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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*



File: WAC 02 119 53620 Office: CALIFORNIA SERVICE CENTER

Date: APR 22 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 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 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 sustained, and the petition will be approved.

The petitioner is a plastic processor. It seeks to employ the beneficiary permanently in the United States as an industrial machine mechanic. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

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 labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered 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. Here, the request for labor certification was accepted on May 12, 1997. The proffered wage as stated on the labor certification is

\$17.94 per hour, which equals \$37,315.20 per year.

With the petition counsel submitted a letter, dated February 12, 2002, from the petitioner's president. That letter observed that the petitioner had been in business for 34 years, employed 72 people to whom it paid nearly \$2 million per year, and had gross receipts of approximately \$10 million per year. The letter further stated that the petitioner had the ability to pay the proffered wage.

Counsel also submitted a copy of the petitioner's 2001 California Form DE-7 employer's reconciliation statement. That form showed that, during that year, the petitioner paid \$1,691,111 in wages.

On April 5, 2002, the California Service Center requested additional evidence pertinent to the petitioner's continuing ability to pay the proffered wage. Specifically, the Service Center requested, consistent with 8 C.F.R. § 204.5(g)(2), that the petitioner submit copies of annual reports, complete federal tax returns, or complete audited financial statements to demonstrate its continuing ability, beginning on the priority date, to pay the proffered wage. The Service Center also gave the petitioner the option of submitting a letter from a financial officer of the company attesting to its ability to pay the wage if it employed more than 100 workers. In addition, the Service Center requested the beneficiary's Form W-2 wage and tax statements for the years 1997 through 2001.

In response, counsel submitted a letter, dated June 14, 2002, from the petitioner's president. That letter states that the petitioner has been in business for 34 years, employs 106 people to whom it paid approximately \$2 million per year, and has gross receipts of approximately \$10 million per year.

Counsel also submitted the 1997, 1998, 1999, 2000, and 2001 W-2 forms showing wages the petitioner paid to the beneficiary. Those forms show that the beneficiary earned \$22,301.51, \$17,346.18, \$18,289.25, \$21,546.90, and \$19,331.24 during those years, respectively.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage, and, on August 2, 2002, denied the petition. The director declined to accept the letter from the president of the petitioner regarding its employment of 106 workers. The director did not comment on the fact that the president's first letter stated that the petitioner employed 72 workers whereas his later letter said that it employed 106 workers.

On appeal, counsel argues that the petition should have been approved because the petitioner's president stated that the petitioner employs 106 people. Counsel further argues that the

Form DE-7 showing that the petitioner paid \$1,691,111.34 in wages during 2001 is sufficient to demonstrate the petitioner's ability to pay the proffered wage. With the appeal, counsel submitted copies of the petitioner's 1996, 1997, 1998, 1999, and 2000 Form 1120S U.S. income tax returns for an S corporation.

As noted above, in its request for additional of April 5, 2002, the California Service Center gave the petitioner the option of submitting tax returns, annual reports, or audited financial statements, or a letter from a financial officer. The petitioner chose to submit the latter which the director found wanting.

The increase in the total number of employees of the petitioner from 72 to 106 in a matter of a few months is remarkable and should have been explained by the petitioner; nevertheless, the tax returns submitted on appeal support the petitioner's contention that it has the ability to pay the wage, and convince one to accept the president's statement showing an increase of employees to 106.

The petitioner's tax returns indicate that it operates on a fiscal year basis running from December 1 to November 30. The 1996 tax return shows that the petitioner declared an ordinary income from trade or business activities of \$143,854 for that year. The corresponding Schedule L shows that at the end of that year, the petitioner had \$3,928,657 in current assets and \$783,431 in current liabilities, which yields net current assets of \$3,145,226.

The 1997 tax return shows an ordinary income from trade or business activities of \$139,312 and net current assets of \$3,346,798. The 1998 return shows an ordinary income of \$11,111 with \$3,174,319 in net current assets. The 1999 return shows a loss of (\$283,698), but net current assets were \$2,557,164.

The 2000 tax return, covering the period of December 1, 2000, to November 30, 2001, shows a loss of (\$1,361,892) while net current assets were \$1,402,211.

Clearly, the petitioner had the ability to pay the proffered wage during 1996, 1997, and 1998 out of its ordinary income. Those years need not be further addressed.

During 1999, the petitioner declared a loss. The petitioner's net current assets at the end of that year, however, were sufficient to pay the proffered wage. Similarly, during 2000, the petitioner declared a loss, but its net current assets were sufficient to pay the proffered wage.

Based on the evidence of record, the petitioner has 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 met that burden.

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