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U.S. Department of Homeland Security

Citizenship and Immigration Services

OFFICE OF ADMINISTRATIVE APPEALS
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 03 2003

IN RE: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

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 Citizenship and Immigration Services (CIS) 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, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an analytical instrumentation firm. It seeks to employ the beneficiary permanently in the United States as a field service representative. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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 November 5, 1999. The beneficiary's salary as stated on the labor certification is $36,005 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage as of the priority date. In a request for evidence (herein RFE) of October 16, 2001, the director required the petitioner's 1999 and 2000 federal

income tax returns, as well as the employer's quarterly federal tax return (Form 941) for the third quarter of 2000.

In response to the RFE, counsel submitted a letter dated November 28, 2001 (controller's letter), from a previously unidentified entity, Instrument Corporation The attachments to the controller's letter included the first page only of 1998 and 1999 Forms 1120 U.S. Corporation Income Tax Returns, and, for years ending October 2, 1999 and September 30, 2000, its balance sheet, statement of operations, and consolidated statement of cash flows. The federal tax returns for 1998 and 1999, respectively, both showed taxable income before net operating loss deduction as (losses) of ($1,153,486) and ($216,452).

Notes to "Consolidated Financial Statements of October 2, 1999 and September 30, 2000" (Notes) state that the petitioner is a wholly owned subsidiary whose accounts have been consolidated with Micrometrics' statements. The Notes do not pertain to the ability to pay the proffered wage at the priority date.

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

Counsel contends that the director erred, since the evidence supported the petitioner's ability to pay. The petitioner's service manager supplemented the appeal with two (2) pages from the petitioner's and five (5) from websites and a letter dated April 5, 2002 (service manager's letter).

This letter explained Micrometrics' spreadsheets in the record dated February 7, 2000:

> .... There simply was no need to mention our parent company until it was apparent that we needed to do so in order to supply the financial documentation required to support the I[-]140 petition....
>
> Therefore, we have provided the INS with financial documentation establishing [that as a whole has assets valued at over $19,863,000, net revenues in 2000 exceeding $26,500,000. This clearly establishes the ability to pay $35,005 to an employee....

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 that financial

ability and 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).

Micrometrics' website pages make no mention of the petitioner at all. The petitioner's website data refers to itself as a wholly owned subsidiary since 1985. The same paragraph immediately contradicts that legal conclusion and limits its claim to "our jointly operated 88,000 square feet of modern, ISO9001 plant facilities." A joint use agreement was not offered in evidence and does not, in any case, establish a parent and subsidiary status. It should be noted that the petition admits that the petitioner has been doing business only since 1990, not 1985.

The controller's letter admitted:

> .... In [fiscal 2001] [Micrometrics] total company profits will be in the neighborhood of $2 million pre-tax. [The petitioner] was our only non-contributing subsidiary, but [the petitioner] is an integral part of our plan going forward.

The controller's letter as late as November 28, 2001 conceded that the petitioner was an integral part of the parent's plan only "going forward." No evidence supports the petitioner's self-serving assertion that Micrometrics owned it since 1985.

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).

Just as the record does not permit the conclusion that the petitioner is the wholly owned subsidiary of Micrometrics, the evidence is, likewise, unpersuasive as to the ability to pay the proffered wage at the priority date. The petitioner submitted no tax return at all. Financial Notes did not establish the consolidation of Micrometrics and the petitioner on the priority date. Micrometrics' partial tax returns offered the first page only for 1998 and 1999, and each shows a (loss) for the priority date. Though full tax returns might reveal a source of funds at the priority date or even a reference to the petitioner, these partial ones did not. Indeed, their titles designate, without a name, only one (1) subsidiary, rather than the several in the Notes.

Matter of Ho, 19 I & N Dec. 582 (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.

After a review of the federal tax returns, financial statements, and the documentation of the petitioner's status, 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: The appeal is dismissed.