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U.S. Department of Justice

Immigration and Naturalization Service

*Identification date defense
current clearly unwarranted
reversion & personal history*

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



File: WAC 99 169 51660

Office: CALIFORNIA SERVICE CENTER

Date:

24 MAY 2007

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, California 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 restaurant and deli. It seeks to employ the beneficiary permanently in the United States as a specialty cook. 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.

On motion, counsel submits a brief and additional documentation.

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 December 16, 1996. The beneficiary's salary as stated on the labor certification is [REDACTED] per month or [REDACTED] 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 submits a copy of the petitioner's 2000 Form 1040 U.S. Individual Income Tax Return and an affidavit of support for the beneficiary.

Counsel argues that:

The Director's denial misinterprets the petitioner's October 13, 2000 response to a request for evidence. Mr. Tang never stated that he or his company would fail to pay the proffered wage simply because the beneficiary is his sister-in-law. Indeed, he has never wavered from his commitment to employ his sister-in-law according to the terms in the labor certification. Moreover, [REDACTED] provided several statements showing that he has substantial deposits in a savings account and 401(K). Thus, regardless of the present profitability of the petitioner's deli, the petitioner shows remarkable evidence that he will pay the required wage and not allow his employee/sister-in-law to become a public charge.

Counsel's argument is not persuasive. A review of the federal tax returns show that while the petitioner had the ability to pay the wage offered in 1996, 1997 1998, and 2000, the petitioner did not have sufficient funds available in 1999.

Regarding the petitioner's claimed other assets such as his 401(K) and personal savings, the director found that the petitioner's savings would only pay one year's salary.

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 continuous sufficient funds available to pay the beneficiary the proffered wage as required by 8 C.F.R. 204.5(g)(2). The petitioner has not overcome the decision of the director 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 sustained that burden.

ORDER: The Associate Commissioner's decision of August 21, 2001, is affirmed. The petition is denied.