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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]

MAR 17 2004

File: WAC 01 278 51147 Office: CALIFORNIA SERVICE CENTER Date:

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)

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

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director to request additional evidence and entry of a new decision.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is an Internet research and development firm. It seeks to employ the beneficiary permanently in the United States as a software 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 additional evidence and asserts that the petitioner has established its ability to pay the beneficiary's proffered wage.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) also provides employment based visa 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) provides in pertinent part:

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the [CIS].

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's priority date. The priority date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(g)(2). Eligibility is also based on the petitioner's ability to pay the wage offered as of the petition's priority date. Here, the petition's priority date is April 11, 2001. The beneficiary's salary as stated on the labor certification is $82,000 per annum.

At the outset, it is noted that the relevant documentation corroborating the beneficiary's past employment experience is not contained in the record and was not requested by the director. Block 14 of the Application for Alien Employment Certification, Form ETA-750A provides that the applicant for the position of software engineer must have one year in the job offered or one year in the related occupation of programmer.

The regulation at 8 C.F.R. § 204.5(g)(1) provides that the evidence relating to "qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s)" including the identity of the writer and a specific description of the employee's experience or training. The regulation at 8 C.F.R. § 103.2(b)(2)(i) also sets forth specific requirements relating to alternative forms of evidence and affidavits, which may be submitted when other evidence has been demonstrated to be unavailable. Taken together, the regulations reflect that a petitioner's attestations as to a beneficiary's prior qualifying work experience with a previous employer carries little evidentiary weight because that employer does not have first hand knowledge about this experience.

In this case, the record contains a letter of support from the petitioner's vice-president, which describes the beneficiary's experience with other employers. It also states that the beneficiary has been employed by the petitioner since April 2000, but fails to specifically describe the beneficiary's duties. As explained above, this is not acceptable. For this reason, the case will be remanded for additional evidence supporting the beneficiary's past qualifying employment experience pursuant to the requirements set forth above.

As evidence of its ability to pay the proffered wage, the petitioner initially submitted an unaudited financial statement for the year 2000, a copy of the beneficiary's 2000 W-2, the beneficiary's payroll statements for the periods ending June 30, 2001 and July 14, 2001, and a copy of the petitioner's "active assets account" statement with Morgan Stanley Dean Whitter for the month ending April 30, 2001. On December 26, 2001, the director instructed the petitioner to submit additional financial information in the form of annual reports, federal tax returns, or audited financial statements from 2000 to the present.

In response, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for the year 2000 with a notation on page one that it had been filed pursuant to an extension granted until September 17, 2001. In a letter dated March 7, 2002, counsel indicates that the petitioner has not filed its 2001 tax return yet. In lieu of the tax return, counsel submitted unaudited 2001 financial statements.

The petitioner's 2000 corporate tax return indicates that the petitioner declared -$6,941,321 as its taxable income before net operating loss deduction (NOL) and special deductions. Schedule L for this year shows that the petitioner had $5,425,862 in current assets and $1,536,852 in current liabilities. The difference between the petitioner's current assets and current liabilities reflects that the petitioner's net current assets were $3,889,010.

The director concluded that evidence failed to establish that the petitioner had demonstrated that it had the ability to pay the proffered wage as of the filing date of the labor certification. The AAO does not concur, at least as it relates to the figures revealed by the petitioner's 2000 tax return and its assets account with Morgan Stanley Dean Whitter. As noted above, the beneficiary's proposed salary is $82,000. Although the petitioner's taxable income for 2000 would not cover this amount, its net current assets of $3,889,010 far exceed the funds it would need to meet the proffered salary.

The AAO would further observe that, as noted by counsel on appeal, the petitioner's assets account showed that it had $217,413.12 in money market funds as of April 30, 2001. This is more than sufficient to meet the ability to pay the proffered salary as of the priority date of April 11, 2001. Although this information should be updated on remand, as the record currently stands, the AAO finds that the petitioner has established its ability to pay the proffered salary, at least as of the priority date.

In view of the foregoing, the director's decision is withdrawn. The petition is remanded to the director to request further evidence relevant to the beneficiary's qualifying past experience. The director may also request updated financial information pursuant to 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may also provide any further pertinent evidence within a reasonable time to be determined by the director. Upon receipt of all evidence, the director will review the record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.