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U.S. Department of Homeland Security

Citizenship and Immigration Services

**REMOVED TO PREVENT CLEARLY UNWARRANTED  
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ADMINISTRATIVE APPEALS OFFICE  
425 I Street, N.W.  
CIS, AAO, 20 Mass, Rm 3042  
Washington, DC 20536

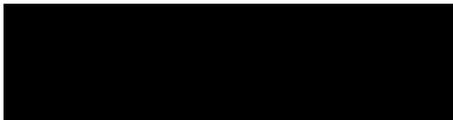


File:   
SRC 01 197 53995

Office: TEXAS SERVICE CENTER

Date: FEB 23 2004

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 § 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 the 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a firm for the manufacture of electronics' circuits, electrical assembly, and consultancy. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A), provides for the granting of preference classification to qualified immigrants who are members of the professions holding advance degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

*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 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. The petition's priority date in this instance is October 26, 1998. The beneficiary's salary as stated on the labor certification is \$55,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for

evidence (RFE) dated December 17, 2001, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's 2000 income tax return, last three bank statements, and the last federal quarterly tax return showing wages paid to its employees.

In response to the RFE, the petitioner's banks chronicled 1998 monthly balances of \$10,617.18 (10-31-98) and \$26,260.42 (11-24-98); 1999 monthly balances of \$50,222.57 (1-31-99), \$14,537.17 (2-28-99), \$38,200.70 (3-31-99), \$39,814.15 (4-30-99), \$25,908.24 (5-31-99), \$27,987.47 (6-30-99), \$24,086.67 (7-31-99), \$34,416.82 (8-31-99), \$12,193.11 (9-30-99), \$32,980.54 (10-31-99), \$28,715.63 (11-30-99), and \$89,878.64 (12-31-99); and 2001 monthly balances of \$16,993.70 (10-31-01), \$31,923.50 (11-30-01), and \$34,372.87 (12-31-01). Only the monthly balance for 12-31-99 was equal to, or greater than, the proffered wage.

The petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return, reported taxable income before net operating loss deduction and special deductions of \$40,979. Schedule L showed the difference of current assets of \$354,719, minus current liabilities of \$241,659, as net current assets of \$113,060, equal to, or greater than, the proffered wage. A Wage and Tax Statement of 1998 (Form W-2) reflected \$18,620 in wages that the petitioner paid the beneficiary. A 2001 payroll tax report did not show any wages paid to the beneficiary.

For 1999, Form 1120 reported taxable income before net operating loss deduction and special deductions of \$32,443, less than the proffered wage. On appeal, however, counsel amplified this data with Schedule L, reflecting net current assets of \$270,069, equal to, or greater than, the proffered wage.

For 2000, Form 1120 reported taxable income before net operating loss deduction and special deductions as a loss (\$291,827). Nonetheless, Schedule L reflected net current assets of \$264,659, equal to, or greater than, the proffered wage.

The director considered only the 1998-2000 taxable income before net operating loss deduction and special deductions and the monthly bank balances, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On appeal, counsel furnished the missing Schedule L for 1999, with net current assets of \$270,069, equal to, or greater than, the proffered wage. More recently available, Form 1120 for 2001

reported taxable income before net operating loss deduction and special deductions of \$92,775, equal to, or greater than, the proffered wage.

The director and counsel emphasized bank statements. Even though the petitioner submitted commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds beyond those of the tax returns and financial statements. They are superfluous, since Schedules L of the federal tax returns documented current net assets available to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

Finally, the Immigrant Petition for Alien Worker (Form I-140) indicated that the proffered position was not a new position, thereby implying that the beneficiary would be replacing a previously hired employee. Although the director and counsel did not address this issue, the validity of the job offer would be further strengthened if the beneficiary had been replacing and assuming the salary of an employee who had left the organization. However, as the record is devoid of evidence regarding the identity and actual salary of the previous employee, this factor may not be a basis of this decision. Regardless, a review of the record confirms that the job offer is realistic and can be satisfied by the petitioner. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

After a review of the federal tax returns, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

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.

**ORDER:** The appeal is sustained.