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U.S. Department of Justice
Immigration and Naturalization Service

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

[Redacted]

File: [Redacted] Office: Vermont Service Center

Date: **PUBLIC COPY**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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) **6 DEC 2002**

IN BEHALF OF PETITIONER:
[Redacted]

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 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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a computer systems consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst at an annual salary of \$75,000. 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.

On appeal, counsel argues that the company's 2001 bank statements resolve the issue of whether the petitioner "has" the ability to pay the beneficiary. The petitioner submits its bank statements.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3), 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 or unskilled labor, 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 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 17, 2000. The beneficiary's salary as stated on the labor certification is \$75,000 annually.

With the original petition, the petitioner submitted the ETA 750-B filed in March 2000 indicating that the beneficiary was working for AMC Computer Corporation at that time, a 1999 Form W-2 wage and tax statement issued by AMC Computer Corporation to the beneficiary, and a statement from Keith A. Staszak, the accounting manager for the petitioning company, asserting that the company "will be able to meet all current and future payroll liabilities."

In response to the director's request for additional documentation, the petitioner submitted audited balance sheets comparing the end of 1998 with the end of 1999 and Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1999. These documents considered together reveal the following at the end of 1999.

Officers compensation	\$125,000.00
Salaries	\$1,305,205.00
Net income (loss) per books	(\$219,184.00)
Current assets	\$417,428.00
Current liabilities	\$516,441.00

Counsel asserted that the gross receipts of \$2,786,679 covered the \$1,305,205 in total salaries, including the \$56,688.20 paid to the beneficiary.

The director denied the petition, noting that AMC Computer Corporation, and not the petitioner, paid the beneficiary's salary in 1999 and concluding that the financial documents did not reflect that the petitioner had the ability to pay the beneficiary the proffered wage of \$75,000 as of the end of 1999, three months prior to the petition's priority date.

Counsel argues on appeal that the petitioner has the ability to pay the proffered wage. The petitioner submits its bank statements for January through March 2001 reflecting cash balances of \$427,033.33, \$2,873.44, and \$538,596.65. First, these documents do not pertain to the company's financial situation as of March 2000. Regardless, as quoted above, 8 C.F.R. 204.5(g)(2) requires copies of annual reports, federal tax returns, or audited financial statements. There is no provision for the substitution of bank statements, which do not reflect the company's liabilities.

It remains, the company suffered a net loss in 1999 of \$219,184. In addition, the current assets were \$99,013 less than the current liabilities as of December 1999. Without evidence that this situation changed dramatically between December 1999 and March 2000, we cannot conclude that the petitioner had the ability to pay the beneficiary as of March 17, 2000.

Beyond the decision of the director, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of "progressive experience" in the specialty. 8 C.F.R. 204.5(k)(2).

The key to a determination of whether the job requires an advanced degree professional is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered.

It is important that the ETA-750 be read as a whole. Blocks 14 and 15 on the ETA-750 Part A contained in the record contain the following information:

Education (number of years) – Blank
 Degree - Bachelor's
 Major Field of Study – "Science, Engineering, Math, or Computer Science."

Experience – “5” years in job offered or related occupation.
Related Occupation - “Network administrator”

Block 15 - “Will accept Master[']s + 3 yrs[.] experience.”

Initially, counsel referenced the settlement in Chintakuntla v. INS, No. C99-5211 (N.D. Cal. May 4, 2000), for the proposition that “a bachelor’s degree with five years of experience qualifies for EB-2 - Employment based preference.” In that case, the court ordered second preference employment based petitions to be adjudicated under a March 20, 2000 memorandum, a copy of which the petitioner submits. The memorandum does provide that “the absence of the word ‘progressive’ from blocks 14 and 15 on the ETA-750 is not grounds for denial if the required experience is in fact progressive in nature” and that “it is reasonable to infer that highly technical positions are progressive in nature due to the constant state of change in their respective industries.” We do not contest that the beneficiary’s years of experience in the computer science industry are sufficiently progressive.

Nevertheless, the memorandum also provides examples of job requirements and how they are to be adjudicated. Example “Position 1” is similar to the labor certification in this case. The labor certification for “Position 1” requires a bachelor’s under “education” and five years under “experience.” The memorandum concludes:

It is unclear whether this job requires 5 years of experience *following* receipt of the baccalaureate. For this reason, the adjudicator should request that the petitioner provide a supplemental statement clarifying whether the position requires five years of post-baccalaureate experience that is truly progressive in nature. If the supplemental statement establishes that the minimum qualifications for the position require a member of the professions holding an advanced degree and, assuming the beneficiary possesses these qualifications, the petition should be approved.

(Emphasis added.) While the director never requested the supplemental statement, it remains that the record is lacking this statement. Without such a statement, the petitioner cannot establish that the labor certification requires an advanced degree professional. As such, even if the petitioner had established its ability to pay the beneficiary as of March 2000, we would need to remand the case in order for the director to request a supplemental statement from the petitioner regarding whether the five years of experience listed on the labor certification must be post-baccalaureate.

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.