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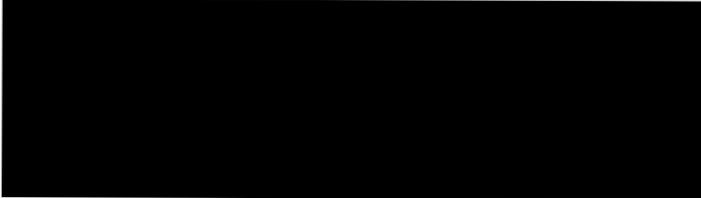
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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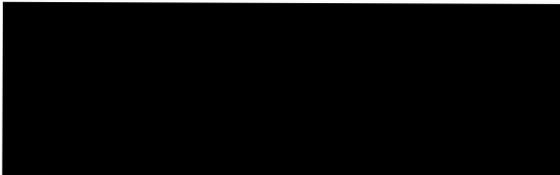
FILE: EAC 03 255 50546 Office: VERMONT SERVICE CENTER Date: DEC 27 2006

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 for

Robert P. Wiemann, Chief
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 sought to classify the beneficiary as an employment based immigrant pursuant section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), as a skilled worker. The petitioner is a church. It sought to employ the beneficiary permanently in the United States as an assistant pastor. As required by statute, the petition was accompanied by an individual labor certification approved by the Department of Labor. The director denied the petition, determining that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

Section 203(b)(3)(A)(i) of 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) not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 Department of Labor. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the Department of Labor and submitted with the instant petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The beneficiary's proposed salary as stated on the labor certification is \$1,300.00 per month or \$15,600.00 per year, based on a 40-hour week. The petition's priority date is April 20, 2001. The visa petition indicates that the petitioner has one employee. The petitioner and counsel assert that the petitioner has not employed the beneficiary. Information on the Form ETA 750B, signed by the beneficiary on April 13, 2001, indicates that the beneficiary worked for the petitioner as a "volunteer pastor assistant" beginning in January 1998 and continuing through the date of the ETA 750B.

With the initial petition, the petitioner submitted a letter from the Internal Revenue Service (IRS) assigning the petitioner an Employer Identification Number and instructing the petitioner to file an Application for Recognition of Exemption if the petitioner wanted to establish its exemption and receive a determination letter recognizing its exempt status.

The director issued a request for evidence on September 16, 2004 concerning the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2),

the director specifically requested that the petitioner provide federal tax returns or the beneficiary's W-2 form for 2002 to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner's former counsel explained that the petitioner has never filed any tax forms and that the beneficiary's salary would be paid by church offerings or donations. He stated further that the church pastor is paid by the [REDACTED] located in Baltimore, MD.

The director denied the petition on June 29, 2004, stating that the petitioner failed to submit regulatory-prescribed evidence of its continuing ability to pay the proffered wage beginning on the priority date, specifically noting that the petitioner's checking account statements were insufficient absent corroborating financial documentation such as a tax return or audited financial statements.

On appeal, counsel states that the record contains bank account statements to demonstrate the petitioner's ability to pay the offered wage. Counsel states further that the [REDACTED] [REDACTED] remits \$7,000 monthly to the petitioner for payment of employee salaries. Counsel also states that the North American Division prepares all financial filings, including IRS filings, which are not available to the local churches, including the petitioner. As supporting documentation, counsel submits a document entitled [REDACTED] "World Church Structure and Governance," and letters from the petitioner's pastor and from the president of the Spanish Ministry of Churches.¹

The regulation at 8 C.F.R. § 204.5(g)(2) requires federal income tax returns, audited financial statements, or annual reports as evidence of a petitioner's ability to pay a proffered wage. The regulation neither states nor implies that a business checking account may be submitted in lieu of its explicit requirements. Additionally, for petitioning entities with over 100 employees, a letter from a financial officer may be accepted in lieu of tax returns, audited financial statements, or annual reports. The regulation neither states nor implies that an entity with less than 100 employees may submit such a letter or that a letter from, in this instance, the president of the [REDACTED] would suffice in lieu of its explicit requirements.

The prospective U.S. employer named on the approved labor certification and the visa petition is [REDACTED] [REDACTED]. The regulation at 8 C.F.R. § 204.5(g)(2) obliges this employer to submit evidence establishing that it has the ability to pay the proffered wage. This ability must be demonstrated beginning as of the priority date of April 20, 2001 and continue until the beneficiary obtains lawful permanent resident status. Counsel and the petitioner assert that its affiliation with the [REDACTED] and the Columbia Union Conference, which is part of the larger North American Division, demonstrates its continuing ability to pay the proffered wage beginning on the priority date. However, any assertions regarding those entities are irrelevant since those are not the petitioning employer. See *Avena v. I.N.S.*, 989 F. Supp. 1, 7 (D.D.C. 1997). Regardless, the record of proceeding does not contain any regulatory-prescribed evidence concerning either of those entities' continuing ability to pay the proffered wage beginning on the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm.

¹ The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

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Because of its failure to submit regulatory-prescribed evidence, the petitioner has failed to demonstrate its 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.