

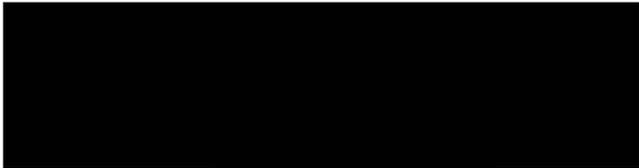


U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 22 2006
EAC-03-079-52867

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 church. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 petition's priority date, which is the date the Form ETA 750 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 priority date in the instant petition is April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$13.01 per hour, which amounts to \$27,060.80 annually. On the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on August 23, 2002.

The I-140 petition was submitted on December 9, 2002. On the petition, the petitioner claimed to have been established on November 16, 1998, to currently have one employee and to have a gross annual income of \$213,741.00. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated November 14, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on February 6, 2004.

In a decision dated July 22, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. On appeal counsel states that the petitioner is a congregation which is part of a larger parent organization which is the American Baptist Churches of Massachusetts. Counsel states that the parent organization has ample financial resources and that the petitioner relies financially upon its parent organization.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 26, 2001, the beneficiary claimed to have worked for the petitioner beginning in November 1998 and continuing through the date of the ETA 750B.

The record contains multiple copies of a Form 1099-MISC Miscellaneous Income statement for the beneficiary for 2003. No Form 1099-MISC statements for other years are in the record, nor does the record contain copies of any Form W-2 Wage and Tax Statements of the beneficiary. The relationship of the non-employee compensation shown on the Form 1099-MISC for 2003 to the proffered wage is shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	not submitted	\$27,060.80	no information
2002	not submitted	\$27,060.80	no information
2003	\$27,060.80	\$27,060.80	\$0.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the years 2001 and 2002. For the year 2003, the Form 1099-MISC purports to show non-employee compensation to the beneficiary in exactly the amount of the proffered wage. Without corroborating evidence, that Form

1099-MISC is insufficient to establish the petitioner's ability to pay the proffered wage during 2003. No copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2003 was submitted in evidence, and no paycheck stubs or other pay statements of the beneficiary were submitted in evidence. Nor did the petitioner submit any other evidence which might confirm that the beneficiary was actually paid the compensation stated on the Form 1099-MISC. A Form 1099-MISC usually contains less information than a Form W-2 Wage and Tax Statement, which normally has information on amounts withheld for various federal and state taxes, as required by law. Moreover, a Form W-2 Wage and Tax Statement constitutes a representation by the employer that the amounts withheld for those taxes have been transmitted to the appropriate federal and state tax authorities. The Form 1099-MISC in the record in the instant case shows no withholding amounts of any type, and accordingly it makes no such representations.

It may be noted that on the ETA 750B the beneficiary claimed to have been employed by the petitioner beginning in 1998. The record does not explain the absence of Form W-2 Wage and Tax Statements showing employee compensation to the beneficiary for each of the years at issue in the instant petition, nor the absence of any evidence pertaining to the beneficiary's compensation for the years prior to 2003.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "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." The record contains no explanation for the inconsistencies in the evidence noted above.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record in the instant case contains no copies of any income tax returns for the petitioner or for any parent organization. The petitioner is a church, which counsel states is tax exempt under section 501(c)(3) of the Internal Revenue Code.

The record contains a copy of unaudited financial statements for the petitioner for the years 2001 and 2002. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel asserts in his brief that the petitioner is one of 289 congregations within a parent organization which is the American Baptist Churches of Massachusetts (TABCOM). Counsel states that the petitioner relies financially upon its parent organization, TABCOM. Counsel submits copies of audited financial statements of TABCOM as evidence on appeal.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). No evidence in the record supports counsel's assertion that the petitioner is a Baptist church, nor that the petitioner is a congregation within the American Baptist Churches of Massachusetts. Counsel submits on appeal a copy of a letter dated September 12, 2001 to the American Baptist Churches in the U.S.A. from the Internal Revenue Service. That letter confirms the tax exempt status of American Baptist Churches in the U.S.A. However, nothing in the record ties that letter to the petitioner. The petitioner's federal identification number as shown on the Form 1099-MISC statements of the beneficiary is a number ending in the three digits "334." But that federal identification number does not appear on the letter from the Internal Revenue Service to the American Baptist Churches in the U.S.A., which is presumably a separate corporation from its member congregations. Moreover, the petitioner's name, [REDACTED] also contains no indication that the petitioner is a Baptist church.

For the foregoing reasons, the evidence fails to establish that the petitioner is a member congregation within the American Baptist Churches of Massachusetts (TABCOM) or within the American Baptist Churches in the U.S.A. Accordingly, the audited financial statements of TABCOM may not be relied upon as evidence of the petitioner's ability to pay the proffered wage.

In his decision, the director analyzed the financial statements of the petitioner in the record. The director noted that according to those statements, the petitioners total expenses for wages were in the amount of \$11,389.00 for all employees. The director found that that figure failed to establish the petitioner's ability to pay the proffered wage in 2002. The director also found that the record failed to establish the petitioner's ability to pay the proffered wage as of the date of filing. The director's decision to deny the petition was correct, based on the evidence then in the record. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail to overcome the decision of the director.

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.