PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: WAC 00 267 54163 Office: CALIFORNIA SERVICE CENTER Date: JAN 17 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

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 CFR 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 CFR 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is "a high-tech startup company . . . in the business of designing and manufacturing 'smart' semiconductor wafers." It seeks to employ the beneficiary permanently in the United States as a research engineer at an annual salary of $85,000. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined the petitioner had not established that it will be financially able to pay the beneficiary's proffered wage in the future.

On appeal, counsel cites case law and asserts that the director has relied on standards not found in the statute, regulations, or precedent decisions. The petitioner submits payroll records for 2000.

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 or unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 CFR 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 priority date is established on 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 application for labor certification was accepted on August 3, 2000. The beneficiary's salary as stated on the labor certification is $85,000 per year (the petitioner has since raised that figure to $90,000).

An independently audited financial statement for 1998 and 1999 submitted with the petition indicates that, as of 1999, the petitioner had over four million dollars in cash and other current assets, and only $111,500 in current liabilities, albeit with a "stockholder's deficiency" of over $2.1 million and net losses of $465,400 in 1998 and $1,833,300 in 1999. The auditor's report also states "the Company's recurring losses, accumulated deficit and stockholders' deficiency raise substantial doubt about the Company's ability to continue as a going concern."

In response, the petitioner submitted a Form 1120 U.S. Corporation Income Tax Return for 1999 which contained the following information:

Assets	$4,593,245.00
Officers compensation	90,000.00
Salaries	442,044.00
Net income (loss)	(1,327,048.00)
Current assets	3,992,246.00
Current liabilities	111,509.00

Karen Myers, the petitioner's director of Human Resources, indicated that the petitioner's 2000 tax and payroll information was not yet available. Ms. Myers added that the company "recently raised $31.25 million dollars in Series C round of fund raising" from various venture capital sources, although the only evidence of this funding was in the form of a press release issued by the petitioner itself.

Counsel states that the beneficiary "has been on [the petitioner's] payroll since March 3, 1999," and cites documentation of the beneficiary's nonimmigrant visa to work for the petitioner. The petitioner has never submitted any payroll documentation to confirm that the beneficiary had been on the payroll in 1999, or the amount paid to the beneficiary. The 1999 tax return reflecting payment of salaries does not support the petitioner's claim, because the tax return does not identify the employees to whom the salaries were paid. The beneficiary's proffered wage of $85,000 amounts to nearly a fifth of all salaries and wages paid by the petitioner in 1999.

The director denied the petition, noting the petitioner's significant net losses and stating "[t]he petitioner provided no evidence that they currently have sufficient income from gross receipts and sales to cover expenses. . . . At this stage they are relying on investment capital to cover their expenses. The petitioner has not been in business long enough to show that they will ever make a profit and be able to continue as an ongoing concern." The director asserted that the petitioner "must establish that [it] can guarantee the beneficiary permanent full time employment. [It] must show that [it has] sufficient income to pay the beneficiary's salary and not be reliant on investment capital."

On appeal, counsel contends that the petitioner "has over $24 million dollars [sic] in current assets, holds numerous patents and recently completed Series C Round of fund raising totaling $31.25 million dollars." This assertion appears entirely consistent with the director's finding that the petitioner is dependent on capital infusions because it has no other sufficient source of income. The petitioner's 1999 tax return reports no profits and no sales. At no time has the petitioner submitted actual documentation to show the claimed infusion of $31.25 million, or to confirm that the current assets have grown from roughly $4 million to six times that amount.

Counsel states "absent sustained failure in the past or proof of inability to pay salaries from a lawful source, [to demand] Appellant to prove substantial profits from gross receipts and salaries is overly restrictive. After all, the Service is allowed to consider '[i]n appropriate cases, additional evidence,

such as profit/loss statements, bank account records, or personnel records.'" In the instant matter, the record lacks evidence of "sustained failure in the past" not because the company has been profitable for most of its history, but rather because it has existed for a very short period of time, and has been sustained by venture capital for that entire time.

