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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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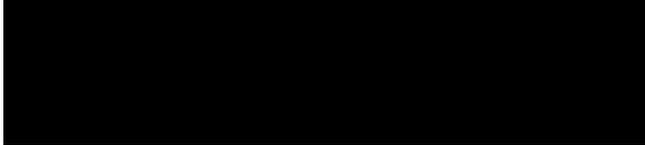
Date: DEC 17 2002

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

The petitioner is a computer sales and services firm. It seeks to employ the beneficiary permanently in the United States as a PC/Network support specialist. 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 in addition to evidence already in the record.

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). Here, the petition's priority date is August 19, 1999. The beneficiary's salary as stated on the labor certification is \$35,000 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the priority date of the petition. On August 9, 2002, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of August 19, 1999.

In response, counsel submitted copies of the petitioner's 1999 Form 1120S U.S. Income Tax Return for an S Corporation. It reflected an ordinary income of (\$222), a loss. Counsel submitted a brief concerning the petitioner's personnel with employment-based visas, which said:

2. ... While the regulations do not include such a request, I have enclosed a copy of the approval notice for the only other such employee. This is Ms. Zhang who Mr. Yao was to replace and with whom he is currently working until the petition is approved, at which time, he will replace her...

4. ... TechEra apparently became concerned about the Service's petition approval rate... and decided to keep both Ms. Zhang and Mr. Yao on until the petition was approved... ..A new job has been found for Ms. Zhang in Martinsville, VA and she will take that position when Mr. Yao replaces her. The annualized combined salaries of Mr. Yao and Ms Zhang as reflected in their W-2's is [sic] Mr. Chen is \$48,903.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a brief and evidence pertaining to several objections.

Counsel states on appeal,

The VSC examiner failed to note that the 1999 salary of the beneficiary) who was then employed by the petitioner) plus the salary of the employee whose position would be absorbed in the offered position exceeded the proffered salary.

Counsel concluded, "When you add Mr. Yao's salary of \$17,222 to the 1999 business income of \$5,954 **and** Ms. Zhang's salary of

\$29,003.28, the short fall turns into a surplus of \$17,179.68."

Counsel's contentions are not persuasive. If the petitioner is paying \$29,003.28 in salary to others at the priority date of the petition, such sum is not readily available at that date to pay to the beneficiary. The petitioner must show that it had the ability to pay the proffered wage on the priority date of the petition. A petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I & N Dec. 45, 49 (Comm. 1971). Moreover, the 1999 federal tax return reveals a loss of (\$222), not the claimed income of \$5,954. Charges for depreciation may not be charged back to cash, and net income is the proper measure, for the purpose of calculating the ability to pay the proffered wage. Chi-Feng Chang v. Thornburgh, 719 F. Supp. 532, 537 (N.D. Texas 1989).

The petitioner asserts that upon approval of the instant petition, it will no longer have to pay Ms. Zhang because it has found a job for her when she leaves. This assertion does not relate to the ability to pay the proffered wage at the date of the petition. In any event, no evidence of this contract of employment is in the record. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

The petitioner had a loss in 1999. Nevertheless, the 1999 federal tax return showed net current assets of \$43,910, defined as current assets minus current liabilities. This source suffices to fund the deficiency, \$17,778.

Accordingly, after a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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 met that burden.

ORDER: The appeal is sustained.