



U.S. Citizenship
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Services

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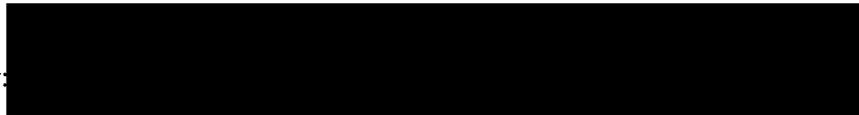
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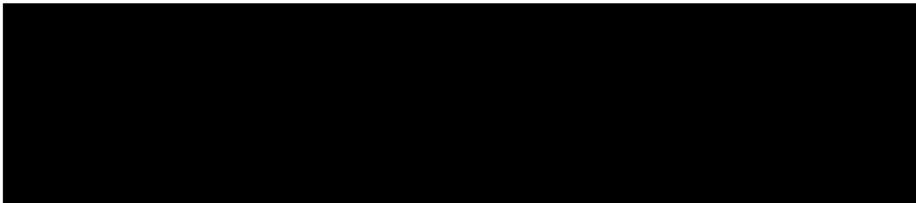
FILE: LIN 06 106 52683 Office: NEBRASKA SERVICE CENTER Date: JAN 09 2008

IN RE: Petitioner:
Beneficiary:



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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an airport services company. It seeks to employ the beneficiary permanently in the United States as a shop mechanic. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor accompanied the petition. The acting director found that the visa petition indicates that the petitioner does not intend to pay the beneficiary the prevailing wage, and denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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 regulations at 20 C.F.R. § 656.20(c) require the prospective employer in Schedule A labor certification cases to make certain certifications in the application for labor certification.¹ Specific to the issue of offering wages that meet the prevailing wage rate, the regulations require the prospective employer to make the following certification: "The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." See 20 C.F.R. § 656.20(c)(2).

If the petitioner did not intend to employ the beneficiary at the prevailing wage, then the petition would not be approvable.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See, e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

¹ Since Schedule A labor certifications are procedurally submitted directly to CIS and are not reviewed by the Department of Labor, CIS officers are authorized to determine the petitioner's compliance with the regulatory requirements governing Schedule A labor certification-based preference visa petitions. See 20 C.F.R. § 656.22(e).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.² In the instant case the approved Form ETA 750 Application for Alien Employment Certification/Labor Certification indicates that the prevailing wage that the petitioner agreed to pay to the beneficiary is \$20.13 per hour.

On the Form I-140, Part 6, item 9 “Wages per week,” the petitioner, or someone acting on the petitioner’s behalf, entered “\$12.13/hr.” The acting director denied the petition, finding that the visa petition indicates that the petitioner does not intend to pay the beneficiary the prevailing wage of \$20.13.

On appeal, counsel stated that “\$12.13/hr” was entered on the Form I-140 in error, and that the entry should be amended to reflect that the petitioner intends to pay the beneficiary \$805.20 per week, an amount equal to \$20.13 per hour for 40 hours.

This office accepts counsel’s assertion that the incorrect amount was entered on the Form I-140, and that the petitioner intends to pay the beneficiary the prevailing wage. The petitioner has overcome the sole basis for which the decision of denial, and no other basis for denial appears in the record.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).