



U.S. Citizenship
and Immigration
Services

05

[Redacted]

FILE:

[Redacted]

Office: TEXAS SERVICE CENTER

Date:

APR 27 2004

IN RE:

Petitioner:

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:

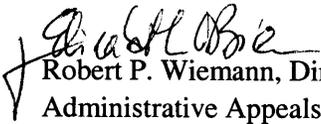
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prevent clearly unwarranted
invasion of personal privacy**

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INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a software development, consulting and staffing services company. It seeks to employ the beneficiary permanently in the United States as a software engineer at an annual salary of \$68,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it had the financial ability to pay the beneficiary's proffered wage as of the filing date of the visa petition.

On appeal, counsel asserts that the director raised new grounds from a "domestic investigation" not previously raised. We concur that the director should have issued a new notice of intent to deny based on the results of its investigation.¹ We find that the remedy, however, is to consider any rebuttal arguments or new evidence that might have been put forth in response to such a notice on appeal. We will consider counsel's appellate arguments below.

Section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides for the granting of preference classification to members of the professions holding an advanced degree or aliens of exceptional ability.

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.

The priority date is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). Here, the petition's filing date is November 8, 2000. The beneficiary's salary as stated on the labor certification is \$68,000 annually.

The petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for the tax year ending 2000 that contained the following information:

Net income (loss)	\$105,623
Current assets	\$273,535
Current liabilities	\$0

The petitioner also submitted quarterly returns for the first two quarters of 2001. The petitioner filed quarterly returns in Georgia, where it is based, as well as in California, Connecticut, Florida, Louisiana, Michigan,

¹ Although it would have been preferable for the director to have advised the petitioner of the derogatory information prior to its final decision, we note that 8 C.F.R. § 103.2(a)(16)(i) provides that notice is required when relying on derogatory information "of which the applicant or petitioner is unaware." The petitioner has not established that it was unaware of how many immigrant and nonimmigrant petitions it has filed since 1997.

Minnesota, North Carolina, New Jersey, Oregon, Texas, Virginia, and Wisconsin. These documents reflect no employees in California, Connecticut, Louisiana, Michigan, Minnesota, Virginia, and Wisconsin. The record contains no explanation for why the petitioner is filing quarterly returns in states in which it does not employ any workers. The petitioner employed 14 workers in Georgia in January 2001. While the petitioner indicated that it employed no workers in February or March of 2001, it appears from the wages earned that at least 13 of those employees could have worked the full quarter. The petitioner indicated on its second Georgia State quarterly return for 2001 that it employed five workers in April, six in May, and seven in June. This quarterly return appears to be filled out correctly as the form lists a total of nine names, not the 18 that would be expected if the petitioner were indicating how many employees were added each month instead of totals for the month. The remaining quarterly returns reflect that the petitioner employed no employees in Florida until April 2001 and had two employees as of June 2001.² (Only two names appear on the Florida form.) The petitioner employed no employees in North Carolina until May 2001, at which time it employed one individual. The petitioner employed three workers in New Jersey in January 2001, none in February or March, and listed four employees for the second quarter of 2001. The petitioner did not employ any employees in Oregon until June 2001, at which time it employed one employee. The petitioner employed one employee in Texas in January 2001, none in February or March, and one in April, May and June. Finally, the petitioner submitted its quarterly wage summaries for the first two quarters of 2001. The first quarter summary lists 26 employees, only 17 of whom received any wages during this quarter. The second quarter summary lists 25 employees, only 17 of whom received any wages.

The director noted the petitioner's failure to submit the articles of incorporation filed with the state, that the petitioner's employment records did not support the claim on the petition to employ more than 20 employees, and that the petitioner has filed more than 150 nonimmigrant petitions in behalf of specialty workers. The director concluded that the evidence did not establish a realistic job offer as the petitioner had not demonstrated its ability to pay the salary of the nonimmigrants for whom it had petitioned.

On appeal, counsel argues that the director never specified that the articles of incorporation should be government registered. The petitioner does not, however, submit evidence of registration on appeal. Counsel further asserts that the claim on the petition that the petitioner employed more than 20 workers is based on its second quarter returns for 2001 that reflect 25 employees. Counsel asserts that the director ignored the evidence required under 8 C.F.R. § 204.5(g)(2), ordering a domestic investigation "for the ostensible reason that the employee names in the quarterly returns are not '[C]hristian sounding.'" Regarding the nonimmigrant petitions, counsel asserts that this office has held that ability to pay is not a consideration in adjudicating nonimmigrant petitions and that the director failed to take into account how many of the nonimmigrant petitions had expired.

