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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date **MAY 14 2008**

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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 for

Robert P. Wiemann, Chief
Administrative Appeals Office

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 The motion to reopen will be granted and the previous decisions of the director and the AAO will be withdrawn.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

The petitioner is a general contractor. It seeks to employ the beneficiary permanently in the United States as a decorative painter. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly. The AAO dismissed a subsequent appeal on May 11, 2006.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The Immigrant Petition for Alien Worker (I-140) was filed on March 30, 2006. The director determined that the petitioner failed to establish that it had the continuing financial ability to pay the proffered wage of \$29,557 and on May 11, 2006, he denied the petition. The evidence that the director examined included a copy of the petitioner's 2005 federal income tax return, which reflected insufficient net income or net current assets to pay the proffered wage.

On appeal, the AAO reviewed the evidence of the petitioner's continuing financial ability to pay the proffered wage and dismissed the appeal on May 11, 2006, concluding that the evidence did not support the petitioner's ability to pay. In rendering this decision, the AAO reviewed the evidence submitted to the record and on appeal including the petitioner's bank statements and a copy of a handwritten note with a summary of figures representing payment of compensation to the beneficiary through his business of [REDACTED]'s Painting. Accompanying this document were nine pages of copies of the front of 133 checks. The copies were reduced in size and almost all were illegible. Some checks were circled but the payee names were all illegible except for four. One of the four was "[REDACTED]'s Painting," written for \$5,000.

Through counsel, the petitioner submits a motion to reopen the AAO's decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Counsel has now provided copies of a number of full size, legible negotiated checks representing payment of compensation to [REDACTED]'s Painting from the petitioner in 2005, 2006 and 2007 and in support of the assertion that the petitioner has had the ability to pay the proffered wage of \$29,557 per year as set forth in the Form ETA 9089 with a priority date of December 27, 2005. Counsel has additionally provided additional documentation establishing that the beneficiary has operated a business called [REDACTED]'s Paint Effects including the beneficiary's affidavit, business card, 2006 incorporation record, tax election, and bank statements. These documents are considered as new evidence which supports counsel's motion to reopen under 8 C.F.R. § 103.5(a)(2).

We consider the new evidence to be sufficient to establish the petitioner's ability to pay the proffered wage. As noted in the AAO's previous decision, if documentary evidence establishes that a petitioner has employed the beneficiary at a rate equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The additional evidence submitted herein sufficiently corroborates payment of compensation to the beneficiary as an independent contractor that would reasonably be considered to be available to pay him as an employee. The cancelled checks show total amounts paid to the beneficiary to be \$28,690 in 2005; \$36,553 in 2006; and \$7,310 in the first two months of 2007. As the proffered wage is \$29,557, it may be concluded that the petitioner has demonstrated its ability to pay.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate a *continuing* ability to pay a proffered salary. Based on a review of the record and considering the evidence submitted on motion, the AAO finds that the petitioner has established that it has had the continuing financial ability to pay the certified wage.

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. The petition is approved.