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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

MAR 26 2003

File: LIN 02 031 51832 Office: NEBRASKA SERVICE CENTER Date:

[redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

PUBLIC COPY

ON BEHALF OF PETITIONER:

[redacted]

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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Helen E. Crawford for
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reopen (motion). The motion will be granted, the previous decisions of the director and the AAO will be withdrawn, and the petition will be approved.

The petitioner engages in retail sales and installation of flooring. It seeks to employ the beneficiary permanently in the United States as a carpet layer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (Form ETA 750).

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.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements….

Eligibility in this matter hinges on 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is November 26, 1997. The beneficiary's salary as stated on the labor certification is $13.24 per hour or $27,539.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent

residence. On January 6, 1999, the director requested additional evidence of said ability to pay in the nature of the petitioner's 1997 federal income tax return and a summary of monthly recurring household expenses (I-797).

Counsel submitted the petitioner's 1997 Form 1065 U.S. Partnership Return of Income. It showed a (loss) of ($17,968).

On February 26, 1999, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition.

On the appeal of March 29, 1999, counsel contended that the position subject to the Form ETA 750 was not a new one and that the petitioner's 1998 Form 1065 U.S. Partnership Return of Income showed that it was already paying salaries and outside labor expenses. The petitioner did not identify such parties, state the amounts of their compensation, or describe their duties as similar to those required by the Form ETA 750. The federal tax return for 1998 reflected a (loss) of ($100). The AAO dismissed the appeal on October 1, 2001.

The petitioner filed the instant motion to reopen on November 2, 2001. Counsel now offers Forms 1099-MISC to prove that the petitioner paid the beneficiary, in particular, more than the proffered wage, $32,441.72 in 1997 and $62,925.40 in 1998.

Counsel states in the instant motion of November 2, 2001 that:

> ... Although INS is correct in stating per petitioner's 1997 Form 1065 ... no salary was paid, an amount equal or greater than the salary was in fact expended by the employer in independent contractor expenditure for the performance of petitioned duties. During the entire period [the beneficiary] was paid and hired as an independent contractor until he was allowed to work under the terms of his labor certification.

Counsel's argument is persuasive. The payment of the proffered wage to the beneficiary under the circumstances of this record and during the entire period can establish the ability to pay the proffered wage.

After a review of the evidence of record, it is concluded that the petitioner has established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to 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 motion to reopen is granted, and the decisions of the director and the AAO are withdrawn. The petition is approved.