



U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE: WAC 02 201 50173 Office: CALIFORNIA SERVICE CENTER Date: APR 27 2004

IN RE: Petitioner: [Redacted]  
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]

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

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.

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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. 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 skilled worker. The petitioner is a dairy farm. It seeks to employ the beneficiary permanently in the United States as a milking machine operator. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the petitioner had failed to establish its continuing ability to pay the proffered salary as of the visa priority date.

On appeal, counsel asserts that the petitioner has demonstrated its ability to pay the proffered salary based on its employment of the beneficiary at a salary exceeding the proffered wage.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 matter is based, in part, upon the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is March 30, 1999. The beneficiary's salary as stated on the labor certification is \$7.03 per hour for a 40-hour week or \$14,622.40 per year.<sup>1</sup> The record reflects that the petitioner has six employees and was established in 1988. Part B of the ETA-750 indicates that the petitioner has employed the beneficiary as a milking machine operator since 1996.

In support of its ability to pay the proffered wage, the petitioner submitted copies of its Form 1065, U.S. Return of Partnership Income for 1999, 2000 and 2001. These tax returns reflect that the petitioner declared -\$31,759 as ordinary income in 1999; -\$44,959 in 2000; and -\$287,551 in 2001. Schedule L further reflects that its current liabilities exceeded its current assets in each of those years.

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<sup>1</sup> The annual salary was calculated by multiplying the hourly wage by 40 (hours) and then multiplying the result by 52 (weeks). The director's figure of \$13,497 was miscalculated.

On September 26, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage as of the priority date of March 30, 1999. The director also instructed the petitioner to submit copies of the beneficiary's Wage and Tax Statements (W-2s) from 2000 to the present. The director did not ask the petitioner to submit a copy of the beneficiary's W-2 for 1999. The petitioner submitted the requested W-2s. They showed that the petitioner paid the beneficiary \$31,890.11 in 2000 and \$30,540.17 in 2001.

Following a review of the petitioner's declared ordinary income as shown on its partnership tax returns, the director denied the petition, concluding that the petitioner failed to establish its financial ability to pay the proffered wage. The director did not consider the wages that the petitioner had paid to the beneficiary.

On appeal, counsel maintains that the petitioner has already employed the beneficiary at a salary exceeding the proffered wage, thus demonstrating its ability to pay the wage offer. Counsel submits copies of the beneficiary's individual federal tax returns for 1999-2001, including a copies of his W-2s. The beneficiary's 1999 W-2 shows that the petitioner paid him \$30,686.74 in wages.

The AAO agrees with counsel. The beneficiary's W-2s show that the petitioner has already employed the beneficiary at levels exceeding the proffered wage. This credibly establishes its continuing ability to pay the wage offer of \$14,622.40 as of the priority date of March 30, 1999.

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.