U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

B6

FILE: EAC-00-195-50226 Office: VERMONT SERVICE CENTER Date: JUN 22 2004

IN RE: Petitioner: [redacted]

Beneficiar[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:

[redacted]

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 employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted. The decision of the AAO will be withdrawn and the petition will be affirmed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a construction engineer at an annual salary of $43,126.00. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The AAO affirmed this determination on appeal.

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.

The petition's filing date is June 24, 1996. The beneficiary's salary as stated on the labor certification is $43,126.00 annually.

The AAO affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel asserts that the beneficiary's salary was incorrectly listed on line 12 of the 1996 federal income tax return, Compensation of officers, and should have been listed on line 13, Salaries and wages (less employment credits). Counsel states that a revised federal tax return for 1996 reflecting the correction is being submitted.

The petitioner must show that it has the ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The priority date of the petition is June 24, 1996. Contrary to the AAO decision, the petitioner would be required to pay only half of the proffered wage of $43,126 during that year. The record indicates that the beneficiary was paid at least $24,000, which is more than half the proffered wage. However, during the year in question, 1996, the petitioner claims to have paid the beneficiary the entire proffered wage. In the absence of a Form W-2 Wage and Tax Statement made out to the beneficiary from the petitioner for 1996, such claim is questionable. Based on the evidence submitted, however, it is be found that the petitioner paid the beneficiary the required portion of the proffered wage

subsequent to the time of filing the application for alien employment certification as required by 8 C.F.R. § 204.5(g)(2) . Therefore, the petition may be approved.

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 AAO's decision of May 3, 2002 is withdrawn. The petition is approved.