While counsel correctly asserts that "personnel records" can supplement the required evidence of the petitioner's ability to pay, it remains that the record contains no contemporaneous records to show that the beneficiary has been on the payroll since early 1999 as claimed. Still, the priority date is August 3, 2000, and the petitioner is not required by regulation to show its ability to pay the beneficiary before that date, even if it claims to have employed the beneficiary prior to that date. The petitioner, on appeal, submits Forms W-2 and other documentation showing that the petitioner paid the beneficiary $76,883.30 in 2000. While this amount falls short of the $85,000 proffered wage, and the petitioner's subsequently revised figure of $90,000 per year, it is more than ample to cover the proffered wage during the five months between August 3, 2000 and December 31, 2000.

Counsel states "[t]he evidence all point[s] to Appellant's solid financial standing, clearly enough to satisfy the offered wage. Attached hereto is Appellant's present Balance Sheet as of April 30, 2001. [The petitioner] has over 17 million dollars in cash available and total assets of over 24 million dollars. This money is not pledged but actually in hand and can be used for operations, including staff wages. It was an abuse of discretion to ignore this relevant fact."

The evidence does not, as counsel claims, "all point to Appellant's solid financial standing," which is clear from the audited financial report submitted with the initial filing. As noted above, the auditors had stated "the Company's recurring losses, accumulated deficit and stockholders' deficiency raise substantial doubt about the Company's ability to continue as a going concern." The same audited report, along with the subsequently submitted tax records, indicated that the company's assets in 1999 (the most recent year for which verified information was available prior to the director's decision) were closer to $4 million than to $24 million.

The petitioner has not shown that the "Balance Sheet" cited on appeal has been prepared by an independent auditor. The sheet indicates that the petitioner has over $17 million in bank accounts, although the record contains no actual bank documentation to support this claim. Counsel states that there has been "press coverage concerning Series C round funding," but a press release issued by the petitioning company does not carry the same weight as independent press coverage. The petitioner does not add weight to an unsupported claim simply by releasing that claim to the media.

Most importantly, counsel's allegation of an abuse of discretion is untenable on its face. In the passage cited above, counsel claims "[i]t was an abuse of discretion to ignore this relevant fact," the "relevant fact" being the cash reserves shown on the petitioner's "Balance Sheet as of April 30, 2001." The director denied the petition on April 18, 2001. It is patently absurd to state that the director should have taken into account a balance sheet that did not exist at the time. The director's failure to anticipate the future creation of the balance sheet is not, by any reasonable standard, an abuse of discretion.

Nevertheless, counsel is correct in observing that regulations only require the petitioner to establish its ability to pay the beneficiary "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence." The petitioner has submitted acceptable evidence of millions of dollars of cash reserves (albeit not the tens of millions claimed after the filing of the petition) which is sufficient to pay the beneficiary's salary during the normal span of time required to process an application for adjustment of status. The record, on balance, indicates that the petitioner has paid the beneficiary the proffered wage since the petition's filing date, thus definitively settling the question of whether the petitioner was able to do so.

While the director's concerns (echoing those of the independent auditor) are understandable, there is no statutory or regulatory mandate for the petitioner to establish permanent or indefinite financial viability, nor is it clear how any petitioner could meet such a burden. Also, if the petitioning company should go into serious decline between the approval of this petition and the adjudication of the beneficiary's application for adjustment of status, the Service can then revisit the issue of ability to pay and revoke the approval of the petition at that time. If the petitioning company ceases to exist altogether, the petition would be automatically revoked subject to 8 CFR 205.1(a)(3)(iii)(D). Because the revocation process exists as a safeguard mechanism, it is not permissible to base a denial on the director's speculation that, at some future time, the petitioner may no longer be able to pay the beneficiary's salary. The record does not contain persuasive evidence that the petitioner's inability to pay the wage is imminent.[1]

The petitioner has demonstrated its ability to pay the beneficiary's wage as of the petition's filing date, and it has established sufficient reserves to continue to pay that wage until the approval of the beneficiary's application for permanent residence.[2] The petitioner has thus overcome the only stated ground for denial 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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained.

---

[1] A visit to the petitioner's web site, www.novacrystals.com, on January 2, 2003 shows that the petitioning company remains active, having updated the site as recently as December 13, 2002.

[2] The above finding necessarily relies on the assumption that the application is amenable to approval, a circumstance that is in no way guaranteed by the approval of this petition. Approval of a visa petition vests no rights in the beneficiary of the petition but is only a preliminary step in the visa or adjustment of status application process, and the beneficiary is not, by mere approval of the petition, entitled to an immigrant visa or to adjustment of status. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988).