

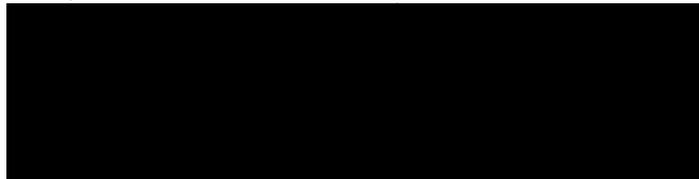
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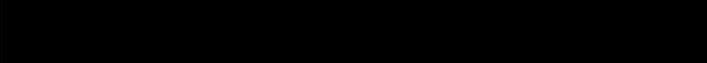
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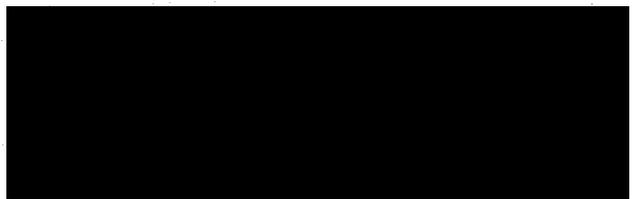
**U.S. Citizenship  
and Immigration  
Services**



**FILE:** EAC 00 005 53470    **Office:** VERMONT SERVICE CENTER    **Date:** APR 28 2004

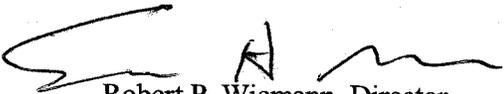
**IN RE:**    **Petitioner:**   
              **Beneficiary:** 

**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. The director treated an untimely appeal as a motion to reopen, approved the motion, and reaffirmed his decision to deny the petition. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a day care center. It seeks to employ the beneficiary permanently in the United States as a preschool 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 hinges on the petitioner's ability to pay the wage offered from 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. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 6, 1997. The beneficiary's salary as stated on the labor certification is \$23,261 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. In a request for evidence (RFE) dated July 10, 2000, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date. The RFE exacted the petitioner's 1997 federal income tax return, as well as Wage and Tax Statements (Forms W-2) for wage payments, if any, to the beneficiary.

Counsel submitted the petitioner's exemption from federal income tax under § 501(c)(3) of the Internal Revenue Code (IRS letter), dated December 21, 1981. The IRS letter stated that the petitioner was not subject to the filing of Form 990, Return of Organization Exempt from Income Tax, unless it engaged in activities unrelated to the trade or business as defined in § 513. In addition, audited financial records reported results of operations for the petitioner at Loving Care Day Care Center through FY 1998, as of June 30 1998. Copies of the 1997 Quarterly Wage Report of Wages Paid to Each Employee named about 34 employees, though the Immigrant Petition for Alien Worker (I-140), filed October 4, 1999, stated that there were 14.

Counsel further extracted page 1 only, with Articles I and II of Part I, from the New York City Department of Social Services Purchase of Day Care Services Agreement (POS-FY 1996), and, also, Articles I-IV of Part IIA, on pages 3-9. Neither fragment had a date or signature. Articles II, A and B, of Part I indicated two (2) year terms for POS-FY 1996 from July 1, 1995 with options to renew through June 30, 2001. Article I, C identified the center as the Dolores Mattox Child Care Center, as did the Day Care Center Budget for the fiscal year (FY) from July 1, 1995 through June 30, 1996, as formulated by the City of New York, Human Resources Administration, Agency for Child Development (ACD).

The director reviewed the financial records, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage at the priority date, and denied the petition.

On appeal, the petitioner submits a letter (variance letter), dated April 17, 2001, and stipulates:

4. The program audit report for fiscal year ended June 30, 1996 shows a favorable variance in the ACD salary line of \$11,646. The variance would have been \$23,261 [the proffered wage] had we not opted to shift some budgets for other expenses since we had not been able to hire a full time teacher.
5. The program audit report for fiscal year ended June 30 1997 again showed a favorable variance in the ACD salary line. As in the previous year, some budgets were shifted to other expense lines to utilize a portion of the unused budgets for a teacher.
6. We maintain a sound fiscal policy and we see to it that our actual expenditures do not exceed the approved budgets. Up to the present time, the [petitioner] has not been penalized by the City [New York] for any deficiency resulting in overspending.

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).

Although the city has not penalized the petitioner, up to the present time, the petitioner has given no account of the shifted expenses or the scope of similar ones, of their recurrence, or of their source. The proceedings contain no record of other assets from which to pay the proffered wage and shifted expenses.

*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.

Counsel's brief on appeal, dated April 18, 2001, admits that expenditures exceed the budget for operational purposes and explains:

Petitioner justifies its financial ability to pay the wages as follows: that Bethel Mission Loving Day Center's expenditures-inclusive of teacher salaries-are advanced by [New York] on the basis of a cost reimbursement contract. In addition, it states that should there be [sic] any deficiencies, the same shall be shouldered by the day care's principal benefactor which is [the petitioner]. (A copy of Bethel Mission Station Church, Inc.'s financial statement shall be submitted to you in a supplemental filing).

*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 Citizenship and Immigration Services (CIS), formerly the Service or the INS, 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 (5<sup>th</sup> 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's supplemental filing on appeal, dated May 17, 2001, presented no new financial statement, but only copies of the variance letter and brief on appeal. The petitioner's pastor and founder offered a letter dated April 23, 2001 (appeal letter).

The appeal letter simply repeated:

[The petitioner] shall shoulder any expenditures spent by Mission Loving Day Care Center (the school that proposes to hire alien beneficiary) in excess of the budget given to it for operational expenses.

The doubt in the proof, however, arises from the defect of the legal obligation to "shoulder" additional expenses and of financial data to show the ability to pay the proffered wage. The will to do so has little evidentiary value.

Beyond the scope of the decision, several documents near the priority date, especially POS-FY 1996 and budget materials, refer to the school as Dolores Mattox Child Care Center. The financial statements and later discussion assume the name Bethel Mission Loving Day Care Center. Though it is not a basis of the AAO's decision, the evidence poorly states the centers' relationship and the corporate status of each in respect to the petitioner.

After a review of the audited financial statements, counsel's brief, the variance and appeal letters, POS-FY 1996, and quarterly wage reports, 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:** The appeal is dismissed.