



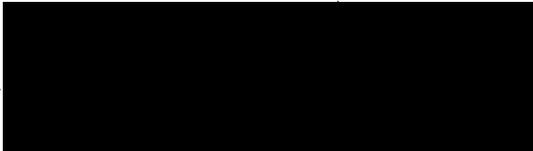
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U.S. Department of Justice

Immigration and Naturalization Service

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



17 SEP 2002

File: [Redacted] Office: Nebraska Service Center

Date:

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)

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 dismissed.

The petitioner seeks to classify the beneficiary classification 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 with the equivalent of an advanced degree. The petitioner is a CAD/CAE, information systems and computer aided management firm. It seeks to employ the beneficiary permanently in the United States as a senior engineer at an annual salary of \$49,210. 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, the petitioner submits copies of bank statements. Counsel argues that the director misinterpreted information on the petitioner's corporate tax returns.

Section 203(b)(2) 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, whose services are sought in the United States. Pursuant to 8 C.F.R. 204.5(k)(2), five years of progressive post-baccalaureate experience in the occupation is equivalent to a master's degree.

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 filing date is November 17, 1997. The beneficiary's salary as stated on the labor certification is \$49,210 annually.

With the original petition, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax period from October 5, 1998 to December 31, 1998 which contained the following information:

Assets	\$30,904
Salaries	[blank]
Depreciation	43
Taxable income (loss)	21,702
Current assets	27,824

As noted above, the above information applies not to a full tax year or calendar year, but to the period from October 5, 1998 to December 31, 1998. The Form 1120 identifies the company as TechQuest International, Inc. Under "Date Incorporated," the document shows the date October 5, 1998. The I-140 petition form, prepared by counsel and signed under penalty of perjury by the company president, also shows "10/98" under "Date Established."

The October 5, 1998 incorporation date raises a number of questions. The Form ETA-750 application for labor certification identifies the prospective employer as TechQuest, Inc., which is similar but not identical to the company name on the Form I-140 petition. The beneficiary's Form ETA-750B Statement of Qualifications indicates that the beneficiary has worked for TechQuest, Inc., since February 1997. As noted above, the application for labor certification was filed on November 17, 1997. The priority date is, therefore, nearly eleven months earlier than the incorporation date claimed on the Form 1120 tax return and the establishment date claimed on the Form I-140.

We note the name variation between TechQuest, Inc., and TechQuest International, Inc., but we also note that both of these entities have used the same Detroit address (535 Griswold, Suite 500) and the same individual's signature appears on the Forms I-140 and ETA-750. If these two entities are not the same corporation, then the corporation that filed the I-140 immigrant petition is not the same corporation that filed the earlier application for labor certification. If the two entities are, in fact, the same corporation, then there is a serious discrepancy in the record as to when the corporation actually came into existence. This unresolved discrepancy necessarily raises general questions about the petitioner's overall credibility. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

In any event, because the labor certification was received for processing on November 17, 1997, the petitioner must demonstrate its ability to pay the petitioner from that date forward. All of the documentation of record concerns TechQuest International's finances from October 1998 onward, with the implication that the corporation did not exist prior to that time.

On July 7, 2000, the Service requested evidence of the petitioner's ability to pay the proffered wage as of November 17, 1997. In response, the petitioner submitted copies of tax documents from 1999 and 2000. Counsel cites various figures from these tax documents, and states that these documents show that the petitioner "clearly has the ability to pay the offered wage, and has had such ability since the priority date, **November 17, 1997**" (emphasis in original). Counsel fails to explain how documents from 1999 and 2000 establish the petitioner's ability to pay as of late 1997. The 1999/2000 documents do not address the petitioner's finances in 1997. Instead, they repeat the assertion that the company was incorporated in October 1998. While the 1999/2000 documents indicate that the company's assets are increasing, they do not extrapolate back to November 1997.

The director denied the petition. On appeal, counsel cites tax documents showing that the petitioner "has met its payroll responsibilities." We note, in this regard, that the beneficiary claims to have begun working for [REDACTED] in February 1997. The record contains no documentation to confirm this claim, or to establish how much salary, if any, the petitioner paid to the beneficiary in 1997 or afterward. The fact that the petitioner has paid other employees since 1998 is immaterial to the matter at hand.

The petitioner submits copies of its monthly bank statements from November 1998 through November 2000. Counsel states that these bank statements show that "at any given month the petitioner had more than enough cash on hand to pay the offered wage." One flaw with this argument is that any cash used to pay the beneficiary's wage would not be available for future payments; the fact that the petitioner maintained a monthly balance sufficient to pay the beneficiary's wages for a month does not establish that those funds were replenished at a sufficient rate to guarantee wages for the following month.

The bank statements identify [REDACTED] as a "[c]ustomer since 1998," and the earliest statement indicates that the account was first opened on October 21, 1998. This is certainly consistent with the assertion that [REDACTED] was incorporated on October 5, 1998, but it does nothing to show that [REDACTED] would have been able to pay the beneficiary's wage from November 1997 to October 1998.

The director had put the petitioner on notice that the petitioner must establish its ability to pay as of the petition's priority date, i.e. November 17, 1997. Counsel directly acknowledged this 1997 date, but the evidence submitted by the petitioner goes back no further than October 1998, the month that it opened a bank account and purportedly incorporated. If [REDACTED] and [REDACTED] are not the same company, then questions arise as to the legitimacy of the petition itself because the petitioner is not the entity that obtained the labor certification. (The fact that the same individual is the president of both companies does not make them legally interchangeable.) If they are the same company, then that company has been less than forthright in its representation of when it was established.

Whatever the relationship between [REDACTED] and [REDACTED] the record is entirely devoid of evidence that either [REDACTED] or [REDACTED] was able to pay the proffered wage as of November 17, 1997. No quantity of bank statements or tax records from 1998-2000 can resolve that issue. If the petitioner is unable or unwilling to document its ability to pay as of November 17, 1997, then the petitioner must file a new petition, with a new labor certification, showing a priority date for which proper financial documentation is available.

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.