

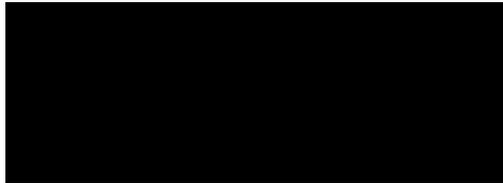
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U.S. Department of Homeland Security
Citizenship and Immigration Services

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invasion of personal privacy**

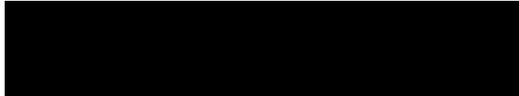
ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: WAC 00 005 52549 Office: CALIFORNIA SERVICE CENTER Date:

DEC 17 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 dismissed.

The petitioner is a Chinese restaurant. It seeks to employ the beneficiary permanently in the United States as a foreign food specialty cook. 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 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). The petition's priority date in this instance is June 25, 1996. The beneficiary's salary as stated on the labor certification is \$1,860 per month or \$22,320 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated December 12, 2001, the director required

further 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 exacted, for 1999 and 2000, the petitioner's federal income tax return, annual report, or audited financial statement for the business, as well as Wage and Tax Statements (Forms W-2 and W-3) for wages paid in 2001, and the quarterly wage reports (Form DE-6) for 2001.

In response, counsel submitted the petitioner's 1999-2001 Form 1065, U.S. Partnership Return of Income. The record already held the 1998 Form 1065. Counsel presented Forms W-2, W-3, and DE-6 for 1999-2001. Other evidence pertained to the verification of the beneficiary's experience.

The director reviewed the 1998-2001 Forms 1065 in respect to gross receipts, salaries and wages paid, ordinary income, and net current assets (the difference of current assets minus current liabilities). The director, determining that the evidence did not establish that the petitioner had the ability to pay the proffered wage from the priority date to the present, denied the petition.

The petitioner, counsel, and director discuss the priority date as one in 1998. The director said it is March 31, 1998. March 31, 1998, however, is stricken, and June 25, 1996 is inserted with appropriate initials on Form ETA 750. See the block for "Date Forms Received" and under L.O. (local office).

Also see, the Amendment to Form ETA 750 referenced as:

"NO. 60702047, 9/13/97 LY. Re: assessment notice 7/31/97.

Amendment in 1997 might occur consistently with the acceptance on June 25, 1996 of the ETA 750 for processing by an office within the employment system of the Department of Labor. A 1997 amendment could not apply to a Form ETA 750 received only in 1998.

On appeal, counsel submits Forms 1065 again, a brief and Forms 1040, U.S. Individual Income Tax Return, of AAC and YLSC, but only for 1999 and 2000. One or both of AAC and YLSC has status as a general partner of the petitioner, whose income, assets, and liabilities are available for the debts of the petitioner. Therefore, it is said, those financial data demonstrate the ability to pay the proffered wage at the priority date. Their adjusted gross income (AGI) was \$36,193 in 1999 and \$28,719 in 2000, equal to, or greater than the proffered wage.

This record contains no evidence of the ability to pay the

proffered wage for 1996 or 1997. Moreover, no authority supports net worth upon liquidation of the business as an encouraging measure of the ability to pay a proffered wage at the priority date in 1996.

Similarly, the assertions that all wages paid in 1998 were available to pay the beneficiary and that somebody quit in that year are unsupported. The record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner replaced them. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

The priority date is crucial. 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 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.

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.