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Bureau of Citizenship and Immigration Services

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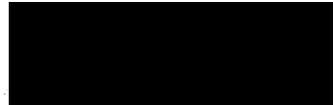
ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: WAC 02 077 53967 Office: CALIFORNIA SERVICE CENTER

Date: AUG 21 2003

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)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

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 on appeal. The appeal will be dismissed.

The petitioner is a computer network systems firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits additional evidence and advances several arguments in favor of approving the petition.

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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 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 Form ETA 750 was accepted on January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$24.94 per

hour, which equals \$51,875 per year.

With the petition the petitioner submitted a copy of its 1998, 1999, and 2000 Form 1120, U.S. Corporation Income Tax Returns. The 1998 return shows that the petitioner declared a loss of \$1,732 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule C shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 1999 return shows that the petitioner declared a loss of \$19,974 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule C shows that at the end of that year the petitioner had current assets of \$7,942 and current liabilities of \$5,794, which yields net current assets of \$2,148.

The 2000 return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,187 during that year. The corresponding Schedule C shows that at the end of that year the petitioner had current assets of \$4,152 and no current liabilities, which yields net current assets of \$4,152.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 23, 2002, requested additional evidence pertinent to that ability.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the petitioner demonstrate its continuing ability to pay the proffered wage beginning on the priority date using copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner submitted a copy of its 2001 Form 1120 U.S. Corporation Income Tax Return. That return shows that the petitioner declared a taxable income before net operating loss deduction and special deductions of \$131,087 during that year.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 30, 2002, denied the petition.

On appeal, the petitioner submits copies of its bank statements, copies of cancelled checks which counsel states were paid for contract labor, copies of Form W-2 wage and tax statements, and other information pertinent to the petitioner's payroll.

The petitioner argues that its bank balances show its ability to

pay the proffered wage. The petitioner further argues that it paid \$60,154 for contract labor during 2001, and that those additional funds will be available to pay the proffered wage. Finally, the petitioner states that an employee who was paid \$84,000 per year has left the company, freeing yet more funds to pay the proffered wage.

The petitioner's reliance on the bank accounts in this case is inapposite. Bank accounts are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are competent evidence of a petitioner's ability to pay a proffered wage. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the tax return.

The petitioner is correct that, if it can demonstrate that hiring the beneficiary will lower its expenses in some way, the amount by which its expenses would be reduced would then be available to pay the proffered wage. The petitioner appears to imply that the beneficiary will replace the contractors whom it has been employing. However, the petitioner did not state that proposition explicitly and certainly did not demonstrate its veracity. The record contains no evidence that the contractors who worked for the petitioner performed the same work the beneficiary would perform. As such, no evidence exists that the petitioner could replace the contractors with the beneficiary. The amounts paid to those contractors will not be included in the determination of the petitioner's ability to pay the proffered wage.

Similarly, the petitioner has asserted, but not demonstrated, that an employee who was paid \$84,000 has left its employ. The petitioner further asserts that the \$84,000 that would have been paid to that departed employee is now available to pay the proffered wage. The petitioner has not demonstrated, nor even alleged, that the departed employee performed the same job duties which the beneficiary is expected to perform. The petitioner has not documented the position, duty and termination of the departed worker. If he performed other kinds of work, then the beneficiary could not have replaced him as suggested by the petitioner.

The proffered wage is \$51,875 per year. The priority date is January 13, 1998. During 1998 the petitioner declared a loss of \$1,732 and ended the year with negative net current assets. During 1999 the petitioner declared a loss of \$19,974 and had net current assets of \$2,148. During 2000 the petitioner declared a taxable income before net operating loss deduction and special deductions of \$1,187 and ended the year with net current assets \$4,152.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1998,

1999, and 2000. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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 not met that burden.

ORDER: The appeal is dismissed.

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