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U.S. Department of Justice

Immigration and Naturalization Service

identification data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: WAC 00 033 51596 Office: California Service Center Date: MAY 14 2002

IN RE: Petitioner: [redacted]
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:

[redacted]

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

Helen 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 construction company. It seeks to employ the beneficiary permanently in the United States as a construction worker. 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 he had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition. The director further determined that the proffered position is not one requiring the services of a skilled worker.

On appeal, the petitioner submits a statement.

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 August 6, 1996. The beneficiary's salary as stated on the labor certification is $17.36 per hour or $36,108.80 per annum.

The petitioner initially submitted insufficient evidence of its ability to pay the proffered wage. On September 14, 2000, the director requested additional evidence of the petitioner's ability to pay the proffered wage as of August 6, 1996.

In response, the petitioner submitted copies of the petitioner's 1996, 1997, and 1998 Form 1040 U.S. Individual Income Tax Return, The tax return for 1996 reflected an adjusted gross income of $14,940. The tax return for 1997 reflected an adjusted gross income of $27,536, and the tax return for 1998 reflected an adjusted gross income of $42,618.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner argues in a letter date April 4, 2001, that:

> We have always paid [the beneficiary] every week since he started working for us 8 years ago and have no problem paying the beneficiary the proffered wage. In the last three years we have invested your (sic) company earnings back into your (sic) business, and have grown from a small company to one of the largest utility contractors in Laguna Beach. Our company history is out standing and so is our credit. [The beneficiary] is more than an employee, he is a good friend and is one reason our company is were (sic) it is today. The 1999 tax form is still not available at this time.

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue is whether the proffered position is one requiring the services of a skilled worker.

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(l)(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), indicated that the minimum educational, training or experience requirements for the job offered is six months of training. The director denied the petition because the petitioner had not established that the position required the services of a skilled worker.

On appeal, the petitioner cites the beneficiary's experience and training with the company, but fails to address the issue at hand.

The determination of whether a worker is a skilled worker or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor. 8 C.F.R. 204.5(l)(4). Based on the above-cited regulations governing classification as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, the proffered position is not one which requires the services of a skilled worker. Therefore, the petitioner has not overcome this portion of the director's decision and the petition may no 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.