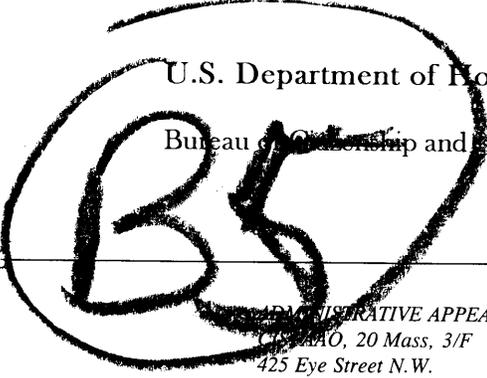


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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services



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

ADMINISTRATIVE APPEALS OFFICE
CIS/AAO, 20 Mass, 3/F
425 Eye Street N.W.
Washington, D.C. 20536



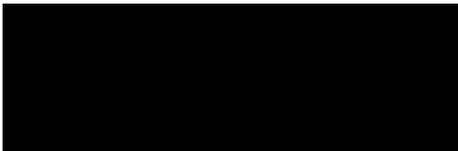
File:  Office: California Service Center

Date: **SEP 30 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:



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 Citizenship and Immigration Services (CIS) 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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a supplier of programmable logic solutions. It seeks to employ the beneficiary permanently in the United States as a staff device/process engineer at an annual salary of \$100,000. As required by statute, the petition was accompanied by an individual labor certification from 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 filing date of the visa petition.

On appeal, counsel asserts that the director failed to consider the documentation submitted in response to the request for additional evidence.

Section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 petition's filing date is June 21, 2001. The beneficiary's salary as stated on the labor certification is \$100,000 annually.

Initially, the petitioner submitted unaudited financial statements. On February 27, 2003, the director requested annual reports, federal tax returns, or audited financial statements for 2001 through the present. The petitioner was given until May 22, 2003 to respond.

On March 25, 2003, the director denied the petition, stating:

On February 26, 2003 the Service Requested for Evidence information from the petitioner of ability to pay. Audited financial records and the beneficiary's W2 printouts for tax years 2001 and 2002. The petition was received back with none of the information requested on March 19, 2003.

On appeal, counsel asserts that the petitioner sent its response the same day it received the denial and had sent nothing previously. The only response contained in the record is dated March 28, 2003, received by the director on April 1, 2003. The response included the petitioner's annual reports and the beneficiary's Forms W-2 for 2001 and 2002. According to the Forms W-2, the petitioner paid the beneficiary \$113,640 in 2001 and \$96,722 in 2002.

The petitioner's 2001 annual report reveals the following information:

Net income	\$35,258
Current assets	\$1,101,879
Current liabilities	\$350,410

The petitioner's 2002 annual report reveals the following information:

Net loss	(113,607)
Current assets	\$998,753
Current liabilities	\$195,840

At the time of filing, the petitioner was paying the beneficiary the proffered wage as specified on the labor certification application. In 2002, the petitioner was paying the beneficiary \$3,278 below the proffered wage. While the petitioner had a net loss in 2002, its net current assets (current assets less current liabilities) was \$802,913, more than the difference between the proffered wage and the amount paid to the beneficiary.

Based on the evidence, it can be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2). Therefore, the petition may be approved.

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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.