

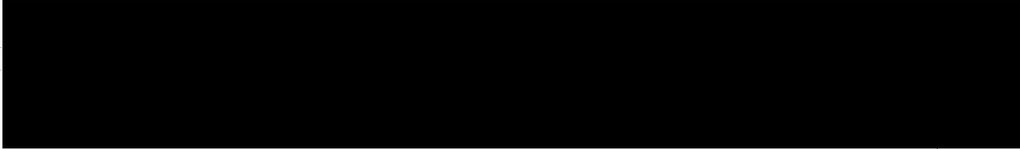


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U.S. Department of Justice  
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 00 218 53095

Office: California Service Center

Date: 4 APR 2002

IN RE: Petitioner:  
Beneficiary:



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)

IN BEHALF OF PETITIONER:



Public Copy

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

*Kelen E Crawford for*  
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and wholesaler of jewelry. It seeks to employ the beneficiary permanently in the United States as a diamond setter. 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 financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition. The director also determined that the petitioner had not established that the beneficiary had the requisite experience as of the filing date of the visa petition.

On appeal, counsel submits a brief.

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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on February 28, 1996, indicates that the minimum requirement to perform the job duties of the proffered position of diamond setter is completion of grade school and four years of experience in the job offered.

Counsel submitted a letter of employment for the beneficiary which stated that he had been a diamond setter from July 3, 1994 to January 9, 1999. The director found that the beneficiary did not have the required four years of experience at the time the ETA 750 was filed and denied the petition.

On appeal, counsel argues that:

The letter of experience submitted for the substituted beneficiary establishes the possession of the required (4) years of experience as a "Diamond Setter", as originally requested the certified application for labor certification.

We would like to advise the Service, to take into consideration that this is not a case of an I-140 filing upon the certification of an application for labor certification. This is a case of filing I-140 petition for a substituted beneficiary with an already approved application for labor certification.

The minimum requirements would have been met at the time that the request for certification was filed, had it been for the same beneficiary the application was initially submitted on February 28, 1996.

Counsel's argument is not persuasive. According to the guideline on substitution agreed upon between the (Department of Labor DOL) and INS, the new substituted for alien must meet all of the minimum education, training, or experience requirements set forth in the original labor certification at the time the priority date was established. In order for the new alien to qualify, his four years of experience must be obtained before February 28, 1996. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage as of the filing date of the visa petition.

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 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 February 28, 1996. The beneficiary's salary as stated on the labor certification is \$12.00 per hour or \$24,960.00 per annum.

Counsel submitted no evidence of the petitioner's ability to pay the proffered wage. The director denied the petition.

On appeal, counsel states "[p]lease be advised that this office had included a copy of employer's most recent tax returns along with its Form I-140 for the substituted beneficiary."

Despite counsel's claim that the petitioner's tax returns are in the record, a review of the file shows no evidence of the petitioner's ability to pay the proffered wage.

To date, no additional evidence has been received. Therefore, the director's decision to deny the petition has not been overcome and 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.

**ORDER:** The appeal is dismissed.