

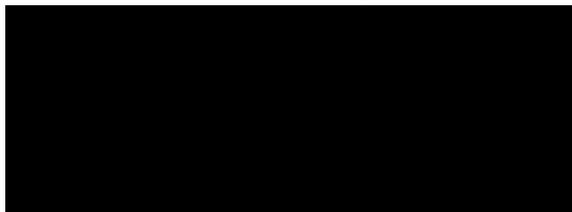
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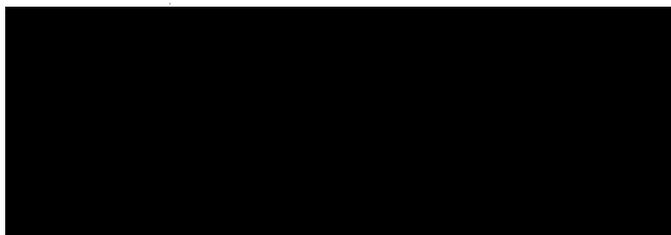
MAR 22 2004

FILE: WAC 01 110 54058 Office: CALIFORNIA SERVICE CENTER Date:

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

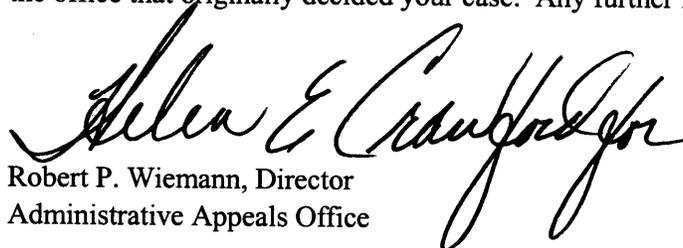
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to § 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 sustained.

The petitioner is a software services and products company. It seeks to employ the beneficiary permanently in the United States as a lead web developer. 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is November 1, 2000. The beneficiary's salary as stated on the labor certification is \$90,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated July 16, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE specified the petitioner's 1998-2000 annual reports, federal tax returns, or complete, audited financial statements.

The petitioner responded with the fiscal year 1999 Form 1120, U.S. Corporation Income Tax Return, reporting the year ending September 30, 2000. For the first quarter only of the fiscal year 2000, ending December 31, 2000, the petitioner, also, offered Form 1120. On January 1, 2001, the petitioner noted, it changed to a calendar year tax period. Other submissions included the beneficiary's Wage and Tax Statements (Forms W-2), reflecting payments to the beneficiary in calendar year 2000 of \$94,770, equal to, or greater than, the proffered wage. For the first two (2) calendar quarters of 2001, the employer's quarterly California Payroll Tax Report (Form DE-6) confirmed payment of \$48,116 to the beneficiary.

The director acknowledged that the petitioner had paid the beneficiary an amount equal to, or greater than, the proffered wage, but considered that its losses, declining revenues, and the deficit of net current assets would create great difficulty in continuing to meet payroll expenditures in the future. The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and denied the petition.

On appeal, the petitioner submits 2001 contracts with the other parties' names blacked out, said to protect subjects' confidentiality. The petitioner refers to verbal agreements to extend others. Unaudited statements of accounts receivable for 2001 (AR trial balance) are said to be favorable financial data, but they disclose no other balance sheet information. These contracts, verbal agreements, and unaudited statements are of little evidentiary value because they are based solely on representations of management. See 8 C.F.R. § 204.5(g)(2). Net current assets are the difference of current assets minus current liabilities, but these submissions, without explanation, omit the necessary data to reach any conclusion for 2001.

A copy of the third quarter Form DE-6 reflects \$34,367.04 in addition to the \$48,116, for a total, as of the third quarter, of \$82,723.04, being a rate equal to, or greater than, the proffered wage. Citizenship and Immigration Services (CIS), formerly the Service or INS, uses a multiple-pronged analysis to evaluate whether the petitioner has the ability to pay the proffered wage. If the petitioner has employed the beneficiary and paid the proffered wage, the inquiry is terminated. Forms W-2 for 2000 and Forms DE-6 for 2001 demonstrate that the petitioner has paid the proffered wage. The record does not warrant further discussion of taxable income before net operating loss deduction and special deductions or of net current assets under the multiple-pronged analysis.

After a review of the federal tax returns, Forms W-2, and Forms DE-6, 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 until the beneficiary obtains lawful permanent residence.

The record suggests no issue as to whether the petitioner established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the priority date.

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.