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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 Mass, 3/F  
425 Eye Street, N.W.  
Washington, DC 20536



File: WAC-01-100-55025 Office: California Service Center

Date: NOV 18 2003

IN RE: Petitioner:   
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, California Service Center. The director reaffirmed his decision on motion. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software developer. It seeks to employ the beneficiary permanently in the United States as a software engineer at an annual salary of \$65,110. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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.

In order to establish eligibility in this matter, the petitioner must demonstrate its ability to pay the wage offered as of the petition's filing 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 filing date is February 2, 1998. The beneficiary's salary as stated on the labor certification is \$65,110 annually.

With the original petition, the petitioner submitted its 1999 tax return and a letter from Marcia Jackson, Vice President of Finance for the petitioning company.

The 1120 U.S. Corporation Income Tax Return for the tax year ending 1999 contained the following information:

Net income (loss)	(\$7,053,767)
Current assets	\$1,259,695
Current liabilities	\$1,082,136

In her letter, Ms. Jackson asserts that the petitioner has never had difficulty meeting its liabilities, including payroll, that it has received over 19 million dollars in capital, and that it is projected to have a "net cash position of \$2.0 Million Dollars" by September 2000.

On April 13, 2001, the Service requested evidence of the petitioner's ability to pay the proffered wage. In response, the petitioner submitted audited financial statements for 1997, 1998, and 1999 and unaudited financial statements through December 31, 2000.

The statements provide the following information:

	1997	1998	1999	2000
Net income (loss)	(\$854,609)	(\$3,149,959)	(\$7,976,660)	(\$6,985,170)
Current assets	\$2,924,741	\$4,508,134	\$1,912,199	\$1,329,643
Current liabilities	\$96,816	\$301,339	\$2,110,214	\$1,079,475
Net current assets	\$2,827,925	\$4,206,795	(\$198,015)	\$250,168

In the report accompanying the audit, PricewaterhouseCoopers stated that the petitioner would require additional financing and referenced Note 1. In Note 1, PricewaterhouseCoopers indicates that the petitioner raised capital in 2000 by issuing \$6.6 million in shares. PricewaterhouseCoopers further states, however, "[t]he company will require additional financing to continue its activities in 2001." PricewaterhouseCoopers acknowledges that the petitioner was pursuing such financing, but states, "no assurance can be given that the Company can obtain such financing or that such financing can be obtained on acceptable terms."

The petitioner also submitted its Form 941 for the fourth quarter of 1998. The employees and their wages, however, are not listed.

The director denied the petition, concluding that the history of losses and negative operating capital precluded the petitioner from establishing that it had the ability to pay the beneficiary the proffered wage from the time of filing and continuing until the beneficiary obtains lawful residence.

The petitioner filed a motion to reopen and reconsider the director's decision. In this motion, counsel notes that the petitioner is a newly formed Information Technology company and that the financial losses of such companies are not predictive of their eventual success. Counsel further stated that the petitioner had completed an additional \$2.5 million in financing deals and was negotiating with General Motors and the Henry Ford Health Care System for purchases in excess of \$1 million. The petitioner submitted articles regarding C.K. Prahalad, the founder of the petitioning company, a letter from Michael McManus, President of the International School of Management at San Diego opining that the petitioning company has the ability to pay the beneficiary, a letter from the President and CEO of the petitioning company asserting that it has been paying the beneficiary the proffered wage during his employment pursuant to a nonimmigrant classification, a report on the petitioning company from IDC, media coverage of the petitioning company, and the company's 2001 payroll tax returns.

The director reaffirmed his decision, noting that it was based on the financial statements submitted and was not merely speculative. On appeal, counsel reiterates his arguments from the motion to reopen and reconsider.

The petitioner must demonstrate its ability to pay the beneficiary the proffered wage as of the priority date through the time of adjustment. The petitioner's financial statements reflecting net losses every year and negative net current assets in 1999 cannot suffice to establish its ability to pay the proffered wage. We would accept evidence that the petitioner has been paying the proffered wage as evidence that it is able to do so. While the petitioner claims to have paid the beneficiary the proffered wage over the past few years, it has not submitted the beneficiary's Wage and Tax Statements, Forms W-2, for the relevant years. As such, the petitioner has not supported its claim to be paying the beneficiary the full proffered wage or, indeed, any wages at all.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

**ORDER:** The appeal is dismissed.