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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File: EAC 00 032 50508 Office: VERMONT SERVICE CENTER

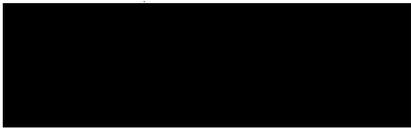
21 JUN 2002
Date:

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

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a religious organization and school. It seeks to employ the beneficiary permanently in the United States as an IMAM. 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 Associate Commissioner affirmed this determination on appeal and also determined that the beneficiary did not meet the minimum requirements of the proffered position.

On motion, counsel submits a brief and additional documentation.

The first issue in this proceeding is whether the beneficiary met the petitioner's qualifications for the position as stated in the labor certification.

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.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 14, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the minimum requirements to perform the job duties of the proffered position are six years of college and the beneficiary must be a graduate of a recognized Islamic religious institution and one year of experience in the job offered.

The Associate Commissioner determined that the petitioner had not established that the beneficiary met the minimum requirements of the labor certification.

On motion, counsel submits evidence that the beneficiary has over six years of college and was awarded a Bachelor's degree in Islamic Studies in September of 1989 from the University of Rizvia Ziaul-Uloom in Rawalpindi, Pakistan. The record further contains a letter from Was Salaam of the Piet Retief Muslim Community which verifies that the beneficiary had seven years of experience as an IMAM. Therefore, the petitioner has 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 petition.

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 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 January 14, 1998. The beneficiary's salary as stated on the labor certification is \$26,000.00 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence

of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel argues that:

ISSC's 1999 income tax return shows an income of \$96,846, \$63,987 more than expenses. Total assets at the end of 1999 were \$150,688. The 1999 income greatly increased from 1998 due in most part favorable reception of Imam Mansoor by the congregation of ISSC leading to a great increase of contributions. The 1998 income was relatively low because money was funneled to improvements on ISSC's property and the building used as a mosque, including a 1,800 sq. ft. additional story addition to the original 2,500 sq. ft. building. The improvements are reflected in the increased value of ISSAC's assets from \$86,701 to \$150,688 in 1999 and \$318,070 currently. During 1999, ISSC had two accounts with PNB, the business checking account (0001519646) and an indexed money market account (3781465905). The combined account had more than enough money to cover Imam Mansoor's monthly salary.

Counsel's argument is not persuasive. As noted by the Associate Commissioner "a review of the 1998 tax return reflects that the petitioner had a deficit of \$6,825." While the Associate Commissioner acknowledged that the petitioner had the means to pay the wage offered in 1999, the petitioner did not have the ability to pay the wage offered in 1998, the year of filing.

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 sustained that burden.

ORDER: The Associate Commissioner's decision of March 12, 2001, is affirmed. The petition is denied.