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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

[Redacted]

File:

[Redacted]

Office: California Service Center

Date:

FEB 24 2003

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)

IN 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 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.

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 (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a corporation that specializes in the manufacture of robotics, automation systems, special machinery, tools, and fixtures. It seeks to employ the beneficiary permanently in the United States as a manufacturing 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 statement and additional evidence.

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, at the time of petitioning for classification under this paragraph, hold baccalaureate degrees and who are members of the professions.

The regulation at 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 September 14, 2000. The beneficiary's salary as stated on the labor certification is \$36,537.00 per annum.

On March 20, 2001, the director issued a request for additional evidence of the petitioner's ability to pay the proffered wage. The director specifically requested copies of the petitioner's latest annual report, tax returns, or audited financial statements.

In response, the petitioner submitted compiled financial statements for the years 2000 and 2001 that had not been audited by a certified public accountant.

The director determined that the evidence submitted did not meet the requirements set by 8 C.F.R. § 204.5(g)(2) and did not establish that the petitioner had the ability to pay the proffered wage. Accordingly, the director properly denied the petition.

On appeal, counsel concedes that the petitioner submitted unaudited financial statements, but asserts that the Service should take into consideration the fact that the petitioner had been paying the beneficiary the proffered wage of \$36,537 as of September 14, 2000, the date that the labor certification application was filed. In support of this claim, the petitioner submitted a copy of the beneficiary's Internal Revenue Service (IRS) Form W-2 for the year 2000 as well as copies of the beneficiary's pay stubs. The Form W-2 and the pay stubs reflect that the beneficiary had been hired by the petitioner on April 16, 2000 and paid an annual salary equivalent to \$36,537 during that year.

In determining the petitioner's ability to pay the proffered wage, the Service will examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by credible documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. Such evidence should include credible payroll documentation that directly relates to the employment of the beneficiary in the year of filing, including payroll records, the beneficiary's individual federal tax return, IRS Form W-2s, and IRS Form 1099s. In the present matter, the petitioner has established by credible evidence that it has previously employed the beneficiary at the proffered salary at the time that the priority date was established.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has established that it had the ability to pay the salary offered as of the priority date 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 met that burden.

ORDER: The appeal is sustained.