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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted



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

File: EAC 01 268 53724 Office: VERMONT SERVICE CENTER

Date: OCT 10 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 that 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 that 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 that 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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a chef. 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 the beneficiary had the requisite experience as of the petition's priority date. The director further determined that the petitioner had not established that it had the financial ability to pay the proffered wage as of the priority date of the petition.

On appeal, counsel submits a statement and indicates that a separate brief and/or evidence is being submitted within thirty days. No further documentation, however, has been received. Therefore, a decision will be made based on the record as it is presently constituted.

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.

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 priority date which is the date on which any office within the employment system of the Department of Labor accepted the request for labor certification. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the priority date of the petition is April 11, 2001.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of chef required two years of experience in the job offered.

The director determined that the petitioner had not established that the beneficiary had the required two years of experience and denied the petition. The director noted that the requested letters of qualifying experience were not submitted, "only a letter from the Department of Revenue-Business Services in Chicago, Illinois

stating that Shilla International Inc. is doing business as a restaurant in Chicago."

On appeal, counsel merely states that "[t]he Service erred on the evidence of the beneficiary's work experience in response to the RFE."

No additional evidence of the beneficiary's experience has been submitted. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has the ability to pay the proffered wage of \$25,147.20 annually as of April 11, 2001, the petition's priority date.

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 priority 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 priority date is April 11, 2001. The beneficiary's salary as stated on the labor certification is \$12.09 per hour or \$25,147.20 per annum.

Counsel submitted a copy of the petitioner's 2000 Form 1065 U.S. Partnership return of Income, an unaudited financial statement for the petitioner for the year 2000, and a copy of the beneficiary's W-2 Wage and Tax Statement which showed he was paid \$3,800.00 in 2000.

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

On appeal, counsel merely states that "[t]he Service erred in its factual and legal conclusion on the identity of the Petitioner, and the Financial information provided.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition.

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.