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U.S. Department of Justice
Immigration and Naturalization Service

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



File:

Office: TEXAS SERVICE CENTER

Date: AUG - 6 2002

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 § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2).

IN BEHALF OF PETITIONER:



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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. A subsequent appeal was dismissed by the Associate Commissioner, Examinations. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted, the previous decisions of the director and the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is an engineering, import/export, and technical company. It seeks to employ the beneficiary permanently in the United States as vice president pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of March 14, 1996, the filing date of the visa petition. The Associate Commissioner affirmed that decision on appeal.

On motion, the petitioner provides a brief and additional evidence. The petitioner contends that the beneficiary is key to the organization and is responsible for the over-all operations. The company is requesting the Appeals Office to consider the above facts and allow this appeal in the interest of the company's further anticipated growth.

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Eligibility in this matter hinges on the petitioner's 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 March

14, 1996. The beneficiary's salary as stated on the labor certification is \$30,000 annually.

On motion, the petitioner submits copies of the beneficiary's Form W-2 Wage and Tax Statement for the years 1995 through 1998. These statements reflect that the beneficiary earned \$13,541.65 in 1995; \$27,041.63 in 1996; \$22,124.97 in 1997; and \$19,666.64 in 1998.

Although the beneficiary was paid \$27,041.63 in 1996, this is still \$2,958.37 less than the proffered wage. In addition, even though the petitioner has shown that it had the ability to pay the proffered wage in 1997 (\$22,124.97 + \$10,303 in taxable income), the petitioner must establish the ability to pay the wage from the date of filing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. 204.5(g)(2).

Accordingly, after a review of the federal tax returns and the beneficiary's Form W-2, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered on March 14, 1996, the time of filing of the petition.

In visa petition proceedings, the burden of proof is on the petitioner to establish eligibility for the benefit sought by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden. Accordingly, the previous decisions of the director and the Associate Commissioner will be affirmed, and the petition will be denied.

ORDER: The Associate Commissioner's decision of October 10, 2000 is affirmed. The petition is denied.