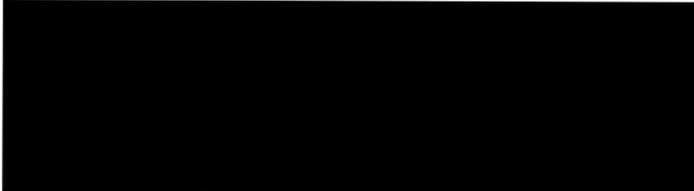




U.S. Citizenship
and Immigration
Services

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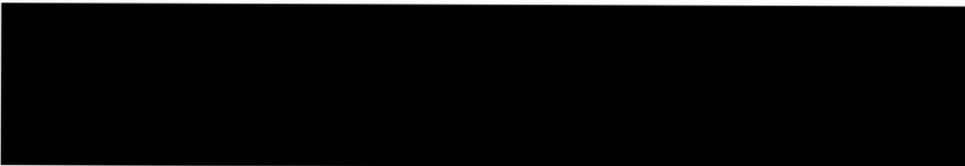
Office: NEBRASKA SERVICE CENTER

Date: JUN 12 2007

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

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:



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, Chief
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 case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is a retail sales firm. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had offered the prevailing wage rate for the certified position and denied the petition accordingly.

On appeal, counsel asserts that the director miscalculated the amount of the proffered salary and that the petitioner has offered the full prevailing wage rate for the certified position.

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 nature, for which qualified workers are not available in the United States.

The petitioner must demonstrate that it intends to employ the alien in the certified job at the wage rate as set forth in the alien labor certification and that it has the continuing ability to pay the proffered wage beginning on the priority date, which is the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(g)(2) and (d).¹ Here, the Form ETA 750 was accepted for processing on April 30, 2001.

The proffered wage as stated on Item 12 of the Form ETA 750 is \$3,450 per month, which amounts to an annualized sum of \$41,400 (12 months x \$3,450 per month).

On Part 6 of the Immigrant Petition for Alien Worker, (I-140), the petitioner indicates that it is offering a permanent full-time position to the beneficiary at the rate of \$796.16 per week.

The director calculated that the weekly wage of \$796.16 equated to an hourly wage of "\$19.90 per hour; \$3,184.00 per month; and \$41,400 per year."² The director denied the petition solely on this issue, reasoning that the petitioner had only offered the beneficiary approximately 92.3% of the certified wage.

On appeal, counsel asserts that the director miscalculated the petitioner's offered wage by assuming that an average month has four weeks and multiplying the weekly offered wage of \$796.16 by this number. Counsel

¹ The offered wage as set forth on the alien labor certification must equal or exceed the prevailing wage determined under 20 C.F.R. § 656.40 and § 656.41 and that the wage will equal or exceed the prevailing wage that is applicable at the time the beneficiary begins work or from the time that the beneficiary is admitted to take up the certified position. *See* 20 C.F.R. § 656.10(c)(1). The prevailing wage rate is determined by the DOL. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

² The director's annualized calculation is erroneously stated as \$41,400 rather than \$38,208.

maintains that the director's calculation should have been based on a month containing 4.3333 weeks, (52 weeks divided by 12 months equals 4.3333).

The AAO concurs with counsel. The weekly offered wage of \$796.16 could also be annualized by multiplying it by 52 weeks. The resulting sum of \$41,400.32 shows that the petitioner is offering a proffered salary equivalent to the certified wage set forth on the ETA 750.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation relevant to the other pertinent issues of eligibility and request any additional evidence from the petitioner pursuant to the requirements of Section 203(b)(3)(A)(i) of the Act. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision. The burden of proof remains solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which, if adverse to the petitioner shall be forwarded to the AAO for review.