

PUBLIC COPY



U.S. Citizenship
and Immigration
Services

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



Ble

FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **APR 21 2004**

IN RE:

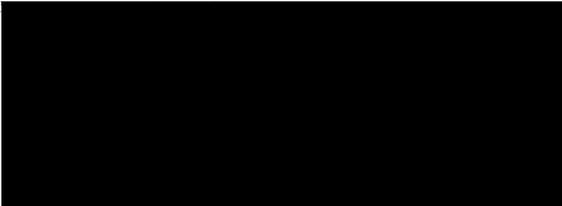
Petitioner:



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:



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 sustained. The petition will be approved.

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 professional. The petitioner is an audio amplifier and electronics manufacturer. It seeks to employ the beneficiary permanently in the United States as an associate 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 continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional information and maintains that the petitioner has demonstrated its financial ability to pay the proffered wage.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 203(b)(3)(A)(ii), 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)(2) also provides 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. . . . 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 [CIS].

Eligibility in this case rests upon the petitioner's ability to pay the wage offered as of the petition's priority date. 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 May 17, 1999. The beneficiary's salary as stated on the labor certification is \$19.62 per hour or \$40,809.60 per year, based on a 40-hour week. The visa petition indicates that the petitioning business has 12 employees. The record reflects that it is organized as a corporation and has employed the beneficiary since December 1998.

As evidence of its ability to pay, the petitioner initially submitted copies of its Form 1120, U.S. Corporation Income Tax Return for the years 1998 and 2000. They reflect that the petitioner files its returns based on a standard calendar year. In 2000, the petitioner declared taxable income before the net operating loss (NOL) deduction and special deductions of \$26,701. Schedule L of the return shows that it had -\$2,727 in current assets and \$40,819 in current liabilities. The difference between the petitioner's current assets and current liabilities are its net current assets of -\$43,546. CIS will consider net current assets as well as a petitioner's net income, because the net current assets reflect the amount of liquidity that a petitioner has as of the date of filing. It represents the level of cash or cash equivalents that would reasonably be available to pay the proffered salary during the year covered by the Schedule L balance sheet.

On August 14, 2002, the director requested additional evidence from the petitioner to support its continuing ability to pay the proffered wage beginning on May 17, 1999. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) from 1998 through 2001.

In response, the petitioner, through counsel, submitted copies of its corporate tax returns for 1999 and 2001 as well as copies of the beneficiary's W-2s for 1999, 2000 and 2001. The tax returns contain the following information:

Year	Current Assets	Current Liabilities	Net Current Assets	Taxable Income Before NOL and Special Deductions
1999	\$ 5,601	\$ 63,847	\$ -58,046	\$ 16,670
2001	4,193	57,741	-53,548	35,192

The W-2s show that the petitioner paid the beneficiary \$21,899.88 in 1999; \$34,336 in 2000; and \$43,008 in 2001. Following a review of the federal tax returns, the director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage. The director noted that the petitioner failed to show its ability to pay the proffered wage in 1999.

In this case, the AAO cannot agree with the director's decision. In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. In *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), the court found that CIS had properly relied upon the petitioner's net income figure as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Because the priority date is May 17, 1999, the petitioner must show that it had the ability to pay the proffered wage as of that date and continuing forward. Thus, for 1999, the petitioner need only demonstrate that part of the beneficiary's proposed wage offer that it would be obligated to pay for the remaining seven and one-half months of the year. This amounts to approximately \$25,500. To the extent that the petitioner already employed the beneficiary, that amount can also be included in the calculation. In 1999, the beneficiary's wages were \$21,899.88, or about \$3,600 less than the prorated salary of \$25,500. The petitioner's taxable income of \$16,670 could cover the additional amount of \$3,600. In 2000, the beneficiary was paid \$34,336, or about \$6,470 less than the proffered salary. The petitioner's taxable income of \$26,701 could meet this additional amount. In 2001, the petitioner's ability to pay has already been demonstrated because it employed the beneficiary at a level exceeding the proffered wage.

Following a review of the financial information contained in the record, it is concluded that the petitioner has demonstrated its continuing ability to pay the proffered as of the priority date 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.