



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: EAC 00 115 52135 Office: VERMONT SERVICE CENTER

Date: FEB 27 2008

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)

**PUBLIC COPY**

IN BEHALF OF PETITIONER:

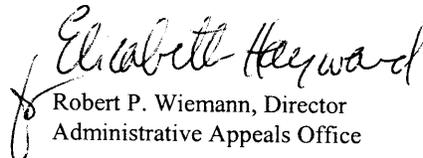
INSTRUCTIONS:

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, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a provider of “software development and training, hardware sales and networking services.” It seeks to employ the beneficiary permanently in the United States as an engineering programmer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2) at an annual salary of \$59,000. 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 states that the director misinterpreted tax documents submitted with the petition. Counsel contends that “evidence [of the petitioner’s] ability to pay the beneficiary” will be submitted within 30 days. Counsel does not specify the nature of such evidence or offer any other clear indication that such evidence actually exists or existed. To date, nearly two years after the filing of the appeal, the record contains no further submission and a decision shall be made based on the record as it now stands.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. The equivalent of an advanced degree is either a U.S. baccalaureate or foreign equivalent degree followed by at least five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2).

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 application for labor certification was accepted on October 8, 1999. The beneficiary’s salary as stated on the labor certification is \$59,000 per year.

Documents submitted with the original petition indicate that the beneficiary began working for the petitioner in June 1999.

The petitioner had submitted a Form 1120 U.S. Corporation Income Tax Return for what the petitioner calls "fiscal year 1998" although the tax form itself indicates that the form covers calendar year 1998 rather than a tax year beginning in a month other than January. The form contained the following information:

Officers' compensation	\$4,000.00
Salaries	6,459.00
Taxable income (loss)	(12,093.00)
Assets	69,760.00
Cash	3,128.00
Current liabilities	44,235.00

The petitioner also submitted a copy of the beneficiary's 1999 Form W-2 Wage and Tax Statement, indicating that the petitioner paid the beneficiary \$6,000 that year.

On August 21, 2000, the Service requested evidence of the petitioner's ability to pay the proffered wage as of the October 8, 1999 filing date. The 1998 tax form, discussed above, does not establish the petitioner's ability to pay a \$59,000 annual wage, nor does it cover the petition's late 1999 filing date. In response, the petitioner submitted additional tax documents and various other exhibits.

A memorandum, dated July 15, 1999 and signed by the beneficiary as well as by an official of the petitioning company, states that the beneficiary "is going to enroll [in] the advanced computer software-training program at [the petitioner's] Learning Center. [The beneficiary] will work as a part-time consultant [for the petitioner] during his training period." The memorandum identifies the beneficiary's "training period" as August 1999 to December 1999.

The petitioner's initial submission, however, included Form ETA-750B, Statement of Qualifications of Alien. That form was signed under penalty of perjury and dated October 15, 1999, during the claimed "training period" during which the beneficiary purportedly worked "as a part-time consultant" for the petitioner. The form, however, indicates that the beneficiary had worked 40 hours per week for the petitioner from June 1999 to "present," i.e. October 1999. The petitioner has, therefore, advanced contradictory and mutually exclusive claims regarding the beneficiary's activities in late 1999.

The petitioner has submitted a copy of the beneficiary's individual income tax return, Form 1040A, for 1999. This form, like the Form W-2 discussed above, shows the beneficiary's total earnings for the year as \$6,000. The petitioner's 1999 corporate income tax return shows the following information:

Officers' compensation	\$53,000.00
Salaries	23,691.00
Taxable income (loss)	(11,896.00)
Assets	37,935.00
Cash	(19,984.00)
Current liabilities	4,996.00

The director denied the petition, stating that the petitioner was not able to pay the beneficiary \$59,000 per year as of October 8, 1999. The director noted that the petitioner's initial submission indicated that the petitioner has employed the beneficiary full-time since June 1999, yet the Form W-2 issued to the beneficiary that year shows only \$6,000 in wages. The beneficiary's prorated salary from June through December 1999 should have been between roughly \$29,000 and \$34,000, depending on when in June the beneficiary began working for the petitioner.

Counsel argues on appeal "[t]he Alien Labor [Certification] Application was approved on October 8, 1999. The beneficiary's 1999 W-2 only represented less than two months what he would be paid according to the salary offered." The labor certification was actually submitted, rather than approved, on October 8, 1999, but counsel is correct in that the October 8, 1999 date is controlling for purposes of determining the petitioner's ability to pay.

Counsel states that the beneficiary's Form W-2 shows "less than two months" worth of payments under the proffered wage. This is correct; \$6,000 represents less than six weeks of salary at \$59,000 per year. Counsel does not, however, explain how this observation helps the petitioner's case. The petitioner must show that it was able to pay the beneficiary's wage beginning October 8, 1999, twelve weeks before the end of calendar year 1999. The petitioner actually paid the beneficiary less than six weeks' wages, even though the beneficiary had supposedly been working there full-time since June 1999 (the petitioner's subsequent alteration of that claim notwithstanding).

The petitioner's 1998 and 1999 tax returns show negative income for both years, and dwindling assets, including negative cash assets of nearly \$20,000 at the end of 1999. The petitioner was established only in September 1997, and thus the unprofitable years of 1998 and 1999 have not been shown to be unusual interruptions in an otherwise profitable corporate history. Rather, there is nothing in the documentation of record that shows that the petitioner has ever been able to pay an annual wage of \$59,000. The company's significant decline from 1998 to 1999 does not readily suggest that the petitioner will be able to pay such a wage in the foreseeable future. As noted above, counsel has promised additional, unidentified "evidence [of the petitioner's] ability to pay" but the record contains no supplemental submission as of February 2003.

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.