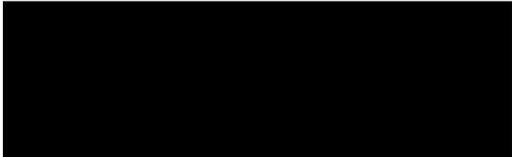


B5

U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



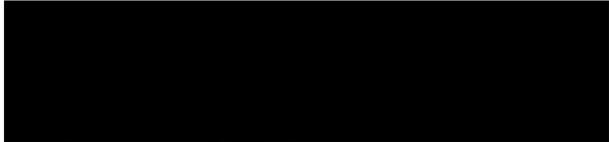
File: WAC 02 025 56644 Office: CALIFORNIA SERVICE CENTER

Date: **MAR 11 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)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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 dismissed.

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 an electronic networking company. It seeks to employ the beneficiary permanently in the United States as a design 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 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 April 12, 2001. The beneficiary's salary as stated on the labor certification is \$72,500 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On January 29, 2002, 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 copies of various invoices and purchase orders, unaudited financial statements for the year 2001 and a copy of the company's federal Form 1120 U.S. Corporation Income Tax Return for the tax year ending 2001. It contained the following information:

Assets	\$ 389,434
Officers compensation	74,274
Salaries	109,829
Depreciation	46,845
Net Income (loss) per books	(1,124,760)
Liabilities	389,434

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 noted that the petitioner's 2001 corporate tax return showed a loss that was almost double the total gross receipts of \$617,234.

On appeal, counsel resubmits a copy of an unaudited balance sheet for the period ending Dec. 31, 2001, various copies of purchase orders and invoices and another balance sheet for the period ending March 31, 2002 showing the company's net income at \$382,897. Counsel contends that the petitioner had sufficient working capital and revenue to pay its expenses and will continue to grow based on its existing contracts. We further note that although the record indicates that the petitioner may have employed the beneficiary since October 2000, no evidence was submitted showing the salary paid to the beneficiary.

The petitioner must establish its ability to pay the proffered wage as of the priority date. As noted previously, 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. Even if one considered the unaudited balance sheet for the period ending Dec. 31, 2001, it shows the petitioner's net loss at "(1,124,760.39)." This corroborates the information shown on the petitioner's 2001 federal tax return. We further note that adding the depreciation of \$46,845 to the net loss of (\$1,124,760) does not produce a sufficient amount to cover the beneficiary's salary. Based on the evidence contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage.

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.