

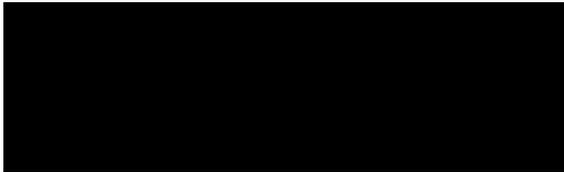
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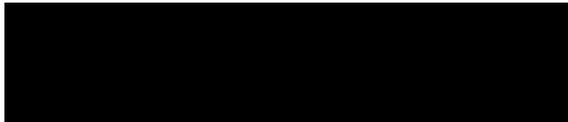
**U.S. Citizenship
and Immigration
Services**



FILE: EAC 02 196 51074 Office: VERMONT SERVICE CENTER

Date: **APR 26 2004**

IN RE: Petitioner:
Beneficiary:



PETITION: 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:



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

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

The petitioner is a drywall contractor. It seeks to employ the beneficiary permanently in the United States as a supervisor for drywall application. 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.

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) 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 turns, in part, 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. 8 C.F.R. § 2024.5(d). The petition's priority date in this instance is April 30, 2001. The beneficiary's salary as stated on the labor certification is \$27.18 per hour or \$56,534.40 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated October 25, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE required the petitioner's 2001 federal income tax return and copies of the beneficiary's 2001 Wage and Tax Statement (Form W-2), reporting wages paid to him, if any. The RFE requested, also, a letter verifying the beneficiary's qualifying experience, being two (2) years in the job offered, under the Form ETA 750.

Counsel submitted the petitioner's 2001 Form 1120S, U.S. Income Tax Return for an S Corporation. The beneficiary's statement of 2001 Miscellaneous Income (Form 1099) supported Schedule C of the beneficiary's 2001 Form 1040, U.S. Individual Income Tax Return. They substantiated payments, from the petitioner to the beneficiary, a drywall sub-contractor, of \$61,732, equal to, or greater than, the proffered wage.

The director noticed the difference between the \$61,732 reported on Schedule C and Form 1099 and the beneficiary's adjusted gross income (AGI), \$16,724, reflected on Form 1040. The director concluded that the

difference was a discrepancy that made all of the forms questionable. Consequently, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date and continuing to the present and denied the petition.

On appeal, counsel presents a brief. Counsel notes that the petitioner's Form 1120S showed payments to contractors, of \$1,718,744, and that the beneficiary properly reported his portion on his Form 1040 and Schedule C, \$61,732, a sum equal to, or greater than the proffered wage. Counsel concludes, correctly, that the petitioner's payment of the proffered wage to the beneficiary, at the priority date and continuing until the beneficiary obtains lawful permanent residence, establishes the ability to pay it.

The petitioner has overcome the basis of the director's decision. There was no discrepancy. The RFE exacted a letter of qualifying experience. The decision takes no issue with the petitioner's submission, and no further consideration of it is necessary.

In part, the director denied the petition as abandoned because, it was said, the petitioner failed to respond to the RFE by the required date, January 20, 2003. This basis of the decision is groundless. The director did not stamp the date of his receipt of the response on the RFE. Judging from the date of counsel's correspondence, plus an allowance of three (3) days for service by mail, the director received the response timely, on or about November 21, 2002. *See* 8 C.F.R. 103.5a(b).

After a review of the federal tax returns and Form 1099, 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 until the beneficiary obtains lawful permanent residence.

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 visa petition is approved.