

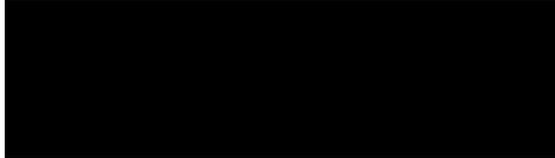


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U.S. Department of Justice  
Immigration and Naturalization Service

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



File: [Redacted]

Office: Nebraska Service Center

Date: 28 MAR 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 Section 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner seeks to classify the beneficiary 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. The petitioner is a provider of information systems. It seeks to employ the beneficiary permanently in the United States as a senior systems application developer at an annual salary of \$69,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The certification had originally been issued to Oracle Corporation. 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 petitioner is the successor in interest to the original employer that had obtained the labor certification, and therefore the petitioner need not establish ability to pay as of the priority date.

Section 203(b)(2)(A) of the Act states in pertinent part: “[v]isas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . and whose services in the sciences, arts, professions, or business are sought by an employer 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.

The petition's filing date 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 July 14, 1997. The beneficiary's salary as stated on the labor certification is \$4,887 per month, which equates to \$58,644 annually.

Oracle Corporation originally filed the application for labor certification. Subsequently, Oracle Corporation filed a Form I-140 immigrant visa petition on the beneficiary's behalf, and that petition was approved on January 11, 1999. Before the beneficiary was able to adjust status, however, the present petitioner acquired Oracle Energy Upstream, a division of Oracle Corporation. The present petitioner filed a new petition on March 7, 2000.

In a letter accompanying this petition, Kelly C. Parrino, vice president and chief information officer of the petitioning corporation, states:

Oracle Energy Upstream (OEU) was a unit of Oracle Corporation involved in the development of applications software used to manage the operations and financial accounting of oil and other energy producers. . . .

[The beneficiary] will continue his employment with [the petitioner] in the same capacity as he had as an Oracle employee, with the same work location, job duties, and salary. Those job duties are described in the approved labor certification filed on his behalf by Oracle Corporation.

[The petitioner] is the successor-in-interest of Oracle Energy Upstream in all aspects, and Oracle Energy Upstream ceases to exist.

Ms. Parrino states that documents in the record “reflect this complete substitution, and the acquisition of OEU’s assets, rights, and liabilities.” These documents include an Asset Purchase Agreement, which indicates that the petitioner has assumed OEU’s obligations and employs all of OEU’s former employees.

The petitioning corporation was established on April 24, 1998. Therefore, the director concluded, the petitioner could not have paid the proffered wage as of the petition’s July 14, 1997 filing date, because the petitioner did not yet exist at that time. The director denied the petition solely on that basis, without addressing the petitioner’s claim to be the original employer’s successor in interest.

Counsel argues on appeal that, because the petitioner was Oracle Energy Upstream’s successor in interest, the petitioner need establish ability to pay only from the date of its acquisition of that company. Counsel cites Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm. 1986), in which the Service found “the petition could be approved if eligibility is otherwise shown, including the ability of the predecessor enterprise to have paid the certified wage at the time of filing.” Counsel observes that Oracle Corporation’s original petition was approved, indicating that Oracle has established to the Service’s satisfaction its ability to pay the proffered wage.

Counsel is correct in arguing that a successor in interest need not establish its own ability to pay as of the filing date, provided that the successor in interest is now able to pay the wage, and that evidence is supplied of the original employer’s ability to pay as of the filing date. The record also contains considerable support for the petitioner’s claim that it is the legitimate successor in interest for the purposes of the labor certification in question. The petitioner has, therefore, overcome the sole stated ground for denial.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

**ORDER:** The appeal is sustained and the petition is approved.