

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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



File:  Office: Texas Service Center

Date: **APR 08 2003**

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)

ON 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 Bureau of Citizenship and Immigration Services (Bureau) 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 Robert P. Wiemann, Director
Administrative Appeals Office



DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a database engineering company. It seeks to employ the beneficiary permanently in the United States as a [REDACTED] Database Engineer at an annual salary of \$80,000. As required by statute, the petition was accompanied by an individual labor 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 the filing date of the visa petition.

On appeal, the petitioner submits its 2001 tax return and 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 January 3, 2001. The beneficiary's salary as stated on the labor certification is \$80,000 annually.

In response to a request by the director, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax year ending which contained the following information:

Net income (loss)	\$18,965
Cash	\$27,403
Depreciation	\$19,765
Current assets	\$35,496
Current liabilities	\$10,013

The director denied the petition upon concluding that the petitioner's net income, plus depreciation and cash at hand was less than the proffered annual wage of \$80,000.

On appeal, the petitioner submits its 2001 tax return and bank statements. The tax return reflects \$56,724 net income, \$244,284 in current assets, and \$2,462 in current liabilities.

Even if we accepted the director's formula, she failed to take into consideration that the beneficiary claims on the Form ETA-750B that he has worked for the petitioner since 1999. In general, the ability to pay the proffered wage can be demonstrated by one of three means: the petitioner's net income in the year of filing was equal to or greater than the proffered wage, the petitioner's net current assets in the year of filing were equal to or greater than the proffered wage, or the petitioner paid the beneficiary a salary equal to or greater than the proffered wage in the year of filing. In addition, where the petitioner is paying the beneficiary less than the proffered wage, the petitioner need only demonstrate that its net income or net current assets are equal to or greater than the difference between the proffered wage and the beneficiary's salary that year. The director's formula did not match any of the above formulas and she failed to take into account that the beneficiary was already working for the petitioner as of the priority date of the petition.

The record contains some of the petitioner's quarterly wage reports reflecting that the beneficiary earned \$22,000 in the third quarter of 2001 and \$30,041.82 in the fourth quarter of 2001. While the petitioner did not submit the quarterly report for the first quarter of 2001 covering the priority date, the reports submitted suggest that the petitioner has been paying the beneficiary more than the proffered wage since at least July 2001. Moreover, the 2001 tax returns reflect net current assets of \$241,822, more than the proffered wage. Thus, the petitioner has established its ability to pay the proffered wage.

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.