



U.S. Citizenship
and Immigration
Services



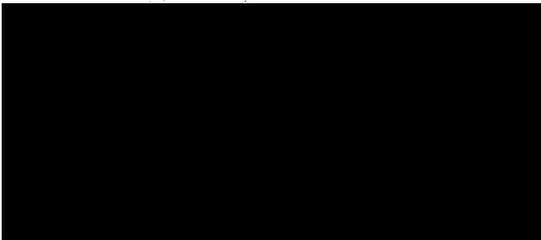
B6

FILE: WAC 02 075 50581 Office: CALIFORNIA SERVICE CENTER Date: MAY 19 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

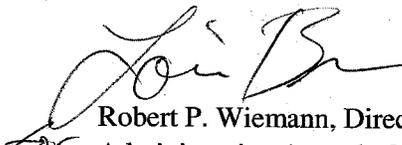
ON BEHALF OF PETITIONER:



PUBLIC COPY

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

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

DISCUSSION: The Director, California Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification 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 director determined that the petitioner had not established its ability to pay the proffered wage as of the priority date and continuing to the present.

On appeal, counsel provided the petitioner's 1997 federal tax return and requested that the petition be approved. On December 8, 2003, the AAO affirmed the director's decision, concluding that the evidence failed to establish that the petitioner had the ability to pay the proffered wage.

On motion, the petitioner submits additional evidence relating to its ability to pay the proffered wage as of the priority date and continuing to the present. This evidence will be discussed below.

The petitioner has provided copies of Form W-2, Wage and Tax Statement, for the years 1997 through 1999 and for the year 2001. The petitioner has also provided copies of Form W-3, Transmittal of Wage and Tax Statements, for the years 1997 through 2001. The petitioner now claims for the first time that he intends to replace two to three part-time employees with the beneficiary and that the wages paid to those individuals would be available to pay the proffered wage to the beneficiary.

The petitioner states that in 1997 he employed three part-time employees, and that it was his intention to replace at least two of the employees with the beneficiary. The petitioner suggests that two of the salaries equaling between \$30 and \$33 thousand could be added to the ordinary income of \$27,514 for the year, and, thus, the proffered wage for the beneficiary could be met.

In 1998, the petitioner claims that he employed two part-time employees who the beneficiary would have replaced. These two salaries equaled \$26,790 and, when added to the ordinary income of \$31,571 would have been more than enough to pay the proffered wage.

In 1999, the petitioner states that he employed two part-time employees whose combined salaries equaled \$32,836. These salaries added to the ordinary income of \$19,226 would also have been more than enough to pay the proffered wage.

The petitioner was unable to provide Forms W-2 and W-3 for the year 2000, but indicated that in 2001, he employed three part-time employees with combined salaries of over \$44,000. He asserts that the beneficiary would have replaced two of the employees with combined salaries of \$34,905. The salaries of these employees along with the claimed ordinary income of \$37,474 would have been available to pay the beneficiary's proffered wage.

The petitioner is correct that if these salaries and ordinary incomes were combined each year, they would more than cover the beneficiary's proffered wage. However, the petitioner states that he has always had difficulties in getting good mechanics that are knowledgeable about European automobiles, especially Mercedes Benz automobiles. The petitioner further states that he has been waiting patiently for the beneficiary because he has the skills that he needs and because he has not been able to find anyone locally who has those skills. Therefore, it is unclear whether these part-time workers were qualified to do the same type of work that the beneficiary would do. There is no evidence that the position the part-time employees held involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the workers who performed the duties of the proffered position. If those employees performed other kinds of work, then the beneficiary could not replace them. In addition, wages already paid to others are not available to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

Furthermore, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In the present case, the petitioner has not established its ability to pay the proffered wage from the priority date and continuing to the present.

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 not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of December 8, 2003 is affirmed. The petition is denied.