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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

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OFFICE OF ADMINISTRATIVE APPEALS  
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BCIS, AAO, 20 Mass, 3/F  
Washington, D.C. 20536



**JUN 12 2003**

File: EAC 00 032 50508 Office: VERMONT SERVICE CENTER Date:

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

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER:



**INSTRUCTIONS:**

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

*Robert P. Wiemann*  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. Then, the petitioner's counsel filed a motion to reopen and a supplement (Motion 1). The AAO reopened the decision, but determined that the petition must be denied. The petitioner, finally, filed the instant motion to reopen (Motion 2). Again, the motion will be granted, and the previous decisions of the AAO will be affirmed. The petition will be denied.

The petitioner is a religious organization and school. It seeks to employ the beneficiary permanently in the United States as a member of the clergy (an imam). As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$26,000 per year.

On January 2, 2001, the director denied the visa petition because the petitioner had not established that it had the ability to pay the offered wage at the priority date of the visa petition. The petitioner appealed, and, on October 17, 2001, the AAO dismissed the appeal. The AAO, further, concluded that the evidence did not establish that the beneficiary met the minimum requirements of the position, set forth in Form ETA 750.

On November 16, 2001, the petitioner filed Motion 1, later supplementing it with evidence as to the qualifications of the beneficiary for the minimum requirements of the position. The AAO reopened the appeal and determined that the petitioner had overcome the objection to the beneficiary's qualifications. The evidence, however, still failed to establish that the petitioner had sufficient funds to pay the proffered wage at the priority date of the petition. Consequently, the AAO, on June 21, 2002, affirmed the dismissal of the appeal and denied the petition.

Counsel filed Motion 2 on July 22, 2002 and stated:

[The beneficiary] was hired to replace the [imam] who departed... [The imam who departed] was paid a monthly salary of \$750... plus a house for him and his family... Imam's position is not a new one.

Counsel cites no precedent decision to support the concept that payment of a lesser wage is proof of the ability to pay the proffered wage. While 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

In Motion 2, counsel continues:

[The petitioner's] 1998 income tax return shows a deficit of \$16,925. At the same time, the tax return shows assets valued at \$86,451. I am enclosing the 1997 income tax return that shows \$89,451 assets and cash of \$4,091 for a total of \$94,542. [(The annual deficit was only \$1,020).

Counsel refers to the petitioner's 1997 and 1998 Form 990EZ, Short Form Return of Organization Exempt From Income Tax. These show cash available of only \$4,091 at the end of 1997 and a deficit of cash, (\$581), at the end of 1998, less than the proffered wage.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of

the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

Counsel states:

... The monthly balances in [the petitioner's] business account for six months before and after the [Form ETA 750] was filed showed sufficient monthly balances to pay [the beneficiary's] salary. The bank balance for 10 January 199[8] to 10 February, 1998 was \$14,413.23. [The petitioner's] income and assets greatly increased after the arrival of [the beneficiary]...

No bank balance equaled or exceeded the proffered wage. Even though the petitioner submitted its bank statements as evidence that it had sufficient cash flow to pay the proffered wage, there is no evidence that they somehow show additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Counsel identifies an Eastern Service Center/AILA (American Immigration Lawyer's Association) teleconference on November 16, 1994, provides AILA's account, and characterizes its result:

... If the taxable income on the petitioning company's tax return is negative or less than the proffered wage, and the beneficiary is not working for the petitioner, but the return's balance sheet shows a sufficiently favorable ration [sic] of total current assets to total current liabilities, generally assume that the petitioner can afford the proffered wage.

Counsel argues, in this regard, that assets include land and buildings and were available to pay the proffered wage at the priority date. Land and buildings are not current assets, such as the account of the AILA teleconference described, available to pay the salary offered to the beneficiary. The record has no statement of current assets or current liabilities. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

After a review of the federal tax returns and bank statements, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

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 not met that burden.

**ORDER:** Motion 2 is granted, and the AAO's previous decisions are affirmed. The petition is denied.