

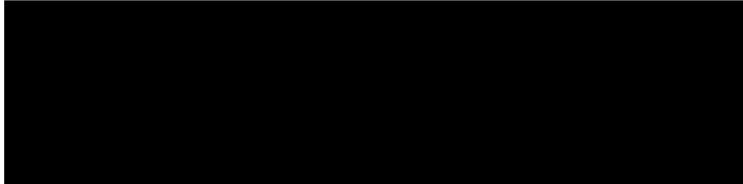
identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

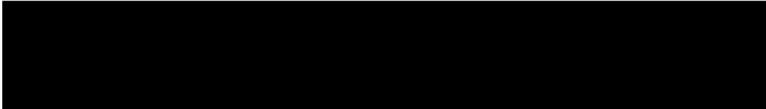
PUBLIC COPY

D2



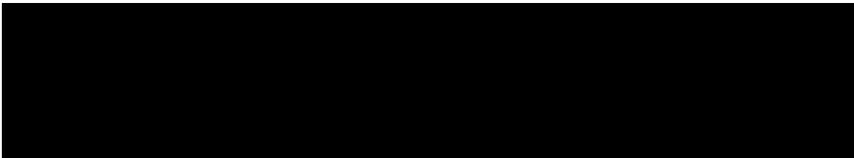
FILE: LIN 05 111 51795 Office: NEBRASKA SERVICE CENTER Date: FEB 04 2008

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a construction company that seeks to employ the beneficiary as a civil engineer. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition stating that the petitioner failed to comply with the Labor Condition Application (LCA) by not paying the beneficiary at least the actual wage level paid by the employer to all individuals with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupation in the area of employment, whichever is higher. The director further stated that it could not be determined that the petitioner would comply with the wage requirements of the LCA in the future because it had failed to comply with it in the past. On appeal counsel submits a brief and additional information stating that the petitioner had at all times complied with the terms of the LCA and that it would continue to do so in the future.

The beneficiary first worked for the petitioner under an LCA which certified employment dates from June 3, 2002 to June 2, 2005. The prevailing wage rate to be paid to the beneficiary under that LCA was \$48,776 per year. The petitioner submitted evidence to establish that the petitioner worked a total of 120 weeks from 2002 until the second week of June in 2005. During that time frame, the petitioner took 19 weeks of unpaid leave to travel to India, and an additional 8 weeks of personal unpaid vacation. At a weekly pay rate of \$938.00 (\$48,776 per year divided by 52 weeks) the beneficiary should have been paid \$112,560 pursuant to the terms of the LCA. The beneficiary's W-2 forms establish that the beneficiary was paid \$111,347.<sup>1</sup> This amount is within the 5% differential then allowed by the regulations. 20 C.F.R. § 655.731(a)(2)(iii).

The beneficiary next worked under an LCA certifying employment from June 7, 2005 through June 6, 2008. The rate of pay on that LCA is listed at \$28.81 per hour. The prevailing wage is listed at \$30.16 per hour. The record establishes that the petitioner paid the beneficiary \$28.81 per hour from June 5, 2005 until September 4, 2005 (on or about the date the documentation was submitted in support of this appeal). This amount is within the 5% differential then allowed by the regulations. 20 C.F.R. § 655.731(a)(2)(iii).

The evidence of record establishes that the petitioner complied with the wage terms of the first LCA under which the beneficiary was employed (6/3/02 – 6/02/05), and with the wage terms of the present LCA as well. The director's findings to the contrary are withdrawn. The record establishes that the petitioner intends to comply with the terms of the current LCA as certified on the petition.

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 sustained that burden.

**ORDER:** The appeal is sustained. The petition is approved.

---

<sup>1</sup> Although there are discrepancies in the pay records, the AAO will accept the W-2 forms submitted indicating total payment of wages for the tax year.