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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 01 159 51601 Office: CALIFORNIA SERVICE CENTER

Date: FEB 27 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)

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 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 web-based database company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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.

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 February 15, 2001. The beneficiary's salary as stated on the labor certification is \$7083.33 per month.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On August 30, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted financial statements for the years 1998, 1999 and 2000. Some of the statements had the phrase "audited" in the heading of the document but were not accompanied by any kind of identification or signature of the auditing official. The director correctly rejected these documents as evidence of the petitioner's ability to pay the proffered wage pursuant to the evidentiary requirements of 8 C.F.R. § 204.5(g)(2). The director concluded that there was insufficient evidence to show the petitioner's ability to pay the proffered wage even if the financial statements had been submitted correctly as audited financial statements. The director noted that the

petitioner's losses showed an accelerating depletion of the petitioner's operating capital.

On appeal, counsel submits the petitioner's corporate and partnership tax returns and a statement by the chief financial officer, Jeffrey F. Wheeler, summarizing the cost-cutting actions the petitioner has taken. Mr. Wheeler emphasizes the need to retain the beneficiary's expertise to service a Department of Defense contract the company has recently been awarded. Counsel also includes copies of the employer's payroll records showing that the company paid the beneficiary the proffered monthly wage of at least \$7083.33 as of the priority date of February 15, 2001. The payroll records submitted show that the petitioner increased the beneficiary's salary to \$7425.00 per month beginning February 16, 2001. The petitioner submitted proof that it continued to pay the beneficiary's salary through the filing date of the appeal.

The evidence submitted showing that the petitioner paid the proffered wage for an extended period is persuasive. Accordingly, after a review of the evidence submitted, 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.