

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, DC 20536



OCT 27 2003

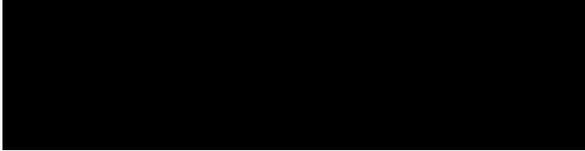
File: WAC 00 237 56480 Office: CALIFORNIA SERVICE CENTER Date:

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)

IN BEHALF OF PETITIONER:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider (the motion). The motion will be granted, the previous decisions of the director and the AAO will be withdrawn, and the petition will be approved.

The petitioner is an ice cream manufacturing and retailing firm. It seeks to employ the beneficiary permanently in the United States as a production supervisor. 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). Here, the petition's priority date is October 23, 1995. The beneficiary's salary as stated on the labor certification is \$2,700 per month or \$32,400 per year.

The director denied the visa petition because the petitioner had

not established the ability to pay the proffered wage as of the priority date with special reference to the years 1995 and 1996. On appeal, the AAO determined that the evidence did not establish that the petitioner could pay the wage at the priority date, October 23, 1995, and continuing until the beneficiary obtains lawful permanent residence, and dismissed the appeal.

Counsel supports the motion with 15 exhibits and three (3) points said to compel the approval of the petition. Significantly, they claim employment of the beneficiary since 1993.

The motion states that:

Finally, the [Form ETA 750], Part B, ... indicates that the Beneficiary has been employed by the Petitioner since April, 1993. As such, enclosed please find the Beneficiary's Forms W-2 for 1996-2001 evidencing the beneficiary's ongoing employment at, or above the proffered salary... Therefore, as the record shows, the [petitioner] has maintained a consistent pattern of cash flow, such that the employer is ready, willing, and able to afford and to pay the Beneficiary the proffered salary...

The appeal brief attached Forms W-2, though not requested by the RFE. The AAO acknowledged them as proof relative to 1996-2001, but noted the absence of the priority date. They reported wages paid to the beneficiary, nonetheless, of \$32,400 in 1996, \$32,400 in 1997, \$32,400 in 1998, \$40,726.50 in 1999, and \$43,930.75 in 2000. A W-2 with the motion shows \$36,000 in 2001. All were equal to, or greater than, the proffered wage.

The petitioner reports federal taxes on a fiscal year (FY) from October 1 to September 30. The FY 1994 and FY 1995 federal tax returns supply evidence for the ability to pay at the priority date. Schedule L of the FY 1994 Form 1120, U.S. Corporation Income Tax Return, reflected net current assets of \$67,135. The petitioner's FY 1995 Form 1120A, U.S. Corporation Short-Form Income Tax Return, for the period from October 1, 1995, included the priority date. Part III reported current assets of \$88,049 minus current liabilities of \$17,500 or net current assets of \$70,549. Net current assets for both years were equal to, or greater than, the proffered wage.

Other points of the motion invoke unaudited financial statements, bank records, and other secondary evidence. They are not material to the outcome. No remaining issue affects the proof of the beneficiary's experience.

After a review of the federal tax returns and Forms W-2, it is concluded that the petitioner's motion has 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 met that burden.

ORDER: The motion to reopen is granted, and the previous decisions of the director and the AAO are withdrawn. The petition is approved.