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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE

425 I Street, N.W.

CIS, AAO, 20 Mass, Rm 3042

Washington, DC 20536



File: WAC 02 082 52302

Office: CALIFORNIA SERVICE CENTER Date:

DEC 16 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:



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 Citizenship and Immigration Services (CIS) 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 petition will be remanded for further evidence and a new decision.

The petitioner is a realty company. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. 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 December 29, 1997. The beneficiary's salary as stated on the labor certification is \$17.18 per hour or \$35,734.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated March 12, 2002, the director required

additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel submitted the petitioner's Forms 1040, U.S. Individual Income Tax Returns. They reflected adjusted gross income (AGI) in 1997-2000, respectively, of \$53,655, \$46,564, \$98,236, and \$53,480, equal to or greater than the proffered wage.

The director considered that this individual petitioner must first apply any income to the maintenance of five (5) family members to ascertain if any funds remained to pay the beneficiary's wage. The director did not ascertain any level of maintenance, but concluded, nonetheless, that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition in a decision (NOD) dated August 20, 2002.

On appeal, counsel contends that the business income from Schedule C, alone, is equal to or greater than the proffered wage on each of the returns. Counsel, further, refers to line 39 of Form 1040, taxable income, as a further sum to support the petitioner's ability to pay.

Counsel's reasoning is unpersuasive. AGI already includes line 39. The NOD observed, properly, "We look at the [AGI]..." Provisions of 8 C.F.R. § 204.5(g)(2) justify that inquiry. Even so, neither the director nor the petitioner elicited evidence of the petitioner's household living expenses. The record lacks a basis to calculate whether the remainder of AGI was equal to or greater than the proffered wage.

After a review of the federal tax returns, 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.

In view of the foregoing, the NOD is withdrawn and the petition is remanded to request evidence pertinent to the foregoing issue.

Beyond the scope of the RFE and the NOD, the record raises the issue of qualifications of the beneficiary under Form ETA 750. Block 14 required that the beneficiary have two years of experience in the job offered. *Employment* means full-time work in a permanent position for an employer. 20 C.F.R. § 656.3. The regulation prescribes a letter from the former employer to verify employment. 8 C.F.R. § 204.5(g)(1).

The former employer's letter, dated July 24, 1997 (employment letter), does not state whether the beneficiary's qualifying employment was full-time. The petitioner amended Form ETA 750, in Part B in block 15b, to claim April 1994 to June 1997 as the qualifying employment. That block, also, alleged work at 48 hours per week. The employment letter, however, verifies employment only from April 1995 to June 1997. The employment letter did not verify full-time employment.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services [CIS], formerly the Service or INS, must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In view of the foregoing, the NOD is withdrawn, and the petition is remanded to request evidence pertinent to the foregoing issue.

Upon remand, the director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. If the new decision is adverse to the petitioner, it is to be certified to the AAO for review.

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 director's decision is withdrawn. The petition is remanded to the director for further action in accord with the foregoing and for entry of a new decision.