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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship
and Immigration
Services

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: FEB 10 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:

[REDACTED]

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

to 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 dismissed.

The petitioner is an environmental testing laboratory. It seeks to employ the beneficiary permanently in the United States as a geologist at an annual salary of \$69,357.60. 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.

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.

In order to establish eligibility in this matter, the petitioner must demonstrate its 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 4, 2001. The beneficiary's salary as stated on the labor certification is \$69,357.60 annually.

With the original petition, the petitioner submitted its Form 1120 U.S. Corporation Income Tax Return for the tax year ending 2000. In response to the director's request for evidence relating to the date of filing, the petitioner submitted its 1999 and 2001 tax returns. The tax return for 2001 contained the following information:

Net income	\$24,357
Current assets	\$20,998
Current liabilities	\$40,812

The petitioner also submitted the 2001 Form W-2 issued to the beneficiary indicating that the beneficiary was paid \$42,933.40, \$26,424.20 less than the proffered wage. As the petitioner's net income was not equal to or greater than the difference between the proffered wage and the wage actually paid to the beneficiary, the director denied the petition.

On appeal, the petitioner submits unaudited financial statements for fiscal years ending February 28, 1999, 2000, 2001, and 2002, Forms W-3 issued by the petitioner in 1999, 2000, 2001 and 2002, and promotional materials about the petitioner. The regulations specifically require audited financial statements in support of a petitioner's ability to pay a beneficiary. The Forms W-3 are not evidence of the beneficiary's wages. Finally, promotional

materials about the petitioner are not evidence of its ability to pay the proffered wage. The petitioner has not overcome the director's conclusion that the petitioner's net income in 2001 was less than the difference between the beneficiary's actual wage and the proffered wage. We further note that the petitioner had negative net current assets in 2001.

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.