

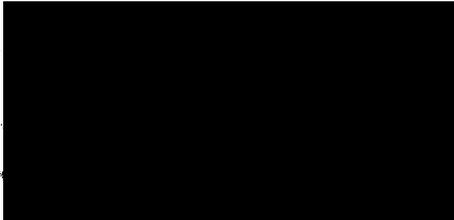
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20536



U.S. Citizenship
and Immigration
Services



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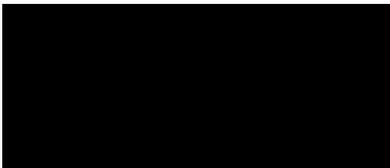
FILE: EAC-01-039-50599 Office: VERMONT SERVICE CENTER

Date: **SEP 30 2004**

IN RE: Petitioner: 
Beneficiary: 

PETITION: 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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

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Robert P. Wiemann, Director
Administrative Appeals Office

for

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 dismissed.

The petitioner is an Internet software developer. It seeks to employ the beneficiary permanently in the United States as a computer programmer. 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)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153 (b)(2)(A), provides for the granting of preference classification to qualified immigrants who 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.

The petitioner must demonstrate the 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 4, 2000. The proffered wage as stated on the Form ETA 750 is \$40,000 annually.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated July 19, 2001, the director required additional evidence to establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing.

In response to the director's request for evidence, the petitioner provided its incomplete 2000 corporate tax return, bank statements, and Forms W-2 showing that the beneficiary was paid \$19,844.28 in 2000 by High Tech Style, Inc., with the same employer identification number (EIN) as the petitioner, and \$25,745.82 by Administaff Companies, Inc., with a different EIN than the petitioner.

The federal tax return for 2000 reflected taxable income before net operating loss deduction and special deductions of - \$1,648,579.

The director apparently accepted that the wages paid by Administaff Companies represented wages paid by the petitioner but determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the time the petition was filed since those wages were less than the proffered wage. Thus, the director denied the petition.

On appeal, counsel states that High Tech Style, Inc. and the petitioning corporation are one and the same company since High Tech Style, Inc. changed its name during 2000. Counsel submits a copy of a letter issued by the Office of Secretary of State, State of Delaware, indicating that corporate name High Tech Style, Inc. became the name currently used by the petitioner effective June 20, 2000. The petitioner, however, has submitted evidence from three separately named companies in an attempt to establish its ability to pay the

proffered wage. As noted previously, the documentary evidence from Administaff Companies has a different EIN from the petitioner and High Tech Style. It is incumbent upon 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not explained why some of the beneficiary's wages allegedly from the petitioner were paid by Administaff Companies. We note that the petitioner's 2000 tax return reflects \$117,990 in wages paid directly by the petitioner and no cost of labor on Schedule A.

Finally, the petitioner submits its complete 2000 tax return on appeal. In his request for additional evidence, the director specifically requested "the Year 2000 United States federal income tax return(s) **with all schedules and attachments.**" (Emphasis added.) The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The petitioner failed to submit sufficient evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2000 or subsequently. 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.