Regarding counsel's concern that the director did not specifically request the government-registered articles of incorporation, Black's Law Dictionary, 107 (7th ed. 1999), defines articles of incorporation as follows:

A document that sets forth the basic terms of a corporation's existence, including the number and classes of shares and the purposes and duration of the corporation. In most states, the articles of incorporation are filed with the secretary of state as part of the process of forming the corporation. In some states, the articles serve as a certificate of incorporation and are the official

² Florida's official website reflects that a domestic corporation, Prosoft Technologies Corporation, and a foreign corporation based in California, Prosoft Technology, Inc., are the only two "Prosoft" corporations registered to do business in that state.

recognition of the corporation's existence. In other states, the government issues a certificate of incorporation after approving the articles and other required documents.

Given this definition and the fact that articles of incorporation have no evidentiary value unless they have been filed with the state, we find that the director's request for the articles of incorporation was an unambiguous request for evidence of the corporation's existence and recognition by the state. Even assuming the director's initial request was ambiguous, the petitioner was placed on notice by the director's notice of denial that the record lacks evidence from the State of Georgia that the petitioner has filed its articles of incorporation and, thus, exists as a corporate entity. Yet, on appeal, the petitioner fails to submit this requested document.

In an attempt to negate this issue, this office, although it bears no burden to confirm the petitioner's claims, attempted to verify that the petitioner is a corporation registered in the State of Georgia. According to publicly available official state records at Georgia's website, www.sos.state.ga.us, the petitioner did file its articles of incorporation with the state on March 3, 1997. The official state records also indicate, however, that as of March 24, 2004 the petitioner is in "active/noncompliance status." According to the definitions page, this status indicates that while the petitioner is technically active, it "is not in compliance because of failure to file an annual registration either within ninety (90) days of its initial filing date or by the statutory due date as required by Georgia Law." The official state records reveal that the petitioner last paid its annual registration fee on June 19, 2002. Thus, our attempt to overcome the petitioner's failure to submit the requested document, which we are not required to do, has not satisfactorily established that the petitioner is a corporation in good standing, fulfilling its financial obligations.

In addition, while we acknowledge that the petitioner showed a net income in 2000, the director was not precluded from looking at other factors. While Citizenship and Immigration Service (CIS) normally evaluates whether the petitioner has employed the beneficiary and paid the proffered wage in the past, the petitioner's net income, and the petitioner's net current assets, it is not precluded from evaluating other factors. In accordance with *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), CIS may also consider the totality of the petitioner's business activities and economic circumstances. Nothing in the language of that decision requires CIS to consider only positive factors beyond a petitioner's tax return.

Contrary to counsel's assertion on appeal, the record does not reflect 25 employees during the second quarter of 2001. As stated above, the quarterly summary for that quarter reflects 25 names, but only 17 of those workers received wages during the quarter. Adding up all the names on the various state quarterly returns for the second quarter of 2001 yields 18 workers (two in Florida, nine in Georgia, one in North Carolina, four in New Jersey, one in Oregon, and one in Texas). We find that the varied monthly employment levels of the petitioner gave the director ample cause to investigate the petitioner's situation in determining whether the job offer was realistic. While counsel questions how the director was able to determine the number of nonimmigrant petitions filed by the petitioner, we note that the computer records of those petitions have been entered into the record.

It is not clear from the information given by counsel that the non-precedent case cited for the proposition that CIS will not consider a petitioner's ability to pay nonimmigrant workers is a decision on an immigrant petition.³ Clearly, the regulations and case law establish that CIS does have the authority to evaluate an immigrant petitioner's ability to pay and the viability of the job offer. A petitioner's filing of numerous nonimmigrant

³ The receipt number provided by counsel is not for an employment-based petition. A search of petitions filed by the employer named by counsel reveals only nonimmigrant visa petitions.

petitions, which may not be a consideration in the adjudication of those petitions, is clearly a relevant factor as to whether the immigrant job offer is viable.

We acknowledge that nonimmigrant petitions are only valid for three years. Nevertheless, the petitioner must demonstrate its ability to pay the proffered wage back to 2000. Thus, visa petitions filed in 1997 are not necessarily irrelevant. Regardless, even considering nonimmigrant visa petitions filed in 2000 or later reveals that the petitioner has filed 23 nonimmigrant visa petitions in 2000, 18 nonimmigrant visa petitions in 2001, and 15 nonimmigrant visa petitions in 2002. We concur with the director that the petitioner's employment records do not establish that the immigrant job offer before us is viable given the numerous nonimmigrant visa petitions filed.

Finally, beyond the decision of the director, we note that the petitioner also filed seven immigrant visa petitions in 2001 in addition to the instant petition. Of these seven, one has been withdrawn and the beneficiaries of three more appear on the petitioner's 2001 payroll. The petitioner has not demonstrated that it had and continues to have the ability to pay the petitioner and the three remaining beneficiaries of immigrant petitions filed by the petitioner. Also, in pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level. While the record contains the petitioner's foreign Master's degree, the record does not contain an evaluation certifying it as equivalent to a U.S. academic or professional degree above the baccalaureate level.

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 sustained that burden. Accordingly, the decision of the director will not be disturbed and the appeal will be dismissed.

ORDER: The appeal is dismissed.