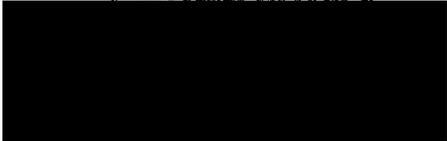




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U.S. Department of Justice
Immigration and Naturalization Service

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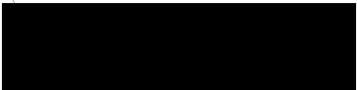


OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 00 271 51609 Office: California Service Center

Date: OCT 10 2002

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 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 that 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 that 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 sustained.

The petitioner is a software development company. 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 approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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.

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 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. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is June 27, 2000. The beneficiary's salary as stated on the labor certification is \$90,000.00 per annum.

Counsel initially submitted insufficient evidence of the

petitioner's ability to pay the proffered wage. On January 20, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage.

In response, counsel submitted an unaudited Statement of Operations for the year 2000, and copies of the petitioner's Quarterly Federal Tax Return filing record for 2000.

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. The director noted that:

The evidence suggests that the petitioner is a start up company. At this stage, they are relying on investment capital to cover their expenses. The petitioner has not been in business long enough to show that they will ever make a profit and be able to continue as an ongoing concern. The H1b program allows start up companies to petition for necessary workers. However, when a company petitions for an immigrant worker they must establish that they can guarantee the beneficiary permanent full time employment. They must show that they have sufficient income to pay the beneficiary's salary and not be reliant on investment capital.

On appeal, counsel submits copies of the petitioner's payroll records and argues that "PurpleYogi had been providing a salary to [the beneficiary] from the time of filing his labor certification application to the present and therefore, a history of ability to pay has been established."

Counsel's argument is persuasive. The Employer's Quarterly State Report of Wages Paid to Each Employee shows that the petitioner paid the beneficiary more than the proffered wage of \$90,000.00 in 2000.

Accordingly, after a review of the evidence submitted, 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 to present.

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.