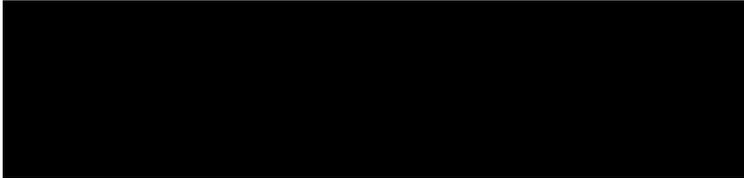


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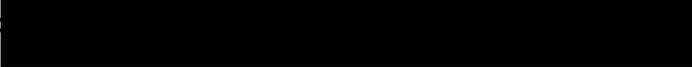
U.S. Citizenship
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Services

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prevent clearly unwarranted
invasion of personal privacy**



B5

FILE: WAC 01 204 58216 Office: CALIFORNIA SERVICE CENTER Date: **MAY 21 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 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 Acting Director (director), California Service Center, and is now before the Administrative Appeals Office (AAO) on certification. The certified decision will be affirmed, and the petition will be denied.

The petitioner is a firm for the research and development of networking. 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 (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 advanced 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 16, 2000. The beneficiary's salary as stated on the labor certification is \$80,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a Notice of Intent to Deny (NOID), dated October 29, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing the beneficiary obtains lawful permanent residence. The director based the NOID on the petitioner's net losses and negative net current assets, as well as negative retained earnings.

Counsel submits seven (7) attachments and a brief in response to the NOID. The Immigrant Petition for Alien Worker (I-140) avers that the petitioner, Acute Communications Corporation of San Jose California [Acute], is a start-up high technology company with a bright future. The brief adduces the petitioner's business plan in attachment 1 (the business plan), a forecast of its income and of personnel to December 31, 2004 in attachment 2, and an advisory opinion of the petitioner's President (the JL letter), dated November 7, 2001, in attachment 6.

Also in response to the NOID, counsel asserts that another party, Acute Technology Corporation Taiwan (AT), supports the petitioner, recognizes the importance of its product development, and is wiring money to run the petitioner's business and keep the brainpower in it. In attachment 5, the petitioner offers two (2) bank statements, as of January 31, 2001 and September 28, 2001, and marks nine (9) deposits and wire transfers that total \$2,012,225.94, said to be from AT.

Attachment 7 included 21 pay stubs of the beneficiary, from November 1, 2000 to October 31, 2001, for \$76,499.27, less than the proffered wage. Within this same period, Quarterly Wage Withholding Reports, in Attachment 4, showed \$1,267.23 paid to the beneficiary in the quarter ended December 31, 2000 and another

\$714.34 in the quarter ended September 30, 2001. The petitioner, however, offers no account of whether pay stubs already included amounts in attachment 4. Even the hypothetical total of attachments 7 and 4, \$78,480.84, is less than the proffered wage. Attachment 3 is a Wage and Tax Statement (Form W-2) and simply states all wages paid by the petitioner in 2000, with no more information as to the beneficiary's.

The director observed that the United States employer and petitioning corporation (Acute) was a separate entity from AT and concluded that Citizenship and Immigration Services (CIS), formerly the Service or INS, may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The director determined that the United States petitioning employer failed to show independent financial solvency to support the position certified in Form ETA 750 at the priority date and continuing until the beneficiary obtains lawful permanent residence. The director denied the petition on May 15, 2002 and certified the decision to the AAO for review. More than the 30 days have elapsed, as allowed for a further brief, in response to the denial, and the petitioner has filed no further brief or request for an extension of time.

The director, in line with the JL letter, speculated that AT was the parent company, said to concentrate on new product development. Counsel's brief, however, contradicts both the director and the JL letter in the matter of the parent and subsidiary relationship.

Counsel, indeed, avers that:

The Petitioner [Acute] was incorporated in March 1997. [Acute] is located in Silicon Valley, California, with a production development center, an affiliated company located in Hsinchu's Science-Based Industrial Park (SBIP). The operation in San Jose focuses on R&D of intelligent multi-layer switch chips, system development, and business development in the U.S.A. The operation in Hsinchu [AT] focuses on system production and business development in Taiwan. .

