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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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

[REDACTED]

File: [REDACTED] Office: Texas Service Center

Date:

~~APR~~

IN RE: Petitioner:
Beneficiary:

[REDACTED]

APR 16 2003

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:

[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 CFR § 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 Elizabeth Hayward
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a law firm. It seeks to employ the beneficiary permanently in the United States as a software engineer at an annual salary of \$39,000. 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, counsel argues that the funds were available to pay the beneficiary but "were paid out to the shareholders for the specific purpose of avoiding the 35% flat tax for personal service corporations."

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), provides for the granting of immigrant classification to aliens who are members of the professions holding an advanced degree. The beneficiary's eligibility for this immigrant classification is not at issue in this proceeding.

8 CFR 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 application for labor certification was accepted on September 11, 2000. The beneficiary's salary as stated on the labor certification is \$39,000 per year.

With the original petition, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for 1999, which contained the following information:

Gross receipts	\$1,621,087.00
Current assets	\$82,734.00
Current liabilities	\$47,858.00
Officers compensation	\$186,020.00
Salaries	\$758,607.00
Taxable income	(\$17,999.00)

On December 17, 2001, the Service requested evidence of the petitioner's ability to pay the proffered wage. In response, the petitioner submitted a 2000 tax return showing the following information:

Gross receipts	\$1,951,011.00
Current assets	\$76,878.00
Current liabilities	\$71,042.00
Officers compensation	\$165,679.00
Salaries	\$795,952.00
Taxable income	(\$20,189.00)

The petitioner also submitted a copy of payroll records indicating that the petitioner paid the beneficiary \$30,895.64 in 2001. The petitioner did not submit Forms W-2 for 2000 or 2001 or payroll records for 2000 although the beneficiary claims to have begun employment for the petitioner in February 2000.

The director denied the petition, concluding that a company operating at a net loss "cannot afford to put another person on the payroll." On motion, counsel asserts that several employees were paid discretionary bonuses in 1999 and 2000 and that this money was available to pay the beneficiary above what he was already being paid, 95 percent of the proffered wage. The petitioner submitted an affidavit from [REDACTED] CPA, affirming counsel's assertions, payroll records documenting the bonuses and the beneficiary's Forms W-2 for 2000 and 2001 reflecting income of \$26,095.33 and \$30,630.56.

In affirming her decision, the director concluded that the evidence did not comply with the regulations and that money paid out as bonuses could not be available to pay the beneficiary.

Counsel argues on appeal that the petitioner did submit the evidence required by the regulations and that distributions of remaining profits at the end of the year is typical for a personal service corporation to avoid double taxation.

The record establishes that in 2000, the petitioner paid the beneficiary \$26,095, \$12,905 less than the proffered wage. In addition to having net income sufficient to cover the difference, a petitioner can establish its ability to pay the proffered wage through net current assets. The petitioner's net current assets that year were \$5,836. Thus, even having paid the bonuses, the firm was only \$7,069 short of demonstrating an ability to pay the proffered wage. The year-end discretionary bonuses far exceeded \$7,069. In addition, only one officer received compensation. Thus, the entire \$165,679 went to a single officer.

Ordinarily, a petitioner cannot establish its ability to pay based on compensation already paid to officers of the company. The petitioner, however, has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for legal service corporations. The sole owner of the corporation is clearly not earning a subsistence wage, a reduction



of which would impair the owner's own ability to earn a living. The petitioner's income is ample and growing.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained.