

BC6

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

PUBLIC COPY

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



File: WAC 02 041 56722 Office: CALIFORNIA SERVICE CENTER Date: **SEP 15 2003**

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)

ON 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 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational English as a second language (ESL) Center for Koreans. It seeks to employ the beneficiary permanently in the United States as an assistant administrative director. 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). The petition's priority date in this instance is November 7, 1997. The beneficiary's salary as stated on the labor certification is \$51,395 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent

residence. In a request for evidence dated February 24, 2002, (RFE), the director required the petitioner's federal income tax returns 1997 to present, quarterly wage report (Form DE-6), and payroll summary (W-2 and W-3).

In response on March 20, 2002, counsel submitted the petitioner's 1997 to 2000 Form 1040, U.S. Individual Income Tax Returns including Schedules A-D, SE, and attachments. The federal tax returns reflected profit or loss from business (Schedule C) in the respective years of \$31,753, \$31,279, \$24,766, and \$13,618, less than the proffered wage. Forms DE-6 evidenced no employment of the beneficiary. The director noted that the response did not include a 2001 federal tax return, but it was not then due. The director considered the living expenses of the petitioner and family as consuming the income of the sole proprietorship.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition on May 24, 2002 (decision).

On the appeal, filed June 24, 2002, counsel requests 65 days to submit a brief or evidence and supplements the appeal on January 31, 2003 with the 2001 federal income tax return. New submissions included, for 2001, a statement of Alliance Capital Fund Services, with an ending balance at \$46,698.20, and the closing statement for \$466,730, including about \$100,000 of equity, from Professional Escrow Services, Inc. for the purchase of a property in the name of the petitioner and his wife.

New submissions, for 2002, included ones of Equitable Life Insurance Company, ending with a stated value of \$30,757.29, and one of Wilshire State Bank with a balance ending at \$12,831.80.

Counsel's appeal states that previous documentation was obviously inadequate because of the denial on the RFE. The AAO observes that the federal tax returns show the petitioner's adjusted gross income in the respective years from 1997 to 2001 is \$29,509, \$34,169, \$35,074, \$54,813, and \$34,169. All are less than the proffered wage.

Additional submissions on appeal relate to 2001 and 2002. They do not claim to represent assets available to the petitioner at the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I & N Dec. 142,

145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I & N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The petitioner's adjusted gross income at the priority date, \$29,509, is less than the proffered wage. The petitioner has not provided evidence of income or assets to support the ability to pay at the priority date. 8 C.F.R. § 204.5(d). Therefore, the petition cannot be approved.

After a review of the federal tax returns and supplement to the appeal, 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 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 not met that burden.

ORDER: The appeal is dismissed.