



U.S. Department of Justice

Immigration and Naturalization Service

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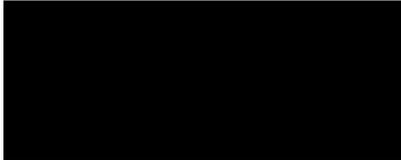
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OFFICE OF ADMINISTRATIVE APPEALS

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Washington, D.C. 20536



File: EAC 01 078 51865

Office: VERMONT SERVICE CENTER

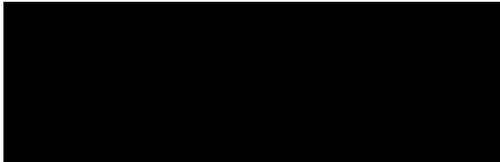
Date: **FEB 27 2003**

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 § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

IN BEHALF OF PETITIONER:



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

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

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior systems analyst. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

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 August 4, 2000. The beneficiary's salary as stated on the labor certification is \$30 per hour or \$62,400 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On August 3, 2001, the director requested additional evidence (Form I-797) to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The Form I-797 required the petitioner's 2000 federal income tax return and evidence of wage payments to the beneficiary for 2000, if any.

Counsel submitted copies of the petitioner's 2000 federal income tax return, wage reports, quarterly tax returns (Form 941), and materials pertinent to the evaluation of the beneficiary's education and work experience. Further evidence in response to the Form I-797 included the petitioner's bank statements, balance sheets, and miscellaneous contracts as proof of revenue.

The director determined that the reported ordinary (loss) of (\$13,142) in 2000 with cash of \$3,755 was less than, and did not establish that the petitioner had the ability to pay the proffered wage. The director denied the petition.

On appeal, counsel submits a brief and discusses Exhibits A-J, but does not mark any exhibit for identification. Counsel's arguments are not persuasive. Much of the additional evidence does not pertain to the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate the financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145; *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 710 F.Supp. 532 (N.D. Tex. 1989). The regulations require the same result. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel offers bank statements. Only one (1) account bore the name of the petitioner and related to the priority date. It had a balance of had \$14,078.94, declining to \$10,585.92, less than the proffered wage. Even though the petitioner submitted its commercial bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds not found in the tax returns and financial statements. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel contends that one shareholder of the corporate petitioner, its 100% owner, had three (3) accounts, totaling \$60,215.92 at the priority date. Still, that is less than the proffered wage. In the final analysis, the petitioner may not commingle personal and corporate assets to prove the ability to pay. The corporation is a separate and distinct legal entity from its owners and shareholders. Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I & N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I & N Dec. 631 (Act. Assoc. Comm. 1980). The same restriction applies to "cash flow," said to arise from items in Exhibits D-J.

Counsel reasons that the rule for considering the assets of an S corporation should be the same as for a sole proprietorship, but

cites no authority. Counsel next contends that the petitioner's ordinary (loss) at the priority date merely reflects the cash, rather than the accrual, basis of accounting. He asserts that extracts of unaudited financial data show ordinary income of \$57,674 under accrual accounting, still less than the proffered wage. The selected items are unaudited financial statements and do not pertain to the priority date in 2000. They are of little evidentiary value because they are based solely on the representations of management. 8 C.F.R. § 204.5(g)(2), which see *supra* p. 2. This regulation neither states nor implies that an unaudited document may be submitted in lieu of annual reports, federal tax returns, or audited financial statements.

Counsel and the director engage in various computations of "cash flow." The pertinent formula for net current assets to prove the ability to pay the proffered wage subtracts current liabilities from current assets, as stated in Schedule L of the 2000 federal tax return. Counsel claims, "... the liabilities are completely offset by the assets of the company." Straightforward mathematics reveal that current assets of \$7,955 less current liabilities of \$19,739 are a (deficit) of net current assets (\$11,784), clearly less than the proffered wage.

Counsel speculates that a long-term liability in Schedule L, a \$27,312 note payable by the petitioner to the 100% shareholder, represents a current asset of the corporation. The 100% shareholder claims, also, that his capacity to incur personal debt of \$155,000 represents an asset or cash of the corporation which does not otherwise appear in Schedule L. Exhibit D. The record contains no basis to apply such accounting principles. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

A careful review of the federal tax returns and submissions leads to the conclusion that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 met that burden.

ORDER: The appeal is dismissed.