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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

[redacted]

File: LIN 02 262 50272 Office: Nebraska Service Center Date: MAR 0 9 2004

IN RE: Petitioner: [redacted]
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 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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a brick laying/concrete contractor. It seeks to employ the beneficiary permanently in the United States as a project crew leader. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanies the petition. The director determined that that the position is not that of a skilled worker and that the petitioner had failed to establish that it had the ability to pay the proffered wage from the time the priority date was established and continuing to the present.

On appeal, the petitioner states the position requires at least four years experience.

With the petition the petitioner submitted an ETA 750 indicating the proffered position did not require any experience and no education beyond that of high school.

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(l)(3)(ii) states, in pertinent part:

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification.

Furthermore, the regulation at 8 C.F.R. § 204.5(l)(4) states:

> *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

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.

The director determined that the petitioner had not established that the position required any training or experience, and the position therefore cannot be classified as a skilled worker. The director also determined that the petitioner had not established the continuing ability to pay the proffered wage.

On appeal, the petitioner states the position requires specialized training in the layout and installation of brick paving, natural stone and concrete projects, and that the position requires at least four years experience. The petitioner, however, failed to specify these job requirements on the ETA 750 that was submitted for certification by the Department of Labor. Therefore, the position as certified cannot be classified as that of a skilled worker.

With the appeal, the petitioner submitted copies of its payroll summary of wages paid to the beneficiary for January through November 2002 and copies of checks made payable to the beneficiary. The payroll summary shows a total of $40,967.44 paid to the beneficiary. It would appear that in 2002 the petitioner was paying the beneficiary at a rate consistent with the proffered wage.

The petitioner must establish it had the ability to pay the wage offered as of the petitioner'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. The petitioner's priority date in this instance is March 29, 2000. The beneficiary's salary as stated on the labor certification is $21.00 per hour or $43,680 per year.

The petitioner has not submitted evidence of its ability to pay the proffered wage during calendar years 2000 and 2001, and, therefore, has not established a continuing ability to pay the wage beginning with the priority date. Although CIS will consider

wages paid to the beneficiary by the petitioner, evidence of ability to pay should be in the form of federal income tax returns, annual reports or audited financial documents.

Upon review, it is determined that the petitioner has not provided sufficient evidence to overcome the findings of the director in his decision to deny the petition. The petitioner has not established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition will be dismissed.

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 met that burden.

ORDER: The appeal is dismissed.