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U.S. Department of Homeland Security
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Washington, DC 20536

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 24 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 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.

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 appeal 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 information systems company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing financial ability to pay the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and asserts that director failed to adequately review the petitioner's tax returns.

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) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) additionally 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) also 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 Service.

The issue raised on appeal is whether the petitioner has established its continuing ability to pay the beneficiary's offered wage as of the priority date of the visa petition. The regulation at 8 C.F.R. § 204.5 (d) defines the priority date as the date the request for labor certification was accepted for processing by any office within the employment service system of the Department of Labor. Here, the petition's priority date is March 2, 1999. The beneficiary's salary as stated on the labor certification is $40,000 per annum based on a 40-hour week. The record reflects that the petitioner is organized as a corporation. It has employed the beneficiary since December 2000.

The petitioner initially submitted insufficient evidence to support its ability to pay the beneficiary's proposed salary of $40,000 per year. On November 21, 2002, the director requested the petitioner to submit additional evidence in the form of annual reports, federal tax returns, or audited financial statements. The director

mistakenly advised the petitioner to submit this evidence from 1998 to the present. The petitioner, through counsel, elected to respond to the director's request with copies of its federal tax returns from 1998 to 2001. They indicate that the petitioner files its taxes based on a standard calendar year.

The information presented in the petitioner's Form 1120S, U.S. Income Tax Return for an S Corporation for 1999, as corrected on appeal, shows that the petitioner declared $287,429 in ordinary income. The beneficiary's proposed salary of $40,000 could be paid out of ordinary income.

The petitioner's Form 1120S, federal corporate tax return for the year 2000 reflects that the petitioner's ordinary income was -$1,888,530. Schedule L shows that the petitioner had $2,034,118 in current assets and $2,490,643 in current liabilities, resulting in net current assets of -$456,525. CIS will consider a petitioner's net current assets as a source to pay a beneficiary's proffered salary because it identifies the amount of liquidity that a petitioner has as of the filing date and represents the amount of cash or cash equivalents that would be available to pay the proffered salary. In this year, however, both the petitioner's ordinary income and net current assets figures were far below the sum necessary to cover the beneficiary's proposed salary of $40,000.

For the year 2001, the petitioner declared ordinary income as $1,302,355. As shown on the petitioner's 2002 corporate tax return submitted on appeal, its ordinary income was $477,265. Even if the beneficiary had not been employed by the petitioner, the petitioner's ordinary income in both years could pay the proffered salary of $40,000.

As noted above, the director denied the petition determining that the petitioner had not established its ability to pay the proffered wage as of the priority date of the visa petition and continuing until the present.

On appeal, counsel correctly notes some of the documentation confusion and the director's use of the wrong priority date. Counsel submits a letter from Carisa Azzi, a Commerica Bank officer, in support of the petitioner's ability to pay the proffered wage. Ms. Azzi states that in mid-1999, Commerica Bank extended a two million dollar line of credit to the petitioner. A summary of the petitioner's income and expenses compiled by the petitioner' s controller, Jack Sheely, was also submitted on appeal. Mr. Sheely states that the petitioner has never missed a payroll obligation since its founding 20 years ago. Mr. Sheely notes that the petitioner sustained losses in 2000 but that the line of credit was paid off the following year. It is also noted that the beneficiary's Wage and Tax Statement (W-2) for 2000, submitted on appeal, reflects that the petitioner began employing the beneficiary at more than the proposed salary of $40,000. The petitioner paid the beneficiary $4,200 for his work beginning in December 2000, which would prorate to over $50,000 per year. Although it is not a perfect fit, this petitioner's expectations of increasing business and profits can be concluded to be reasonable within the context of *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm. 1967). It is further noted that that the petitioner employs over fifty people and has been in business twenty years.

Although the facts may have sufficiently established the petitioner's ability to pay the proffered salary of $40,000 per year, the director failed to discuss whether the beneficiary's educational credentials are sufficient to meet the terms of the approved labor certification. In this case, the position of software engineer requires a bachelor's degree or equivalent in "computer science or a related field." According to a credentials evaluation contained in the record, the beneficiary holds a Master of Science degree and a Bachelor of Science degree in Biomedical Engineering. The record may require more clarification as to whether the beneficiary's academic coursework was sufficiently similar to be classified as a related field. For that reason, the petition will be remanded for the director to make a finding on this issue.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request additional evidence as appropriate. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire 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.