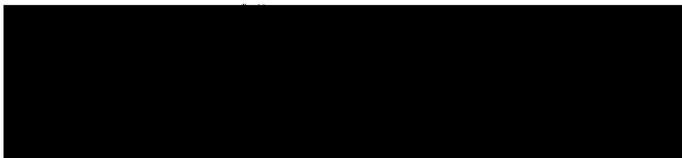


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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



File: WAC 01 110 52880 Office: CALIFORNIA SERVICE CENTER Date:

AUG 22 2003

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions holding and advanced degree or an alien of exceptional ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a developer and distributor of innovative solutions for internet appliance and consumer electronics markets. 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, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, 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.

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 priority date is December 8, 2000. The beneficiary's salary as stated on the labor certification is \$36.13 per hour or \$75,150.40 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. In a Notice of Action dated July 6, 2001 (Form I-797), the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Counsel responded to the Form I-797 and submitted the petitioner's 1998 and 1999 Forms 1120 U.S. Corporation Income Tax Returns, as well as audited financial statements of the petitioner's operations prepared by PriceWaterhouseCoopers for the periods ending December 31, 1999 and 2000 (the audits). The director considered the petitioner's accelerating losses, relatively small revenue, low operating capital and concluded that the petitioner might have great difficulty continuing to meet its obligations in the near future.

The director speculated that the petitioner would have great difficulty in continuing to meet its obligations in the "near future." The auditor stated that:

As discussed in Note 1 to the financial statements, the [petitioner] has incurred losses from operations since inception and is subject to risks that raise substantial doubt about its ability to continue as a going concern. Management's plans in regard to these matters are also described in Note 1. The financial statements do not include any adjustments that might result from the outcome of this uncertainty.

The director observed that the petitioner had positive net current assets, viz., \$3,736,692, as reported in Schedule L of the 2000 tax return. The director considered this sum small, "compared to losses incurred of \$15,655,000 since inception."

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On appeal, counsel asserts that the actual payment of a wage, equal to or more than the proffered wage, supports the ability of the petitioner to pay the wage. Counsel submits the wage and tax statement (Form W-2), which shows the payment to the beneficiary of \$49,199.17 from May 1 to December 31, 2000, less than the proffered wage. Nonetheless, net current assets, as reported on the federal tax return, are greater than the proffered wage and available to pay it at the priority date.

Counsel, also, argues persuasively that earnings statements show

the payment to the beneficiary of \$79,982.49 from January 1 to November 30, 2001, more than the proffered wage. Such payments establish the ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence.

The director speculated that the petitioner might not be able to meet its obligations in the near future. The regulations authorize the Bureau, however, to consider the ability to pay the proffered wage only from the priority date until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

Counsel hypothesizes that Intel Corporation and Yamaha Corporation provide the petitioner's venture funds, but no contracts or evidence in the record support such a finding. Other contentions of counsel are moot. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the beneficiary's Form W-2 and earnings statements for 2000 and 2001 and the petitioner's federal tax return for 2000, it is concluded 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 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.