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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 02 283 54915

Office: CALIFORNIA SERVICE CENTER

Date: **AUG 12 2003**

IN RE: Petitioner:

Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

PUBLIC COPY

ON BEHALF OF PETITIONER: SELF-REPRESENTED

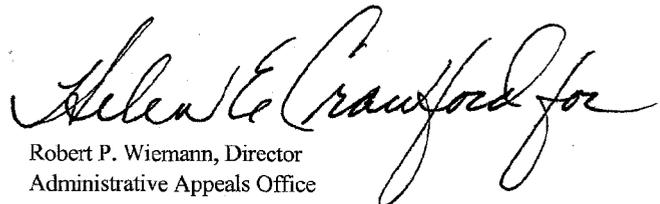
INSTRUCTIONS:

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 household. It seeks to employ the beneficiary permanently in the United States as a housekeeper. 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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(iii), 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 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 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 (DOL). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is February 20, 2001. The beneficiary's salary as stated on the labor certification is \$11 per hour or \$22,880 per year. The DOL approved the ETA 750 on August 30, 2002.

The petitioner initially submitted insufficient evidence of her ability to pay the proffered wage with the Immigrant Petition for Alien Worker (I-140), filed September 20, 2002 with the Bureau (formerly the Service or INS). In a request for evidence (RFE)

dated November 13, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE required the petitioner's federal income tax return, annual report or audited financial statement from 2001 to the present, evidence of wage payments to the beneficiary (Forms W-2 and W-3) for 2001, and those quarterly wage reports (Form DE-6) accepted for the last four (4) quarters.

In the response on February 11, 2003 (RFE response), the petitioner submitted the 2001 IRS computer printout of Form 1040, U.S. Individual Income Tax Return, of J-PC & Mrs. [REDACTED]. The petitioner stated, also, that she could not continue to be the petitioner, that she was unable to provide the requested information, that Mrs. [REDACTED] already is the beneficiary's employer and is willing to continue with this case, and, finally, that there is no payroll summary or Form DE-6, as there are no other employees.

The computer printout for J-PC & Mrs. [REDACTED] reported adjusted gross income in 2001 of \$57,202. As to the I-140, Mrs. [REDACTED] stated, "I am now the employer for [the beneficiary], and I am willing to be the petitioner/sponsor for her in this case."

The director observed that the petitioner admitted that she was unable to continue with the petition and concluded that she did not comply with the requirement to show the ability to pay the beneficiary's wage. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

The petitioning employer filed the appeal on April 3, 2003 and admits that she cannot pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioning employer asserts, however, that she has found Mrs. [REDACTED] a willing and financially viable replacement (willing substitute). The petitioning employer states, "The rate of pay is exactly the same, the job duties are exactly the same, the hours are the same."

The petitioning employer declares her prerogative to confer the validity of her Form ETA 750 on Mrs. [REDACTED] household. Provisions of 8 C.F.R. § 656.30(c), however, withhold that power and state:

- (2) A labor certification involving a specific job offer is valid only for the particular job opportunity, ...

Only the petitioning employer filed the appeal and the RFE response. Both negated her ability to pay the proffered wage at the priority date or continuing until the beneficiary obtains lawful permanent residence. Evidence of Mrs. [REDACTED] ability to pay the proffered wage is not relevant to the petitioner's under 8 C.F.R. § 204.5(g)(2).

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.