MAR 2 2 2004

FILE: WAC 02 092 53829 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for a 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 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 remanded to the director to request additional evidence and entry of a new decision.

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 a sporting goods manufacturer. It seeks to employ the beneficiary permanently in the United States as a patternmaker. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. 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, counsel contends that the director failed to adequately consider that the petitioner will use the beneficiary's services to replace goods manufactured overseas.

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) also provides in pertinent part:

> (2) *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 the Service.

Eligibility in this case rests 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 Department of Labor's employment service system. Here, the petition's priority date is January 15, 1998. The beneficiary's salary as stated on the labor certification is $6.50 per hour or $13,520 per year based on a 40-hour week. The record indicates that the petitioner was established in 1993 and is organized as a corporation. It employs four people.

As evidence of its ability to pay, the petitioner initially submitted unaudited financial statements consisting of profit and loss summaries covering the period from January to December 2000 and January 1, 2001 to May 31, 2001. In a letter dated January 3, 2002, counsel stated that the ETA-750, Part B, regarding the beneficiary's past employment, was not correct and submitted additional information. Counsel further stated that the petitioner has employed the beneficiary as a full-time patternmaker from 1998 until the present. The letter was signed by counsel and by the beneficiary.

On March 19, 2002, the director requested additional evidence from the petitioner in order to establish its continuing ability to pay the beneficiary's wage offer of $13,520 per year. The director advised the petitioner to

submit either signed federal tax returns, audited financial statements, or annual reports from 1998 until the present.

The petitioner responded by submitting copies of its Form 1120, U.S. Corporation Income Tax Return for 1999, 2000 and 2001. Counsel submitted a letter from the petitioner's president explaining that its 1998 tax returns were available due to a "standard three year interval housecleaning." The tax returns submitted reflect that the petitioner files its returns based on a standard calendar year.

The petitioner's 1999 corporate tax return reveals that the petitioner declared -$3,929 in taxable income before the net operating loss (NOL) deduction and special deduction. Its Schedule L balance sheet shows that it had $13,221 in current assets and $7,096 in current liabilities, producing $6,125 in net current assets. Neither the petitioner's taxable income of -$3,929, nor its net current assets of $6,125 could meet the beneficiary's proposed salary of $13,520.

The 2000 tax return discloses that the petitioner declared $9,938 as taxable income before the NOL deduction and special deductions, and had $36,227 in current assets and $5,949 in current liabilities, resulting in $30,278 in net current assets. In this year, the petitioner could pay the beneficiary's proposed salary of $13,520 out of its net current assets.

The petitioner's 2001 corporate tax return reveals that the petitioner had -$473 in taxable income before the NOL deduction and special deductions. Schedule L shows that the petitioner declared $50,306 in current assets and $20,501 in current liabilities, yielding $29,805 in net current assets. In 2001, the petitioner has established its ability to pay the beneficiary's proposed salary because it could be paid out of the petitioner's net current assets.

On July 10, 2002, the director again notified the petitioner that additional financial information was needed. The director recognized that the previous correspondence had indicated that the 1998 tax return was unavailable, but instructed the petitioner to submit either audited financial statements, annual reports, or a signed and stamped federal tax return for 1998.

In response, the petitioner submitted a copy of its 1998 corporate tax return. It shows that the petitioner's taxable income before the NOL deduction was -$2,769. Schedule L reflects that the petitioner had $20,699 in current assets and $8,749 in current liabilities, producing $11,950 in net current assets. The petitioner has not established its ability to pay the beneficiary's wage offer of $13,520 out of its taxable income or net current assets for 1998.

The director denied the position based on his determination that the petitioner's corporate tax returns had not shown that the petitioner had established its continuing ability to pay the proffered salary as of the priority date of January 15, 1998.

On appeal, counsel submits copies of various overseas bills of lading and invoices that have been sent to the petitioner from some of its foreign contractors. Counsel argues that the petitioner's "cost of goods sold," as set forth on Item 2 of its federal tax returns for 1998 through 2001, should be credited back to the petitioner when reviewing its ability to pay the beneficiary's wage because "the petitioner had to incur the added expense to maintain an ongoing business until the company had its own pattern-maker." Counsel states that "the petitioner hires services abroad to comply with customer's orders since the petitioner does not have a pattern-maker in-house."

Counsel's argument is not persuasive. As noted above, counsel's earlier letter submitted to the file, endorsed by the beneficiary, indicates that the beneficiary has already been working as a full-time patternmaker for the petitioner since 1998. Counsel's assertion on appeal appears to directly contradict the earlier statement. It also begs the question as to why the petitioner hasn't already employed the beneficiary to provide these much needed services. It is noted that the record contains no primary documentation from the petitioner, other than copies of selected business transactions, that the petitioner intends to utilize the beneficiary in such a way or that the actual amounts set forth on the tax returns solely reflect these overseas costs. Counsel's assertions do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988).

That said, the record shows that the director failed to request copies of the beneficiary's Wage and Tax Statements (W-2s) or evidence of proof of wages paid, despite having sent two requests for financial ability evidence to the petitioner. Such credible evidence could help establish the petitioner's ability to pay the proffered salary for 1998 and 1999 if the documentation shows that the petitioner's net current assets could cover the difference between the wages paid to the beneficiary and the proffered salary.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request additional evidence from the petitioner related to its past employment of the beneficiary as well as any further updated financial information. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.