

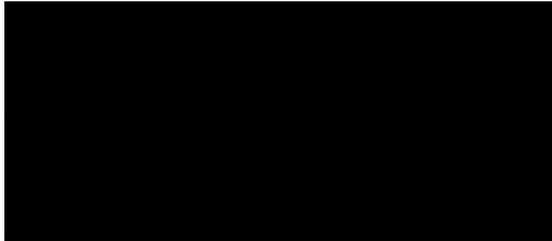
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U.S. Citizenship
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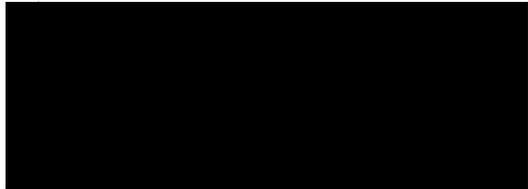


FILE: EAC 01 263 53363 Office: VERMONT SERVICE CENTER Date: APR 28 2004

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

PETITION: 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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Christian Church. It seeks to employ the beneficiary permanently in the United States as a teacher. 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.

Provisions of 8 C.F.R. § 204.5(g)(2) state:

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 turns, in part, 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. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is January 9, 1998. The beneficiary's salary as stated on the labor certification is \$40,435.20 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE), dated October 18, 2001, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing to the present. The RFE exacted 1998-2000 federal income tax returns, annual reports or audited financial statements, as well as Wage and Tax Statements (Forms W-2), as evidence of wage payments to the beneficiary. The director, also, exacted evidence of the beneficiary's one (1) year of experience in the job offered (teacher), as required in Form ETA 750.

The petitioner did not respond to the RFE by the due date, January 13, 2002, and the director denied the petition as abandoned, on May 22, 2002. 8 C.F.R. § 103.2(b)(13). Meantime, counsel did file an untimely response to the RFE on March 1, 2002.

In the untimely response, counsel referenced the Financial Statements and Accountants' Compilation Report (unaudited compilation) for years ending December 31, 1998, 1999, and 2000. The 1998 unaudited compilation reflected net income of \$64,494, equal to, or greater than, the proffered wage. The 1999 and 2000 unaudited compilations, respectively, reflected net losses, (\$13,125) and (\$21,878), less than the proffered wage. In addition, the 1999 and 2000 net current assets were deficits, (\$19,938) and (\$7,790), less than the proffered wage, according to the unaudited compilations. Selected 2001 bank statements from July 1, 2001 [sic] reflected balances of \$18,727.53, less than the proffered wage, to \$51,837.43, equal to, or greater than the proffered wage. Counsel stipulated that the petitioner had no employees and did not file a federal tax return, being exempt as a church.

The untimely response offered no evidence of the beneficiary's one (1) year of experience in the job offered. The RFE and the decision stated that the proceedings had no evidence of the beneficiary's experience. The discussion

of the beneficiary's experience appears at the end of this decision. The director, moreover, determined that the petitioner did not establish its ability to pay the proffered wage continuously, viz., falling short of the proffered wage for the first half of 2001 (no evidence) and for all of 1999 and 2000. Hence, the director denied the petition.

In the appeal, filed October 18, 2002, counsel amplifies the record, including three (3) selected bank account statements of 2002, and states that:

Additional evidence is being submitted to establish that the petitioner had the ability to pay, had unusual expenditures for capital improvements during 1999 and 2000 and that the Board members have more than sufficient income and were always willing to pay any deficit. The bank accounts show more than \$60,000, and all things should be considered to establish ability to pay in a not-for-profit situation

The 2001 unaudited compilation report reflects "excess of income over expenses" of \$41,149, equal to or greater than, the proffered wage. The petitioner submitted several Forms 1040, U.S. Individual Income Tax Returns, for 1999 to 2001 related to individuals, said to be the petitioner's Board members. They reported adjusted gross income and net current assets equal to, or greater than, the proffered wage.

Counsel asserts that unaudited financial statements, such as the 1998-2001 compilation reports, prove the ability to pay the proffered wage. They are of little evidentiary value because they are based solely on representations of management. See 8 C.F.R. § 204.5(g)(2).

Fragments of bank records included six (6) months of 2001 and three (3) of 2002. Even though the petitioner submitted its commercial bank statements to demonstrate that it had sufficient cash flow to pay the proffered wage, there is no proof that they somehow represent additional funds in the absence of tax returns and audited financial statements. No explanation appears for the selective use of a few bank statements in 2001 and 2002.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F.Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F.Supp.2d 7, 15 (D.D.C. 2001).

Counsel presents an affidavit of October 8, 2002, on appeal, to establish that two (2) Board members of the petitioner, a not-for-profit corporation, were willing and able to contribute to the petitioner for any "deficit sums." No contract, however, establishes the commitment of any sum.

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 contends that board members' affidavits are funds available to pay the proffered wage, citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The AAO may consider the reasoning of the decision in *Full Gospel*, but it is not binding, except in cases arising in the same judicial district of the United States District Court. See, *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). As already noted, the affidavit

creates no enforceable contract or asset. Moreover, it promises to contribute only to "deficit sums." The ability to pay the proffered wage arises from net income, net current assets, or sums already paid to the beneficiary.

Contrary to counsel's primary assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders, or of other enterprises or corporations, cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

The Board members state, in addition, that:

In 1999 and 2000, we were doing extensive renovation and expansion of the buildings and spending large sums of money, which made the net income lower for those years.

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).

The appeal, as presently constituted, states that the petitioner expended large sums in 1999 and 2000, but the proceedings lack any evidence of their purpose and amount.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

After a review of the unaudited financial statements, incidental bank account statements, affidavit, and brief, 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 other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. The director based the decision, in part, on the failure to establish that the beneficiary met the petitioner's qualifications.

The salient requirement of Form ETA 750 exacted one (1) year of experience for the position of a teacher. The initial evidence must support the experience with letters, and they must comply with the specified format. See 8 C.F.R. § 204.5(g)(1) and 8 C.F.R. § 204.5(l)(3)(ii). The petitioner offered none in response to the RFE.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Counsel avers, on appeal, that the experience letter accompanied the filing of the I-140, but attachments to the I-140 and Form ETA 750 included only the beneficiary's teacher's license registration, dated April 4, 1977 and reissued December 9, 1997. As late as July 6, 2001, Globe Language Services, Inc. (GLS) attested to the educational equivalent of a bachelor degree in food sciences and technology from an institution in the United States. GLS based its finding on one document, the bachelor degree, but made no mention of a letter of experience. The record reflects that the petitioner submitted a letter of experience, but only after the director entered the decision.

The RFE requested this evidence, but the record shows that the petitioner did not produce it in response to the RFE. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of Form ETA 750 as of the priority date. The petitioner did not establish that the beneficiary had one (1) year of experience. In addition, the prior employer's certificate, as presented on appeal, does not attest to full time experience. Employment is defined as permanent, full time work. *See* 20 C.F.R. § 656.3, *Employment*. Therefore, the petitioner has not overcome this portion of the director's decision, and the petition may not 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 not met that burden.

ORDER: The appeal is dismissed.