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

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



File: WAC 01 258 53927 Office: CALIFORNIA SERVICE CENTER

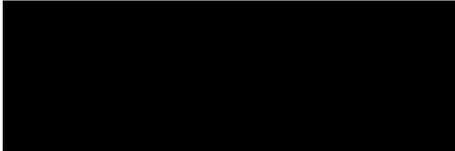
Date: MAR 19 2003

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:



Identifying data deleted to prevent 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 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 a telecommunications company. It seeks to employ the beneficiary permanently in the United States as a financial 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 20, 2001. The beneficiary's salary as stated on the labor certification is \$28.58 per hour. As noted by the director, this represents an annual salary of \$59,446.40. The information provided by the beneficiary on Form ETA 750-B indicates that the petitioner has employed the beneficiary as a financial analyst since May 2000.

The petitioner initially submitted a copy of its federal Form 1120 U.S. Corporation Income Tax Return for the tax year ending 1999. This tax return was filed under the petitioner's name of [REDACTED]. It contained the following information:

Gross profit (loss)	\$	(83,827)
Officers' compensation		(blank)
Salaries		50,392
Depreciation		40,072

Net Income (loss) per books	(384,726)
Taxable Income (before net operating loss deduction)	(384,726)

On December 12, 2001, the director requested additional evidence including a copy of the petitioner's 2000 federal tax return, copies of the petitioner's 2001 quarterly wage reports, and copies of payroll records.

In response, the petitioner submitted a copy of the 2001 W-3 payroll summary for a company named "Union West International" with a different federal tax identification number than the petitioner's. The petitioner also submitted 2001 payroll records from Union West International indicating that this company paid wages to the beneficiary at the rate of \$11.00 per hour with a year-to-date total of \$23,634.48 as of December 22, 2001. As noted by the director, the petitioner failed to submit its tax return for 2000.

The director concluded that evidence failed to establish that the petitioner had employed the beneficiary at the proffered wage or that it had established its ability to pay the beneficiary the proffered wage of \$ 28.58 per hour as of the priority date of the petition.

On appeal, counsel submits two letters from [REDACTED] "CFO" on the petitioner's letterhead. One letter states that the petitioner is a division of Union West International. The other letter states that "part of the [beneficiary's] compensation was invested in the form of stock in MTG Communications." We note that even if this evidence were to be considered, no primary documentation of these assertions was submitted. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's tax records indicate that it is organized as a corporation and obtained the labor certification and filed the I-140 under its own name. A corporation is a separate and distinct legal entity from its owners or stockholders. Consequently, any assets of its stockholders 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); *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980).

Counsel also submits copies of IRS records of Union West's quarterly 2001 tax returns, a copy of the IRS record of Union West's 2001 federal Form 1120 U.S. Corporation Income Tax Return, and copies of Union West's checking account bank statements from December 1, 2001 through March 29, 2002. Counsel asserts that this evidence establishes that the petitioner has the ability to pay the proffered wage. Even if Union West's material were considered, it shows that the beneficiary was not paid the proffered wage during the period of time when it is asserted that he worked for the petitioner as a financial analyst. As stated above, the record establishes that Union West paid the beneficiary \$11.00 per hour, well short of the \$28.58 per hour required by the labor certification. Further, the 2001 federal corporate tax return filed by Union West reveals a taxable

income (loss) of (\$131,746.00).

The petitioner must establish its ability to pay the proffered wage as of the priority date. The petitioner's tax return shows that it sustained a net loss of \$384,726 in 1999. This does not reflect an ability to pay the proffered wage to the beneficiary in that year or reflect the petitioner's financial status as of the priority date in February 2001. The petitioner failed to submit any other evidence of its ability to pay the proffered wage. 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. Based on the evidence contained in the record, the petitioner has not demonstrated the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status.

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.