

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



Ble

FILE:



Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

EAC 03 215 50437

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:

SELF-REPRESENTED

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

CC:



**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 household/church. It seeks to employ the beneficiary permanently in the United States as a live-out cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the counsel<sup>1</sup> submits a brief and additional evidence.

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 nature, for which qualified workers are not available in the United States.

The regulation 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

---

<sup>1</sup> Counsel has not filed a Form G-28 affirming that he represents the petitioner, but as he has filed a brief in this matter for the petitioner, he is copied on this Decision.

Here, the Form ETA 750 was accepted on May 15, 2002. The proffered wage as stated on the Form ETA 750 is \$18.89 per hour (\$39,291.20.00 per year). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, a copy of petitioner's internally generated financial statements, and, copies of documentation concerning the beneficiary's qualifications.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center on August 21, 2003, requested evidence pertinent to that issue.

The Service Center clarified its objections to petitioner's evidentiary submission to that date:

"A review of the evidence submitted with the I-140 ... does not clearly show the petitioner has the ability to pay the proffered wage. Evidence of the petitioner's ability to pay consisted of the petitioner's payroll register and a property assessment. The payroll register does not establish the petitioner has been paying the beneficiary. The payroll register also appears to be an internally generated financial document. As the financial statements were created by and are based on the representations of your management, the documents are considered to be of little evidentiary value. The property assessment is of little evidentiary value when establishing the ability to pay. It is fair to assume that the petitioner is not going to sell the property to pay the wages of the beneficiary...."

In response to the Request for Evidence, counsel submitted the petitioner's internally generated financial statements for the period September 2002 through August 2003 entitled Profit & Loss, an Account "Quick Report," as well as an Individual Parish Budgets Report for the petitioner commencing September 1, 2001 through 2002.

The director denied the petition on January 7, 2004, restating the above objections and finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel submitted a brief and additional evidence. Counsel asserts:

"The petitioner ... can demonstrate through financial documents and affidavits that ... [it is] able to pay the proffered wage of \$39,291.20 to the beneficiary ... during the necessary time period. [The petitioner] has a cook who has worked part-time at the church and who has been intending to leave soon."

"The petitioner has an income of approximately 1 million dollars and they have projects and salary that is available to demonstrate the ability to pay the proffered wage."

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In this instance, there is no evidence submitted that the petitioner employed the beneficiary.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Since the petitioner submitted no income tax returns,<sup>2</sup> no examination is possible.

Since the Service Center is constrained by regulations to what it can accept as proof of the ability to pay the proffered wage from the priority date, there has been a persistent dichotomy between what has been requested by the Service Center and what was offered in evidence by the petitioner. The director has, in an explicit fashion, pointed out to petitioner why its payroll register and a property assessment are not acceptable.

It is clear from the kinds of documentary evidence that the petitioner has produced up to the date of appeal, that it is under a partial disability. As a church, under tax regulations, it is not required to file federal tax returns. As a religious organization, it does not file the kind of annual reports, as public corporations would generate.

The director recognized the above disability and suggested to the petitioner in his request for evidence to:

“Submit a statement from a financial officer of the company which establishes ability to pay the wage.”

“Submit annual reports for 2002, which are accompanied by audited or reviewed financial statements.”

“[Submit] additional evidence such as accredited profit/loss statements, bank account records, or personnel records may be considered but only as supplementary evidence to establish employer's ability to pay.”

However, despite the above, counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. As additional evidence not available to the director at the time of his decision, petitioner submitted the following on appeal:

- A letter from the church's bookkeeper dated February 24, 2004, stating that the church expended \$103,500 in discretionary funds to have the church painted from November 17, 2000 to June 21, 2002.
- A letter from the church's bookkeeper dated February 24, 2004 stating that the beneficiary's salary will come from the replacement of two other paid worker's who will no longer be with that church.
- Copies of Quarterly Combined Withholding, Wage Reporting and Unemployment Insurance Return (NYS-45) for the years 2001 and 2002.
- Various explanatory letters from church personnel concerning the church's finances and financial position.
- The petitioner's bank checking account records from December 30, 2000 through January 30, 2004.

---

<sup>2</sup> The petitioner, as a church, is exempt from filing IRS Form 990.

Counsel submits that budgeted funds could be available to pay the proffered wage. Petitioner has identified two positions, one paid \$12,750.00 annually, and the other paid \$12,240.00 annually, that could be eliminated to free income to pay the proffered wage. Counsel assertion is erroneous.<sup>3</sup> If the two positions were the same or similar to the subject occupation, then in that case, the combined wages could be used as evidence of ability to pay the proffered wage. However, only one of the positions relates to the subject occupation. Also, proof of ability to pay begins on the priority date, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's income is examined from the priority date. It is not examined contingent upon some event in the future such as the elimination of workers and their salaries.<sup>4</sup>

The assertion by counsel that the petitioner's ability to pay the proffered wage is demonstrated by its having met its payroll expenses during 2001 to 2003 is unconvincing. The regulation at 8 C.F.R. § 204.5(g)(2) makes an exception to the necessity of a petitioner demonstrating, with copies of annual reports, federal tax returns, or audited financial statements, its ability to pay the proffered wage, if the petitioner is able to demonstrate that it employs 100 or more workers. No such exception is included in that regulation based on the size of a petitioner's payroll and none will be construed. That the petitioner was able to pay its expenses during the salient years does not demonstrate the ability to pay any additional wages.

Counsel's states that the petitioner is part of the New York Diocese of Catholic Churches and implies that its resources are available to pay the proffered wage. Counsel has not demonstrated that the diocese would be obliged to pay the proffered wage, if the petitioner were unable to do so. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

The primary issue is the determination of the sufficiency of annual income or revenues that petitioner may call upon from the priority date, May 15, 2002. Although, the petitioner has submitted documentary evidence of its finances from its bookkeeper and accountant that show on their face available money, as the director has stated, "... As the financial statements were created by and are based on the representations of your management, the documents are considered to be of little evidentiary value." Had an independent accountant produced these same statements, they would have had more substantive evidentiary value.

By way of corroboration of the revenues stated in the internally generated financial statements mentioned above, counsel submits the petitioner's bank checking account records from December 30, 2000 through January 30, 2004. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

---

<sup>3</sup> Since these wages only total \$24,909.00, additional monies would have to be secured by the petitioner to make up the difference to pay the proffered wage of \$39,291.20.00 per year.

<sup>4</sup> Counsel attempts to make a similar point concerning the used of funds expended to paint the church. If the money was expended for an expense that is a normal building maintenance item, it cannot be used at the same time as a fund to pay a wage.

The fact that an organization maintains a surplus in its banking account does not prove that it has the ability to pay the proffered wage. For example, an organization's expenses may exceed its revenues on a yearly basis with debts going unpaid.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.