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

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



File: WAC 02 031 53901 Office: California Service Center

Date: JUN 20 2003

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 citrus supplier. It seeks to employ the beneficiary permanently in the United States as a fruit-grader operator. 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. The director also determined that the petitioner had not established that the beneficiary had the requisite experience 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(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),

filed with the Department of Labor on December 15, 1997, indicates that the minimum requirement to perform the job duties of the proffered position of fruit-grader operator is three years of experience in the job offered.

Counsel submitted a copy of the beneficiary's W-2 for 1996 from a company named Citrigo.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite training of three years and denied the petition accordingly.

On appeal, counsel submits a letter from the Employment Development Department of the State of California which states "[w]e are currently experiencing a high volume of incoming cases, therefore, if you need a status update of your case we are requesting that you contact us after a 26-week period has elapsed."

No additional evidence of the beneficiary's experience has been submitted. Therefore, the petitioner has not overcome this portion of the director's decision, and the petition may not be approved.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage.

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 15, 1997. The beneficiary's salary as stated on the labor certification is \$11.19 per hour or \$23,275.20 per annum.

Counsel submitted Letter 1722 (ICP) from the IRS which reflected that the petitioner had a total income of \$5,722 in 1998, \$32,696 in 1999, \$30,484 in 2000, and \$23,663 in 2001.

On appeal, counsel argues that:

NET INCOME is the difference between a businesses total revenue and its total expenses. Excess or DEFICIT of total REVENUES and GAINS compared with total expenses and losses for an ACCOUNTING period. Labor cost is paid form (sic) the Gross Receipt. Even many major companies pay wages for employees and sometimes they even run into red. Our gross receipts is \$277,561.00.

The petitioner's total income for 1998 is \$5,722.00. The petitioner could not pay a salary of \$23,275.20 a year from this figure.

While the petitioner has shown the ability to pay the wage offered from 1999 through 2001, the petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

The director's decision to deny the petition has not been overcome and the petition may not be approved.

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.