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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC 01 117 55534 Office: CALIFORNIA SERVICE CENTER Date:

JUN 19 2002

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:



**PUBLIC COPY**

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 Service 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 which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

*Helen E. Crawford for*  
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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner designs software for web-hosting & e-commerce activities. It seeks to employ the beneficiary permanently as a senior software engineer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date. The director also found that the petitioner had not established that it had the financial ability to pay the proffered wage as of the filing date of the petition.

On appeal, counsel submits a statement. Counsel further states that he will submit a separate brief and/or additional evidence to the AAU within 30 days. To date, however, no additional evidence has been received. Therefore, a decision will be made based on the record as it is presently constituted.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is October 3, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of senior software engineer required a Bachelor's degree or equivalent in Computer Science, Electronics, Computer Engineering, Electrical Engineering, or Electronics Engineering and one to two years of experience in the job offered or one to two years of experience with Java and C/C++.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition. The director noted that in response to a request for evidence that the beneficiary possessed the required degree, the petitioner submitted a letter addressed to the Department of Labor, requesting an amendment to the ETA-750. This amendment would read "[i]n lieu of a Bachelor's degree plus 1-2 years of experience with

Java and C/C++, we will also accept 3 years of college-level courses in Computer Science, Electronics, or Engineering plus 3 years of experience with networking protocols including 1-2 years of experience using TCP/IP, BOOTP, DNS, DHCP and SNMP or a combination of education and job experience deemed by an experienced credential evaluator to be equivalent to a Bachelor's degree in the U.S." The director further noted that no evidence was submitted to establish that this addendum was ever submitted or approved by the Department of Labor.

On appeal, counsel states that she is in the process of obtaining a copy of the letter sent to the Department of Labor. To date, however, no additional evidence has been received.

The record contains an educational evaluation from the Foundation for International Services, Inc., which states that the beneficiary has the equivalent of graduation from high school in the United States, two years of university level credit (an associate's degree) in electronics and computer technology from an accredited college or university in the United States and has, as a result of his educational background and employment experience (3 year of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

Counsel states that the petitioner has submitted documentation to establish that the beneficiary had a combination of education and experience to meet the requirements set forth in the Form ETA 750 prior to the filing date of the petition. The three year experience for one year of education rule used in the evaluation, however, is applicable to nonimmigrant H1B petitions, not immigrant petitions. The beneficiary is required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor of science degree in computer science, or any scientific degree on October 3, 2000. Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue is whether the petitioner has established his ability to pay the proffered wage as of the filing date of the petition.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is October 3, 2000. The beneficiary's salary as stated on the labor certification is \$74,000 per annum.

Counsel submitted a copy of the petitioner's profit and loss statement for the period ended June 2001 and unaudited financial statements for the period from March 1999 to May 1, 2001.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel submits a copy of the petitioner's 2000 Form 1120 U.S. Corporation Income Tax Return which reflects gross receipts of \$0; gross profit of \$0; compensation of officers of \$0; salaries and wages paid of \$5,226,125; and a taxable income before net operating loss deduction and special deductions of -\$18,493,843.

The petitioner's Form 1120 for calendar year 2000 shows a taxable income of -\$18,493,843. The petitioner could not pay a proffered wage \$74,000 per year out of a negative income. Therefore, the petitioner has not established its ability to pay the proffered wage based upon its net income.

No additional evidence has been submitted. Accordingly, after a review of the documentation furnished, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition.

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.