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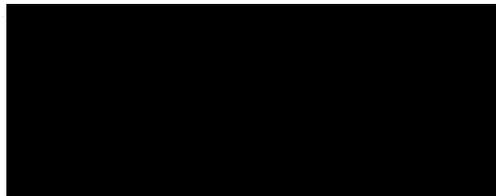


FILE: WAC-01-029-50142 Office: CALIFORNIA SERVICE CENTER Date: JUN 08 2004

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

PETITION: Immigrant Petition for Alien Worker or Professional 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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software and systems engineering firm. 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.

The director denied the petition because she determined the petitioner failed to establish its ability to pay the proffered wage.

Regulations at 8 C.F.R. § 204.5(g)(2) state 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.

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 August 15, 2000. The beneficiary's salary as stated on the labor certification is \$75,151 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 8, 2000, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The director specifically requested that the petitioner submit a copy of "The latest Internal Revenue Service Certified Corporation Tax Return Form 1120 signed by an authorized official."

Counsel submitted a copy of the petitioner's 1998 Form 1120, U.S. Corporation Income Tax Return.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition. It must be noted that the director erred in using the petitioner's 1998 federal tax return to determine the petitioner's ability to pay the proffered wage. The priority date is August 15, 2000. The petitioner is therefore, required to establish its ability to pay the proffered wage from that date. Thus, the petitioner's 1998 federal tax return is of little or no probative value to these proceedings and may not be used to determine the petitioner's ability to pay the proffered wage.

On appeal, counsel submits an additional copy of the petitioner's 1998 tax return. Counsel states that the tax documents reflect the petitioner's ability to pay the proffered wage. Counsel states that she is submitting a copy of the petitioner's most recent bank statements, which reflects that the petitioner has received 25 million dollars in "third round funding" from Pequot Capital Management, Inc. in December 2000.

Even though counsel submitted the petitioner's most recent commercial bank statements as evidence that it had sufficient cash flow to pay the wage, there is no evidence that the bank statements establish the existence of funds that were available at the time of the filing of the petition. Simply going on record without supporting

documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Further, although requested to do so, the petitioner has not submitted federal tax returns for the year 2000. Therefore, it cannot be determined if the petitioner had the ability to pay the proffered wage at the time of the filing of the petition. For this reason, the petition may not 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 not met that burden.

ORDER: The appeal is dismissed.