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U.S. Citizenship  
and Immigration  
Services



**MAY 26 2004**  
Date:

FILE: EAC 02 175 52508 Office: VERMONT SERVICE CENTER

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: SELF-REPRESENTED

**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.

*for*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office 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 jewelry business. It seeks to employ the beneficiary permanently in the United States as a jeweler technician. 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, the petitioner submits additional information and maintains that the petitioner has demonstrated its financial ability to pay the proffered wage.

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.

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 is based 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 October 19, 2000. The beneficiary's salary as stated on the labor certification is \$10.00 per hour or \$20,800 year, based on a 40-hour week. The Immigrant Petition for Alien Worker (I-140) indicates that the petitioning business has one employee and was established in 1995. Part B of the ETA-750, Application for Alien Labor Certification, reflects that the petitioner has employed the beneficiary since 1997.

The petitioner initially submitted insufficient evidence of its ability to pay the beneficiary's proffered salary. On August 19, 2002, the director requested additional evidence from the petitioner in support of its ability to pay the proffered wage of \$20,800. The director instructed the petitioner to submit annual reports, federal tax returns, or audited financial statements. The director did not request the petitioner to provide proof of payment of wages to the beneficiary such as Wage and Tax Statements (W-2s) or payroll records.

The petitioner's response to the director's request included copies of the petitioner's federal income tax returns for 1999 and 2000. They indicate that the petitioner is organized as a sole proprietorship. As the 2000 federal tax return covers the priority date of October 19, 2000, it is the most relevant. It shows that the sole proprietor claimed one exemption and declared an adjusted gross income of \$23,448. This includes a business net income of \$26,144 as shown on Schedule C. Schedule C also indicates that the sole proprietor's business paid \$12,800 in wages.

Following a review of the information reflected in the record, the director concluded that the petitioner had failed to establish its continuing ability to pay the proffered wage. The director noted that the petitioner, as a sole proprietorship, must establish that the sole proprietor's income can not only provide for the payment of the proffered wage, but must also demonstrate that the sole proprietor can sustain himself on the remaining funds. The director determined that the sole proprietor's 2000 adjusted gross income of \$23,448 was only \$2,648 higher than the proffered wage and was not sufficient to pay the proffered salary, as well as provide the sole proprietor's reasonable living expenses.

On appeal, the petitioner submits copies of a W-2 and a Form 1099, Miscellaneous Income provided to the beneficiary in 2000. The petitioner also submits copies of the sole proprietor's Form 1040, U.S. Individual Income Tax Return for 2000 and 2001, as well as a copy of the beneficiary's W-2 issued in 2002. The petitioner asserts that these documents establish that the beneficiary has been compensated at a level that reflects the petitioner's ability to pay the proffered salary of \$20,800. The AAO concurs. In 2000, the beneficiary's W-2 shows that he received \$12,800 in wages from the petitioner. Form 1099 also shows that the petitioner paid the beneficiary \$8,000. Prorating the proposed wage offer from the visa priority date of October 19<sup>th</sup>, the petitioner need show only that it had the ability to pay the beneficiary approximately \$4,650 in 2000. The beneficiary's wages received from the petitioner sufficiently demonstrate the petitioner's ability to pay the proffered wage during 2000. The other W-2s, submitted on appeal, also reflect that the petitioner paid the beneficiary \$20,800 in 2001 and \$22,400 in 2002. As the record demonstrates that the petitioner has also paid the beneficiary either at a level equaling or exceeding the proffered wage in 2001 and 2002, the petitioner has established the ability to pay the beneficiary's proffered salary as set forth in the approved labor certification.

Based on the evidence contained in the record and after consideration of the financial data further presented on appeal, the AAO concludes that the petitioner has demonstrated its ability to pay the proffered as of the priority date of the petition and continuing until 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 met that burden.

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