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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 01 277 57547 Office: California Service Center Date: JAN 14 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a school. It seeks to employ the beneficiary permanently in the United States as a preschool teacher. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 April 2, 2001. The beneficiary's salary as stated on the labor certification is $13.20 per hour or $27,456.00 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the wage offered. On December 19,

2001, the director requested additional evidence of the petitioner's ability to pay the proffered wage.

In response, counsel submitted an undated copy of the petitioner's Form 941 Employer's Quarterly Federal Tax Return for one quarter, copies of Form DE-6 for 10 employees, W-2 Wage and Tax Statements for 13 employees, and a copy of the petitioner's W-3 Transmittal of Wage and Tax Statements for 2001. The W-2 for the beneficiary showed she was paid $17,072.89 in 2001.

The director determined that the documentation was insufficient to establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The director noted that the petitioner failed to submit federal tax returns or audited financial statements as requested in the Request for Evidence.

On appeal, counsel argues that:

> The Service in its denial stated that the petitioner did not comply with the Service's request and submitted only, "W-2 forms for 14 employees and DE-6 forms for 10 employees - for one quarter." There were 13 W-2 forms provided (not 14, as stated by the Service). Such forms evidence the wages paid to the petitioner's employees for the year 2001. Also, the petitioner provided Form W-3 showing total wages paid for the year 2001. Even though the petitioner provided DE-6 forms for only one quarter, the remaining three quarters are reflected in the W-2 forms.

The petitioner has submitted no persuasive documentation to establish that it had the financial ability to pay the proffered wage at the time of filing of the petition. The petitioner has provided scant evidence that it is a member of the California Southern Baptist Convention (one letter only); it has not provided any evidence that the California Southern Baptist Convention has the ability to pay the proffered wage (annual report for 2001, form 990 [if available], budget, etc.); and it has not shown that the job offered would generate additional income with which the beneficiary could be paid.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

8 C.F.R. 204.5(g)(2), already quoted above in part, states that:

> Evidence of this ability [to pay the proffered wage] shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

Accordingly, after a review of the documentation furnished, 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.

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.