

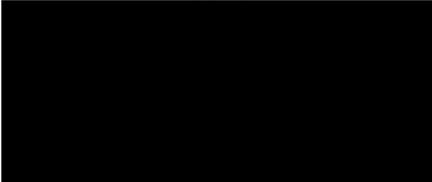
**PUBLIC COPY**



U.S. Citizenship  
and Immigration  
Services

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

BS

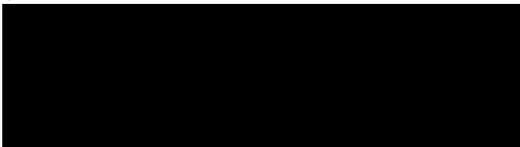


FILE: WAC-02-220-54471 Office: CALIFORNIA SERVICE CENTER Date: JUN 01 2004

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

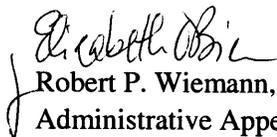
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

  
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 develops and manufactures food additives. It seeks to employ the beneficiary permanently in the United States as a microbiologist at an annual salary of \$67,122. 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 petitioner is a viable company that has secured considerable venture capital.

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 April 20, 2001. The beneficiary's salary as stated on the labor certification is \$67,122 annually.

The petitioner previously submitted Forms 1120 U.S. Corporation Income Tax Return for the tax years ending 2000 and 2001. On appeal, the petitioner submits its 2002 return. These documents contain the following information:

	2000	2001	2002
Net income (loss)	(\$1,924,459)	(\$2,187,832)	(\$1,924,459)
Current assets	\$867,399	\$652,281	\$294,502
Current liabilities	\$539,751	\$597,079	\$493,027
Net current assets	\$327,648	\$55,202	(\$198,525)
Stock and additional capital	\$11,796,983	\$12,571,232	\$15,703,402
Retained earnings	(\$5,508,951)	(\$7,702,843)	(\$9,803,207)
Adjustments to shareholders' equity	(\$4,634,044)	(\$4,617,653)	(\$4,902,113)

The director denied the petition, concluding that the record contained no evidence that the petitioner was already paying the beneficiary the proffered wage and, based on the large losses suffered during 2000 and 2001, the

petitioner had not established its ability to pay the proffered wage as of the filing date or that it would continue to have the ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has increased its payroll from 11 employees to 14, that it continues to raise substantial amounts of venture capital, that it takes five years to break even in the petitioner's line of business, and that the petitioner "is a start-up company with a healthy cash flow and a very promising future." The petitioner, through counsel, submits bank letters attesting to the petitioner's payment of its employees and its balance of \$438,491 on April 24, 2003; its stock ledger; bank statements; 2003 investment agreement letters; a blank stock purchase agreement; its articles of incorporation; and materials regarding the petitioner's products. As stated above, the petitioner also submitted its 2002 tax return.

While Citizenship and Immigration Services (CIS) will consider venture capital and cash on hand on a case-by-case basis, the record is not persuasive that the petitioner had the ability to pay the proffered wage as of the filing date continuing through 2002. While we acknowledge the large increases in capital, these increases appear to cover large prior losses carried over from previous years, represented as negative retained earnings on the tax returns, and "adjustments to shareholders' equity." While Schedule L, line 26, requires an attached schedule for adjustments to shareholders' equity, the record does not contain those schedules. Regardless, any increased cash from venture capital should be represented on Schedule L as a current asset. According to the numbers stated above, the petitioner's net current assets in 2001 were less than the proffered wage and it reported negative net current assets in 2002. Thus, we cannot conclude that the petitioner's venture capital establishes its ability to pay the proffered wage in 2001 or 2002.

Beyond the decision of the director, we further note that while the beneficiary does qualify as an advanced degree professional, she does not meet the requirements of the job as set forth on the labor certification. 8 C.F.R. § 204.5(k)(2) permits the following substitution for an advanced degree:

A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

The petitioner claims that the beneficiary has the equivalent of a baccalaureate degree plus at least five years of progressive experience. The record contains the beneficiary's 1982 baccalaureate degree issued by Shenyang Pharmaceutical University and an evaluation of this degree by Globe Language Services. The evaluation concludes that the beneficiary's degree is the equivalent of a U.S. baccalaureate degree from an accredited institution. The petitioner also submitted a letter verifying the beneficiary's progressive employment for the Sichuan Industrial Institute of Antibiotics from 1982 to 1999. Thus, as acknowledged above, the petitioner has the equivalent of an advanced degree.

The issue being raised, however, is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The key to this determination is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered.

It is important that the ETA-750 be read as a whole. Block 14 on the ETA-750 Part A contained in the record contains the following information:

Block 14 on the ETA-750 Part A contained in the record contains the following information:

Education – “6”

College Degree Required – “Master of Science”

Major Field of Study – “Biology or Pharmaceutical Science”

Experience – Blank

Block 14 of the Form ETA 750 includes no asterisks. Block 15 includes the following other special requirements:

3 years experience with handling pathogens and antimicrobial compounds in operational food and medical environment. Knowledge of ICP, HPLC, and PCR.

Nothing on the labor certification indicates that the petitioner would accept a baccalaureate degree plus five years of experience in lieu of a Master’s degree. Thus, the petitioner does not meet the requirements of the labor certification. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (1977).

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.