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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[redacted]

File: WAC 01 110 53079 Office: CALIFORNIA SERVICE CENTER Date: APR 14 2003

IN RE: Petitioner:
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)

ON BEHALF OF PETITIONER:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(2) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(2) as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner is a software design company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 and continuing until the beneficiary obtains permanent residence.

On appeal, counsel submits additional evidence and requests reversal of the director's decision.

The regulation at 8 C.F.R. § 204.5(g) provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this case rests upon 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 November 14, 2000. The beneficiary's salary as stated on the labor certification is $71,400 per year. The record indicates that the petitioner has employed the beneficiary as a software engineer since March 1999.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On July 16, 2001, the director requested additional evidence including copies of annual reports, federal tax returns, or audited financial statements for 1999 and 2000 fiscal years pursuant to the evidentiary requirements of 8 C.F.R. § 204.5(g)(2).

In response, the petitioner submitted a copy of a summary of terms for a preferred stock sale, copies of a June 30, 2001 bank statement, copies of the cover pages of the company's federal Form 1120 U.S. Corporation Income Tax Returns for the tax years ending 1998 and 1999, a copy of a Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax return for the tax year beginning June 1, 2000 and ending May 31, 2001, and a copy of the beneficiary's W-2 for the 2000 tax

year showing that the petitioner paid him $72,499.93 in wages.

In denying the petition, the director noted that the petitioner failed to provide federal tax returns, audited financial statements, or annual reports for the fiscal year 2000. The director concluded that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage because the information submitted showed that the petitioner's losses had resulted in an accelerating depletion of operating capital.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay. He contends that the petitioner has reduced its number of employees in order to slow its "burn rate" of venture capital. Counsel also submits copies of recent bank statements, a copy of the petitioner's stock capitalization table as of November 15, 2001, a memorandum reflecting an additional sale of stock of approximately $8,000,000 dated January 24, 2002, and a copy of a Form W-3 Transmittal of Wage and Tax Statements showing that the petitioner paid the beneficiary $72,717.86 in wages in 2001.

The evidence submitted showing that the petitioner paid the beneficiary more than the proffered wage as of the priority date and through the filing date of the appeal is persuasive. Accordingly, we conclude 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 the 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.