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U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

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



File: WAC 98 161 52214

Office: California Service Center Date:

MAY 07 2002

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:



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, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference immigrant visa petition was denied by the Director, California Service Center, who certified the decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed.

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 specialty cook. The director found that the petitioner had not established that the beneficiary was eligible for classification under section 203(b)(A)(iii). The director certified his decision to the Associate Commissioner for Examinations for review.

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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is September 6, 1995. The beneficiary's salary as stated on the labor certification is \$9.50 per hour which equates to \$19,760 per annum.

On January 31, 2000, the Administrative Appeals Office remanded the petition to the California Service Center for consideration of the petitioner's ability to pay the proffered wage as of the date of filing the petition, and to determine if the petitioner was a successor-in-interest to the former employer. The Administrative Appeals Office further remanded the petition for clarification of the classification sought.

On July 21, 2000, the director determined that the petition would be adjudicated under section 203(b)(3)(A)(ii) of the Act and

requested evidence of the employer's ability to pay the beneficiary's wage, and evidence that the petitioner is a successor-in-interest to the original employer. Regarding the ability to pay the proffered wage, the petitioner responded by stating that the petitioner had the ability to pay the proffered wage and that the federal tax returns that were requested would be forthcoming. No evidence has been received to date, however, to establish the petitioner's ability to pay the wage offered.

Regarding the issue of successor-in-interest, the petitioner responded by submitting an affidavit from Bo Sung Choi which stated that he (Bo Sung Choi) acquired ownership of [REDACTED] in June of 1996. The petitioner was requested to submit legal documentation evidencing that the petitioner is a successor-in-interest to [REDACTED]. The petitioner failed to provide the requested evidence. On February 6, 2001, the petition was denied and certified to the Associate Commissioner for Examinations for review.

Without any documentation to the contrary, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary, or that it is a successor-in-interest to the former employer. Therefore, the objection of the director has not been overcome.

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 decision of the director is affirmed. The petition is denied.