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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: WAC 02 099 52757 Office: CALIFORNIA SERVICE CENTER Date: **AUG 12 2003**

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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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.

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 Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a painting firm. It seeks to employ the beneficiary permanently in the United States as a custom painter. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 turns, in part, 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). The petition's priority date in this instance is March 31, 1997. The beneficiary's salary as stated on the labor certification is \$19.90 per hour or \$41,392 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated April 19, 2002, the director required

additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required copies of the petitioner's federal income tax return, annual report, or audited financial statement for 1997 to the present, as well as the Quarterly Wage Reports to California for the last four quarters (quarterly reports). In addition, the RFE required letters to establish prior experience listed on the Form ETA 750 (experience letter). They were especially to include the beneficiary's dates and hours of work per week and a certified English translation.

The petitioner submitted only pages 1 and 2 (extracts) of its 1997 to 2000 Form 1120, U.S. Corporation Income Tax Returns. The extracts reported taxable income before net operating loss deduction and special deductions of (\$83), a loss, in 1997, \$8,863 in 1998, \$3,912 in 1999, and \$3,736 in 2000, all less than the proffered wage. The quarterly reports, for periods ending June 30, 2001, September 30, 2001, December 31, 2001, and March 31, 2002, reflected wages paid to the beneficiary of \$21,727, less than the proffered wage.

The petitioner gave only a one-sentence translation of the experience letter (extract). This evidence will, ultimately, be considered.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

Counsel offers no new document on appeal, but argues that:

[Quarterly reports] clearly show that [the beneficiary] has been drawing a salary of at least \$5400 every three months ... for the past few years.

In light of the above, the Petition should be approved since the combination of the employer's income and actual payment to then beneficiary clearly demonstrates the employer has had and presently has sufficient funds.

Counsel's argument is unpersuasive. Counsel does not state when payments began, though a W-2 and Earnings Summary (W-2) for 2000 in the record sets forth a wage payment to the beneficiary of \$24,220. When added to the taxable income of \$3,736 in 2000, the total is \$27,956, less than the proffered wage. In fact, this record reveals no addition of taxable income of the petitioner and wage payments to the beneficiary equal to or greater than the

proffered wage, whether for the priority date or any later year.

The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

On the contrary, the petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

After a review of the extracts of federal tax returns, the employer's quarterly reports, and one Form W-2 of the beneficiary, 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 and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, the petitioner has not established that the beneficiary met the qualifications for the position as stated in the Form ETA 750, block 14, as of the priority date. It required four (4) years of experience in the job offered.

The translation of the experience letter did not comply with the RFE's requirement for hours worked per week. The RFE explicitly required a translation of a foreign language document. The one-sentence extract, from four paragraphs, offered no hours of work in relation to any period of the experience, gave no full translation, and certified no name or competence of the translator. The extract has no evidentiary value in weighing the claimed experience.

The extract did not comply with the terms of 8 C.F.R. § 103.2(b):

(3) *Translations.* Any document containing foreign language submitted to the Bureau [formerly the Service or the INS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Bureau. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The record does not contain acceptable proof, as required in the RFE, of four (4) years of the beneficiary's experience, as stated by the petitioner in block #14 of the Form ETA 750.

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 education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The evidence does not establish that the beneficiary had the requisite experience at the priority date. For this additional reason, 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 met that burden.

ORDER: The appeal is dismissed.