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U.S. Department of Justice
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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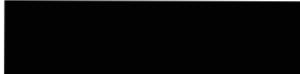
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File:

Office: NEBRASKA SERVICE CENTER

Date: MAR 22 2001

IN RE: Petitioner:
Beneficiary:



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)

IN BEHALF OF PETITIONER:



Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The employment-based preference immigrant visa petition was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Associate Commissioner, Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the Director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner seeks classification for the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3). The petitioner seeks to employ the beneficiary as a alteration tailor. The director found that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of November 6, 1996, the filing date of the visa petition. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel submits a brief in support of his claim that the petitioner has established the ability to pay the proffered wage at the time of filing of the petition.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment service 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 filing date is November 6, 1996. The beneficiary's salary as stated on the labor certification is \$17.00 per week which equates to \$35,360 annually.

On motion, counsel submits a brief.

Counsel argues:

On appeal, Petitioner's argument was two folded: First, Beneficiary's employment will result in more income for the business so that with such increased income Petitioner will be able to pay the proffered wage. To support its argument, Petitioner submitted copies of contracts with local Korean art associations for costumes. Petitioner's second argument is that an income from business by itself does not fully show Petitioner's financial ability and therefore other assets also should be reviewed to accurately determine its financial condition.

With regard to Petitioner's first argument, the Office of Administrative Appeals stated that Petitioner's argument lacked its basis and therefore the service was unable to take the potential earnings to be generated by Beneficiary's employment into consideration.

To provide a basis for its argument that Beneficiary's employment will bring about more income for the business, Petitioner will provide additional information and documents. However, [REDACTED], who is the owner of Holiday Cleaners, is currently out of country and therefore at the present time Petitioner is unable to submit the above documents and information. Petitioner will furnish them by May 5, 2000.

With respect to Petitioner's second argument, the Office of Administrative Appeals reasoned that Petitioner's argument was not persuasive in the absence of evidence of additional income. As new and additional evidence, Petitioner will provide the information and documents regarding Petitioner's additional income, which include documents for Mr. Yi's assets and income. Petitioner will also provide its 1998 and 1999 tax returns. Again Petitioner will submit those documents by May 5, 2000 after Mr. Yi returns from his trip.

Counsel's argument that the beneficiary's employment will increase the growth of the company is not persuasive. Counsel does not explain the standard or criterion for such a conclusion. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, transform the nature of the petitioner's operation, or increase the number of customers on the strength of his reputation. Consequently, the Service is unable to take the potential earnings to be generated by the beneficiary's employment into consideration.

In an unincorporated association or sole proprietorship, the assets and income of the owner can be considered in determining the petitioning business' ability to pay the wages offered. In this case, however, the record does not contain any evidence of the petitioner's personal expenses. Therefore, it is impossible to determine if the petitioner had income sufficient to pay the beneficiary and meet any expenses incurred by the petitioner and his family.

It is noted that the petitioner did provide additional documentation in support of its petition. However, the deed of trust which was submitted is for the business itself and cannot be considered as an asset that could be liquidated to pay the wage of the beneficiary. The lease submitted reflects an agreement date commencing on September 1, 1999. This date does not cover the filing date of the petition and, therefore, cannot be used as proof of the ability to pay the wage as of November 6, 1996. Although the life insurance policy has a policy date of June 25, 1996, the cash value of \$8,799.35 (as of June 29, 1999) is not enough to pay the proffered wage of \$35,360.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2). Therefore, the petition may not be approved.

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. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of February 29, 2000 is affirmed. The petition is denied.