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DEC 30 2004



FILE: [Redacted]
WAC 02 046 54987

Office: CALIFORNIA SERVICE CENTER Date:

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 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.

Mari Johnson

 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 software service provider. It seeks to employ the beneficiary permanently in the United States as a systems analyst at an annual salary of \$84,960. 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's proffered wage as of the filing date of the visa petition.

On appeal, the petitioner submits its signed federal tax returns for 2000 and 2001.

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 October 10, 2000. The beneficiary's salary as stated on the labor certification is \$84,960 annually.

Initially, the petitioner submitted its Form 1120 U.S. Corporation Tax Return for 2000 reflecting net income of \$728,672. The return is not signed. On April 9, 2002, the director requested that the petitioner submit additional evidence regarding its ability to pay the proffered wage at the time of filing and continuing. While the director specified that tax returns were acceptable evidence, he did not indicate that they needed to be signed. The petitioner resubmitted the unsigned 2000 tax return and the beneficiary's Forms W-2 for 2000 and 2001 reflecting annual wages of \$73,441.75 and \$109,825.32 respectively.

The director determined that the wages paid in 2000 were less than the proffered wage and that the tax return, being unsigned, could not be considered valid evidence.

On appeal, the petitioner submits a new copy of its 2000 tax return signed by the president and the accountant who prepared the forms. The information on the returns is the same as that on the return originally submitted. The regulation at 8 C.F.R. § 204.5(g)(2) does not specifically state that the federal tax returns submitted to demonstrate ability to pay must be signed. Similarly, the director's request for additional evidence did not specify that the returns had to be signed. While the requirement that they be signed may be reasonable, the petitioner in this case was not placed on notice of that requirement. Thus, we can consider the new documents submitted on appeal. *Cf. Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The only issue on appeal is the petitioner's ability to pay the proffered wage in 2000. Based on the evidence submitted on appeal, 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). Specifically, the petitioner's net income was higher than the difference between the wages paid and the proffered wage in 2000. 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.