Acute's products will be manufactured by its ODM/OEM customers. Acute's market is in north [sic] America and China at the first stage, then it will expand to Europe gradually. In addition, Acute will license its products to other chips companies and collect NRE [sic] and royalty.

* * *

Acute's financial support has been from its shareholder in Taiwan [AT]. AT has the ability to support Acute's operation in the U.S. It also recognizes the importance of the petitioner's product development and has been wiring money to run Acute's business.

This litany, when taken with the business plan in attachment 1, still neglects documentary evidence regarding any incorporation, the identity of parent and subsidiary entities, AT's shareholder interest in Acute, the existence of affiliates and joint ventures, or contracts for the license, or the collection and sharing of "NRE and royalty." Counsel contradicts JL's letter, particularly, in the identity of the parent and subsidiary.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

The statute reserves the privilege of petitioning for classification of an alien, as a lawful permanent residence in this category, on an employer in the United States. See § 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A), *supra*. Regulations supporting the ETA 750 define an employer as a person, association, firm, or corporation that currently has a location in the United States to which U.S. workers may be referred for employment. See 20 C.F.R. § 656.3 *Employer*.

Acute is the employer in the United States, and it has made a job offer. The AAO uses a multiple-pronged analysis to determine the ability to pay the proffered wage. The petitioner's payment of the proffered wage to the beneficiary may establish such ability. Acute, in 2001, paid the beneficiary \$76,499.27, \$3,500.73 less than the proffered wage. The petitioner could not make up this difference from its net income, a loss of (\$2,020,697.50), or its net current assets, a deficit of (\$3,787,367.28). See the petitioner's unaudited financial statement with the income statement and balance sheet as of December 31, 2000 (unaudited statements). Moreover, the unaudited statements are of little evidentiary value because they are based solely on the representations of management.

The petitioner presented no federal tax return, annual report, or audited financial statement, even in response to the director's Notice of Certification on May 15, 2002. The petitioner offered no explanation for withholding the data prescribed by the regulation and the RFE. See 8 C.F.R. § 204.5(g)(2), *supra*.

As already noted, the petitioner may not apply assets of AT, another corporation, to pay the proffered wage, without credible evidence of an obligation to do so. The brief and JL letter propose only a hopeful business plan and a commonality of interest, namely that AT should supply assets to Acute indefinitely.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate such financial ability continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

No federal tax return, annual report, or audited financial statement presents results for Acute and AT, either separately or consolidated as a parent and subsidiary, for the priority date or continuing until the beneficiary obtains lawful permanent residence. No evidence in the certified proceedings establishes that AT is an employer with a location in the United States. Counsel stipulates that AT focuses on system production and business development in Taiwan.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

Relying on attachment 5, the petitioner claimed that two (2) bank statements proved that AT transmitted \$2,012,225.94 to the petitioner, but AT is not identified. Only two (2) of nine (9) deposit entries reference "ADP Payroll Fees," and none refers to the beneficiary or the priority date. Furthermore, that gift, if made, does not equal the net loss admitted in the unaudited financial statement with the I-140, \$2,020,697.59. No explanation provides any convincing reason to conclude that the bank statements represent additional funds, more than the evidence that the director requested and the regulations require.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Speculation in the JL letter assumes that AT will make up all of the deficiencies of Acute. AT, Acute, and the alleged combination gave no evidence for the ability of any element of it to pay the proffered wage, with its own or consolidated financial data, as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). 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). In this respect the JL letter has little evidentiary weight.

The director, in the NOID, stated the type of evidence required to establish the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence. The petitioner offered pay stubs and checks for \$76,499.27, less than the proffered wage. The proof omitted any tax return, annual report, audited financial statement, or explanation for their absence, either for Acute or AT or their claimed combination. The notice of certification of this decision provided for the submission of a brief or written statement, but the proceedings, as presently constituted have none. *See* 8 C.F.R. 103.4(a)(2). The situation resembles that of an appeal. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

After a review of the pay stubs, bank statements, quarterly withholding reports, business plan, forecast, JL letter, and unaudited balance sheet and income statement, as of December 31, 2000, it is concluded that the petitioner has not 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 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: Upon review, the certified decision is affirmed and the visa petition is denied.