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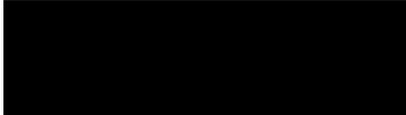
U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
BCIS, AA0, 20 Mass, 3/F
Washington, D.C. 20536



JUL 17 2003

File: WAC 00 043 52382 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 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 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
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 on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently as a cook. 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 the beneficiary met the petitioner's qualifications for the position as stated in the labor certification. The director further determined that the petitioner had not established that it had the ability to pay the proffered wage as of the petition's filing date.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), 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 or 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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750), indicates that the minimum requirement to perform the job duties of the proffered position of cook is three years of experience in the job offered.

Counsel submitted an affidavit from the beneficiary which stated that he was employed at RLC Canteen in the Philippines as a cook from January 1965 through 1972.

The director determined that the petitioner had not established that the beneficiary had the required three years of experience and denied the petition.

On appeal, counsel argues that:

In the instant case, the Beneficiary obtained the qualifying experience over three decades before the filing of a labor certification and the INS' subsequent Request for Evidence. At the time of the initial filing of the labor certification application and the subsequent Request for Evidence, the evidence of the three years prior qualifying experience was presented by a sworn declaration. (Exhibit 8). Unfortunately, as RLC Canteen is no longer in business, and the Beneficiary was not able to obtain a current and detailed qualifying experience letter, the submitted Declaration is the only means of presenting the Beneficiary's prior experience.

No additional evidence has been received. Consequently, the petitioner has not overcome this portion of the director's decision.

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 filing 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 filing date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.37 per hour or \$23,649.60 per annum.

Counsel submitted a copy of the petitioner's 1999 Schedule C, Profit and Loss from Business Statement which reflected gross

receipts of \$21,107; gross profit of \$13,482; wages of \$0; and a net profit of -\$7,791.

The director denied the petition, noting that the petitioner had not demonstrated the ability to pay the proffered wage.

On appeal, counsel argues that:

The Service Director's decision stems from the unavailability of the Petitioner's 1998 Federal Tax Return and a net loss shown on the 1999 tax return. However, please be advised that in late 1999, Shan Li Lee sold New House of Teriyaki to Leonard Coronel, who assumed all the rights, duties, obligations, assets and the continuation of the same type of business as the original Petitioner. Shortly thereafter, the previous owner, [REDACTED] left the country. Thus, obtaining tax returns to evidence the Petitioner's ability to pay the proffered wage at the time the priority date was established, January 14, 1998, became unfeasible.

Counsel submits an unaudited profit and loss statement for New House of Teriyaki for the period from January through December 1998 as evidence of the ability to pay the wage offered.

The record contains no evidence that either [REDACTED] or [REDACTED] had the ability to pay the proffered wage as of the filing date of the petition. In addition, there is no evidence in the record, other than counsel's statement which establishes that Leonard Coronel purchased New House of Teriyaki in 1999 or that it is a successor-in-interest to New House of Teriyaki owned by [REDACTED].

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Upon review, the petitioner has been unable to present sufficient evidence to overcome the findings of the director in his decision to deny 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 sustained that burden.

ORDER: The appeal is dismissed.