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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.
ULLB, 3rd Floor
Washington, D.C. 20536

SEP 12 2003

File:

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:

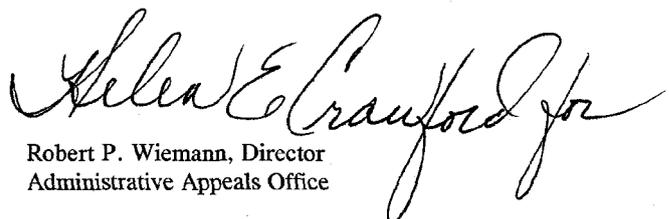
INSTRUCTIONS:

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was initially approved by the Director, California Service Center. On the basis of new information received and on further review of the record, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of intent to revoke the approval of the preference visa petition, and her reasons therefore, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition approved.

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a cake decorator. As required by statute, the petition was accompanied by certification from the Department of Labor.

The petition was approved on June 22, 2001. The director stated that an investigation was conducted, and after consideration, the approval of the petition was revoked on April 15, 2002. The revocation was based on the finding 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.

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 November 18, 1997. The beneficiary's salary as stated on the labor certification is \$12.15 per hour or \$25,272.00 annually.

The director, in her revocation notice, stated in pertinent part that:

The petitioner has responded to our ITR and has submitted the following: a two-page cover letter from their representative, along with a statement from the company's President and the petitioner's Financial statement for the year ended January 31, 2002. The petitioner failed to submit the requested tax documents mentioned in our ITR.

On appeal, Counsel argues that:

B) The fact that the corporation had retained earnings on February 1, 2000 of \$134,000 clearly establishes its viability and its established ability to pay the wages to the alien beneficiary.

C) The net income of the petitioning employer is not the only standard of measure to determine an employer's ability to pay the proffered wage; the totality of its economic circumstances must be balanced in arriving at a decision. In the instant matter the Immigration Service has failed to adequately weigh all of the factors including the length it has operated, its current payroll and its potential for growth.

Counsel's argument is persuasive. The petitioner's net current assets for fiscal year February 1, 1997 through January 31, 1998 are \$51,705. The petitioner could pay a salary of \$25,272 a year from this amount.

In addition, the tax returns for the years 1998 through 2000 continue to show an ability to pay the wage offered.

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).

Upon review, the petitioner has been able to present sufficient evidence to overcome the findings of the district director in her decision to revoke the approval of the petition. The petitioner has established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition may 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 met that burden.

ORDER: The appeal is sustained and the petition is approved.