



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



File: WAC-01-110-53049 Office: California Service Center

Date: FEB 25 2003

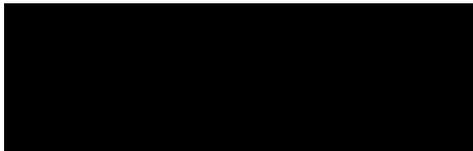
IN RE: Petitioner:
Beneficiary:



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)

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

IN BEHALF OF PETITIONER:



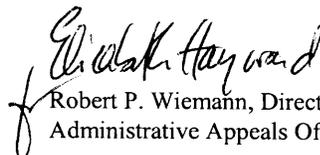
INSTRUCTIONS:

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.


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 on appeal. The appeal will be dismissed.

The petitioner is a company that designs and develops customized enterprise application software. It seeks to employ the beneficiary permanently in the United States as a software engineer at an annual salary of \$71,400. 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 continuing until the beneficiary obtained lawful permanent resident status.

On appeal, counsel notes that the petitioner has been paying the beneficiary more than the proffered wage and argues that the director should have considered the venture capital invested into the petitioning company.

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 priority date is November 14, 2000. The beneficiary's salary as stated on the labor certification is \$71,400 annually. In response to the director's request for additional documentation, the petitioner submitted the beneficiary's 2000 wage and tax statement, Form W-2, reflecting wages of \$86,549.22. 8 C.F.R. 204.5(g)(2) also requires, however, that the petitioner demonstrate an ability to pay the beneficiary until he obtains lawful permanent resident status.

Initially, the petitioner had submitted the first page of its Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1998 that contained the following information:

Assets	\$197,456
Officers compensation	\$121,926.00
Salaries	\$483,420.00
Net income (loss)	(\$1,722,030.00)

Hand written on the tax return appears, "\$35 million venture capital." In support of that claim the petitioner submitted a "Sale of Series A and Series B Preferred Stock Summary of Terms," and a "Series C Preferred Stock Term Sheet." These forms reflect that the petitioner received \$5,050,000 in venture capital from WPGVP, Bessemer, Discovery, Ken Marshall, and GC&H and that JT Venture Partner Funds committed to investing \$35,000,000. The commitment from JT Venture Partner Funds is unsigned.

On July 16, 2001, the director requested evidence that the capital had been invested. The director specifically requested 1999 and 2000 tax returns. In response, the petitioner submitted a capitalization table as of July 30, 2001 reflecting total capitalization of \$14,650,492 and the authorization of additional stock. The petitioner also submitted a bank statement reflecting deposits of \$1,083,333.34 during June 2001 and an ending balance of \$551,853.25. Further, the petitioner submitted a receipt for a term deposit of \$150,000. Finally, the petitioner submitted its 1998 and 1999 tax returns, both without schedule L, and an extension to file its 2000 tax return. The 1999 tax return and amendments thereto reflect:

Assets	\$633,482
Officers compensation	\$203,278.00
Salaries	\$1,356,294.00
Net income (loss)	(\$1,827,977.00)

The director concluded that the petitioner had not demonstrated the receipt of capital from the sale of stock authorized to be issued and determined that the petitioner had not established its continuing ability to pay the beneficiary until he obtains lawful permanent resident status. The director emphasized that his concern was not that the petitioner was relying on venture capital, but that the petitioner had not established, irrespective of the source, sufficient funds to continue paying the beneficiary the proffered wage.

On appeal, counsel asserts that the petitioner employs 25 employees, has raised more than \$20 million in venture capital, and has more than \$6.7 million on deposit in the bank. Counsel notes that the petitioner paid the beneficiary the proffered wage in 2000 and asserts that the petitioner continues to do so. Counsel argues that the director's logic could be used to deny any petition by speculating that the petitioner might no longer be able to continue selling its products.

The petitioner submits a new capitalization table as of November 15, 2001 reflecting \$20,028,257 in capital with additional authorized stock, payroll records reflecting that the petitioner had earned \$73,479.52 year-to-date as of November 15, 2001, and an investment monthly statement for October 2001 reflecting money market funds totaling \$6,707,828.84.

We acknowledge, as did the director, that the petitioner has paid and continues to pay the beneficiary the proffered wage. Counsel's argument that the director's logic would permit the denial of every petition since the public could suddenly stop buying the petitioner's product, however, is not persuasive. Questioning unsupported assertions that venture capital has been invested or will be forthcoming is not comparable to speculating that a pattern of successful business sales will end. The petitioner's failure to submit its complete tax returns, including schedule L, is problematic. Schedule L would reflect the company's capitalization, assets, and liabilities. Without such information, unsupported capitalization tables, unsigned investment commitments, and bank statements reflecting balances on a single date are insufficient to demonstrate the existence of a viable company that will be able to continue paying its employees for the near future.

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.