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U.S. Department of Homeland Security

Citizenship and Immigration Services

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

[redacted]

File: LIN-03-094-50526 Office: Nebraska Service Center Date: MAR 3 1 2004

IN RE: Petitioner: [redacted]
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: [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

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a start-up computer application service provider. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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.

The director denied the petition because the petitioner failed to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage.

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.

The regulations at 8 C.F.R. § 204.5(g)(2) state 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. The petition's priority date in this instance is January 22, 2002. The beneficiary's salary as stated on the labor certification is $78,000 per year.

With the petition, the petitioner submitted a letter from the petitioner's senior staff accountant, who indicates that the petitioner has used investment funds totalling $19.9 million dollars to finance its operations as of October 2002. The petitioner also submitted a letter from the petitioner's "HR" manager, who states that the beneficiary is a full-time employee at an annual salary of $70,000 per year. The petitioner also submitted numerous documents regarding the beneficiary's education and experience.

The petitioner initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated May 6, 2003, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing. The RFE requested that the petitioner submit "evidence that the alien obtained the required two years experience in the related occupation before January 22, 2002."

Counsel submitted a letter from the beneficiary's previous employer and a copy of the petitioner's 2001 Form 1120 U.S. Corporation Income Tax Return. The tax return reflected gross receipts of $0; gross profit of $0; compensation of officers of $219,106; salaries and wages paid of $2,029,221; and a taxable income before net operating loss deduction and special deductions of (-) $6,448,214. The tax return's Schedule L also reflected net current assets of $1,274,109.

In response to the director's RFE, the petitioner also submitted its audited financial statements for the petitioner's date of creation, February 10, 2000, to December 31, 2001. The audited financial reports describe the advances the petitioner has received from stockholders in the form of preferred stock. The accountant states the following:

> As shown in the financial statements, since inception, [the petitioner] has incurred net losses of $8,725,485 and has funded those losses primarily through the issuance of preferred stock. The [petitioner] is dependent on its ability to continue to raise adequate financing and to obtain substantial revenue-generating contracts with customers. These factors, among others, may indicate that the [petitioner] will be unable to continue as a going concern for a reasonable period of time.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage because it showed a net loss of over two million dollars for the year 2000 and a net loss in excess of five million dollars for the year 2001, and denied the petition.

On appeal, counsel submits letters from the petitioner's president and CTO, its CEO, and its Controller, all attesting that the petitioner has sufficient funding to operate and pay the proffered wage. Counsel also submits the beneficiary's earnings statements for the period from December 31, 2002 through August 15, 2003, reflecting that the beneficiary earned $43,782.74 during that period.

The petitioner's Form 1120 for calendar year 2001 shows an taxable income of (-) $6,448,214. However, Schedule L shows cash assets totalling $1,249,910. The petitioner could pay a proffered salary of $78,000 out of its net current assets and has thus established its ability to pay for 2001.

To date, the record contains no evidence concerning the petitioner's ability to pay the proffered wage for 2002, even though the director requested such evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Additionally, the petitioner's earnings statement for the beneficiary for the year 2003 indicates that it is paying the beneficiary at a rate of $70,000 per year. Thus the petitioner must demonstrate an ability to pay the remainder of the proffered wage, which is $8,000. However, the petitioner submitted this evidence in August, 2003 so the record is inconclusive.

After a review of the evidence, 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 record is incomplete with respect to the petitioner's ability to pay the proffered wage in 2002. The petitioner could have presented such evidence in response to the director's RFE or on appeal with an explanation concerning its prior unavailability but did not.

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.