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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

MAR 26 2003

File: WAC 02 024 51022 Office: California Service Center Date:

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as an Other Worker Pursuant to § 203(b)(3)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(iii).

ON BEHALF OF PETITIONER:

[redacted]

PUBLIC COPY

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.

Helen E. Crawford for
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 private household. It seeks to employ the beneficiary permanently in the United States as a housekeeper. 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.

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(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 priority date, 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 request for labor certification was filed on January 7, 1997. The beneficiary's salary as stated on the labor certification is $8,75 per hour or $18,200.00 per annum.

Counsel initially submitted no evidence of the petitioner's ability to pay the proffered wage. Therefore, on December 18, 2001, the

director requested evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted a letter from the petitioner.

The director noted that "the petitioner submitted a response indicating that the employer did not receive reportable, taxable income in the years 1997-2000 sufficient enough to necessitate the filing of tax returns." The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

Counsel argues that the petitioner's past ability to pay the wage is irrelevant to the validity of the I-140 petition. Specifically, counsel notes that:

> The petitioner in her declaration attached hereto as Exhibit 1 has clearly documented the fact that at the time she filed the ETA, she was not employing or in need of the alien's services. She filed and received the labor certification, based on the future need for such services as the result of the petitioner (sic) progressive illness (multiple sclerosis "MS"). As she and her doctor (See Exhibit B and C) noted MS is a degenerative condition that over some long period will render the patient bed ridden and unable to care for themselves. Petitioner realizing this future need and the lengthy delays in labor certification processing, filed the ETA in advance of need. She has not yet employed a person in the alien's position.

The new evidence submitted with the appeal is not adequate to demonstrate that the petitioner has sufficient ability to pay the proffered wage. The regulation states that "evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2).

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage as of January 7, 1997. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the present.

The petitioner must show that it had the ability to pay the proffered wage at the time of filing of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

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.