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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, D.C. 20536

[redacted]

File: WAC 01 280 51457 Office: California Service Center Date: MAR 22 2004

IN RE: Petitioner:
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:

[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.

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 on appeal. The appeal will be dismissed.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a branch manager. 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 ability to pay the beneficiary the proffered wage beginning as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

The priority date in this case is January 9, 1998, which is the date the request for labor certification was accepted for processing by an office within the employment system of the Department of Labor. The beneficiary's salary as stated on the labor certification is $5,208.12 per month or $62,497.44 per annum.

Counsel submitted copies of the beneficiary's W-2 Wage and Tax

Statements which showed a salary paid of $28,284.40 in 1997, $44,356.65 in 1998, $45,000.00 in 1999, $45,000.00 in 2000, and $45,000.00 in 2001, and copies of the petitioner's 1998, 1999, and 2000 Form 1120-F, U.S. Income Tax Return of a Foreign Corporation.

The 1998 tax return reflected compensation of officers of $0; salaries and wages paid of $89,400; and taxable income before net operating loss deduction and special deductions of -$240,530.

The 1999 tax return showed compensation of officers of $0; salaries and wages paid of $113,027; and taxable income before net operating loss deduction and special deductions of -$83,676. For 2000, compensation of officers was $44,400; salaries and wages paid were $0; and taxable income before net operating loss deduction and special deductions was -$177,644.

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

On appeal, counsel argues that: "[CIS] did not consider the fact that the Korean Company will be paying the proffered wage of the beneficiary." Counsel further argues that:

> Can & Can Trading Co., Ltd. via the Korean Company has in fact paid wages from 1997 through 2001. The Korean Company paid [the beneficiary] $28,284.40 in 1997, $44,356.65 in 1998, $45,000 in 1999, $45,000 in 2000, and $45,000 in 2001. The fact that the wages have been paid from 1997 to 2001 should be considered a factor in determining whether the petitioner has the financial ability to pay. If the petitioner did not have the financial ability to pay, it would have closed the U.S. Company. Although the U.S. Company may not be in the best financial situation, a significant portion of Foreign and U.S. Corporations have recorded Net Losses in the last several years. In fact, many large Multi-National Corporation (sic) continue to operate despite negative income because they are investing in their company so that it may be profitable in the future.

In his decision, the director noted:

> As per the representative's letter submitted along with the evidence, "the U.S. Company is wholly owned branch of the Korean parent company and thus the U.S. company is owned by Korean nationals. The wire transfer statements indicate that the Korean parent company has

been replenishing the U.S. company's (Can & Can Trading Co., Ltd's) funds since 1997, before the priority date of January 9, 1998 was established, and has continued to do so in the present, on a monthly basis." The evidence included all the wire transfers from the Korean parent company showing the following amount was transferred:

1997 -- $45,000
1998 -- $205,000
1999 -- $233,000
2000 -- $151,000
2001 -- $193,000
2002 -- $ 30,000

Counsel's argument that the Korean parent company will pay the proffered wage, and has done so, is not persuasive. The tax returns submitted already contain the salary paid the beneficiary, and in all years it does not meet the proffered wage. Furthermore, the tax returns reflect that in all the pertinent years the difference could not have been made up from the net income or net current assets shown on the tax returns.

Beyond the director's decision and of even more significance in this case is the fact that the petitioner is not a United States employer. The employer is by counsel's admission the Korean company. This is further established by the fact that the employer has continuously filed Form 1120-F, U.S. Income Tax Return of a Foreign Corporation, with the Internal Revenue Service.

The regulation at 8 C.F.R. § 204.5(c) states that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under section ... 203(b)(3) of the Act. In *Matter of A. Dow Steam Specialities, Ltd.*, 19 I&N Dec. 389 (Comm. 1986), the Commissioner ruled that "a petitioner, having no location in the United States, is not an employer, and, therefore, cannot offer to permanently employ an alien in the United States. Only a U.S.-based branch office, affiliate, or subsidiary of the foreign organization may file such a petition."

In the case at hand, it is clear that the foreign entity is really the petitioner. According to the evidence of record, it has paid and will continue to pay the beneficiary. The tax records submitted have been filed by the petitioner as a foreign corporation. Furthermore, the record contains a Certificate of Qualification, issued by the State of California on August 21,

1996, which states that Can & Can Trading Co. Ltd., "a corporation organized and existing under the laws of REPUBLIC OF KOREA," is qualified to conduct intrastate business in the State of California. The record is devoid of any evidence that a United States entity has been incorporated. Clearly, neither the petitioner nor the petitioner's presence in the United States, whatever it is, is not a United States employer as contemplated by the statute, regulations, and relevant case law.

Accordingly, after a review of record, it is concluded 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 the present. It is also concluded that the petitioner, a foreign corporation, is not competent to offer the beneficiary permanent employment in the United States.

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.