

BCF

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
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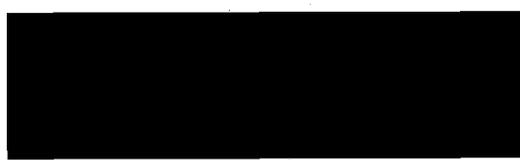
AUG 12 2003

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)

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 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
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 neon light and tube manufacturing firm. It seeks to employ the beneficiary permanently in the United States for neon sign service. As required by statute, the petition is accompanied by an individual labor certification 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 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 December 16, 1996. The beneficiary's salary as stated on the labor certification is \$19.68 per hour or \$40,934.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 14, 2001, the director issued a request for further evidence (Form I-797) of the petitioner's ability to pay the proffered wage as of December 16, 1996 and in 1997, 1999, and 2000. On February 11,

2002, the petitioner provided Form 1120S, U.S. Income Tax Return for an S Corporation, for 1998, again, and for 1999. The petitioner appended a note to the I-797, stating, "Our fiscal year ends June 30. We have not completed the year 2000-2001 taxes yet."

On February 22, 2002 in a notice of intent to deny (NOID), the director requested anew the proof of the ability to pay for 1997, 1999, and 2000 plus quarterly wage reports for all employees from June 2000. The petitioner submitted only the Form 1120S U.S. Income Tax Return for an S Corporation for 2000 in response to the NOID.

The director determined that the federal tax returns for 2000/2001, 1999/2000, and 1998/1999 reflected ordinary (loss) from trade or business of (\$13,081), (\$13,231), and (\$8,339), respectively. The director concluded that the petitioner did not have sufficient income to pay the proffered wage and denied the petition.

On appeal, counsel contends that nothing in the law says that the employer must make a certain amount of money to pay a certain wage. Counsel incorporates a history of the petitioner from 1944. It presents the owners' admirable tenacity in adversity.

Counsel's argument, nonetheless, is not persuasive. In *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1986), the court held that the Service could rely on income tax returns as a basis for determining a petitioner's ability to pay the proffered wage. Further, in *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985), the court held that the Service had properly relied on the petitioner's corporate income tax returns in finding the petitioner could not pay the proffered wage.

Indeed, the pertinent regulation continues and specifies the primary evidence of the ability to pay the proffered wage, namely, annual reports, federal tax returns, or audited financial statements. See 8 C.F.R. § 204.5(g)(2), *supra* at 2. Counsel points to no unavailability of primary evidence to justify lesser proof and, in any case, offers none. 8 C.F.R. § 103.2(b)(1), (2)(i).

The record, inexplicably, lacks prescribed evidence for the very period of the priority date, for example, tax returns for 1996 and 1997. 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 the financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145; *Matter*

of *Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 710 F.Supp. 532 (N.D. Tex. 1989). Regulations are in accord. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

A review of the federal tax returns and evidence leads, though reluctantly, to the conclusion that the petitioner has not established that it had the ability to pay the proffered wage at the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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.