

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, 29 Mass, 3/F  
Washington, D.C. 20536



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File: [REDACTED] WAC 01 254 53885 Office: CALIFORNIA SERVICE CENTER

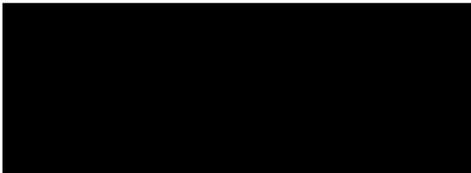
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**JUL 17 2003**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

ON 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 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, 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 software development company. 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 approved by the Department of Labor.

The director determined that the petitioner had not established 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 March 15, 2001. The beneficiary's salary as stated on the labor certification is \$80,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On 12/10/2001, 02/28/02, 05/26/02 and on 8/26/02 the director requested additional evidence in the form of copies of annual reports, federal tax returns, or audited financial statements pursuant to the evidentiary requirements of 8 C.F.R. § 204.5(g)(2) to establish that the petitioner had the ability to pay the proffered wage.

In response, the petitioner submitted a copy of the beneficiary's W-2 issued by a company bearing the same name, but with a different address than that stated on the petitioner's I-140 immigrant visa petition. The W-2 showed that the beneficiary earned a salary of \$77,005.66 in 2001. The record also contains California quarterly wage reports for 2001 which support the amount stated in the

beneficiary's W-2; a certificate of incorporation, dated April 8, 2002, indicating that a company with the petitioner's name is incorporated in the state of Delaware; Form 1120 US Corporation Income Tax Return for 2001 filed on behalf of [REDACTED] and unaudited balance sheets for the years 1999, 2000 and 2001 in the petitioner's name, [REDACTED]. As noted above, 8 C.F.R. § 204.5(g) requires copies of annual reports, federal tax returns, or audited financial statements. While additional material may be considered, such documentation generally cannot substitute for the evidentiary requirements.

The director concluded that there was insufficient evidence to support the petitioner's ability to pay the proffered wage for a permanent full time position. The director found that the petitioner's financial and corporate documentation did not sufficiently explain the discrepancies between the petitioner's name and addresses given on the I-140 and the names and addresses as stated on various documents such as the 2001 Form 1120 corporate tax return. As such, the information contained in the corporate tax return could not be used to support the petitioner's ability to pay the proffered wage because it did not establish the petitioner as a subsidiary of [REDACTED].

On appeal, along with additional documentation, counsel submits an explanation of the petitioner's corporate history and its various addresses and a statement of the Chief Financial Officer of [REDACTED] indicating that [REDACTED] acquired 100% of the stock of Reality by Design on November 1, 1999. We note that the employer tax identification number appearing in Part 1 of the petitioner's I-140, the tax identification number given on the beneficiary's 2001 W-2, and the tax identification number set forth on page 9 of the 2001 Form 1120 corporate tax return all identify the petitioner, [REDACTED] which has employed the beneficiary since 1998. The tax return identifies the petitioner as a wholly-owned subsidiary of the parent company [REDACTED].

The petitioner must establish its ability to pay the proffered wage as of the priority date. Here, the difference between the proffered wage and the beneficiary's salary as stated on his 2001 W-2 was \$2,994.34. The petitioner's tax information is set forth in the schedule of combined income and deductions incorporated within the 2001 corporate tax return of [REDACTED]. It states that the petitioner's taxable income before the net operating loss deduction was \$162,450. This is more than enough to cover the difference between the proffered wage and the salary actually paid to the beneficiary in 2001.

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 filing date. 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.