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U.S. Department of Homeland Security
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

[Redacted]

AUG 25 2003

File: WAC 02 158 51017 Office: California Service Center

Date:

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 Immigration and Citizenship 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 company. It seeks to employ the beneficiary permanently in the United States as a technical support specialist. 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 and continuing. The director also determined that the petitioner had not established that the beneficiary had the requisite experience 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(1)(3) states, in pertinent part:

(ii) *Other documentation* -- (A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupational designation. The minimum requirements for this classification are at least two years of training or experience.

The Application for Alien Employment Certification (Form ETA 750),

filed with the Department of Labor on July 28, 1995, indicates that the minimum requirement to perform the job duties of the proffered position of technical support specialist is two years of managerial and computer sales experience.

Counsel submitted four letters of experience from companies which stated that the beneficiary worked for them on various occasions for approximately 25 to 30 hours a week.

The director concluded that the evidence submitted was insufficient to establish the beneficiary's requisite experience of two years and denied the petition accordingly. The director noted that all but one of the letters referred to part-time intermittent work.

On appeal, counsel submits an E-mail statement from the beneficiary explaining that he worked part time because he was a student. As the record does not contain an employment history from the beneficiary's previous employers attesting to the actual hours he worked, it can not be determined if the beneficiary had two years of experience in the job offered as of the filing date of the petition. Consequently, the petition may not be approved on this ground.

The other issue in this proceeding is whether the petitioner has established its ability to pay the proffered wage.

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 July 28, 1995. The beneficiary's salary as stated on the labor certification is \$34,000.00 per annum.

In response to a request for additional evidence of the petitioner's ability to pay the wage offered, counsel submitted copies of the petitioner's 1995 through 2001 unaudited financial statements.

The director determined that the evidence submitted 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 beneficiary's W-2 Wage and Tax Statement for 2001 which shows he was paid \$63,335.57, and copies of the petitioner's 1995 through 2001 Internal Revenue Service (IRS) Form 1120. The Forms 1120 show taxable income of \$50,101 in 1995, \$18,711 in 1996, \$425 in 1997, \$48,808 in 1998, \$11,165 in 1999, -\$54,121 in 2000, and -\$66,327 in 2001.

Counsel argues that the petitioning entity "qualifies as a 'bona fide' and financially viable business entity, under the regulations and INA, and therefore respectfully request your favorable and expeditious decision."

Counsel's argument is not persuasive. The petitioner's Form 1120 for calendar years 1995 and 1998 show a taxable income of \$50,101 and \$48,808 respectively. The petitioner could have paid a proffered wage of \$34,000.00 a year out of this income.

The petitioner's tax returns for the years 1996, 1997, 1999, 2000, and 2001 show either minimal taxable income or losses. The record shows that the petitioner employed the beneficiary in 2001, and paid him \$63,335.57; however, that same year the petitioner showed a loss of \$66,327.

The petitioner must show that it had the ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent resident status. See 8 C.F.R. § 204.5(g)(2).

In this case 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 to the 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 not met that burden.

ORDER: The appeal is dismissed.