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**U.S. Citizenship
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Services**

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FILE: LIN 04 095 52033 Office: NEBRASKA DIRECTOR Date: **MAY 16 2006**

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Director, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as an assistant pastor. 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.

The petition stated that the church was established in 1984, and, employed two individuals.

On appeal, counsel 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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 the Service.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 5, 2003. The proffered wage as stated on the Form ETA 750 is \$19,386.00 per year.

The petition does not state the petitioner's gross and net incomes. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary at 1424 S. 55th Street, Kansas City, Kansas.

In support of the petition, counsel submitted a letter of recommendation; a certificate; and, eight business-checking statements.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director on March 26, 2004, requested, *inter alia*, additional evidence pertinent to that ability. Consistent with 8 C.F.R. § 204.5(g)(2) the director requested copies of annual reports, federal tax returns, or audited financial statements to show that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The Director also noted that the petitioner might submit W-2 Wage and Tax Statements or Forms MISC-1099 showing wages or compensation that the petitioner paid to the beneficiary as evidence of the petitioner's ability to pay wages.

In response, counsel submitted a letter, dated June 10, 2004, from the petitioner's principal stating, *inter alia*, that the petitioner has the ability to pay the proffered wage.

Counsel submitted property information, additional bank checking statements, and cancelled paychecks to the two staff individual of the church (the payments do not include the beneficiary).

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 14, 2004, and, denied the petition.

On appeal, counsel submits a legal brief with a Form G-28. Counsel states that of the two staff individuals noted in the petition, one is no longer employed as of December 2003. His salary was \$1,500.00 per month. The other individual, [REDACTED] is, at the time of counsel's brief submission, employed as an assistant pastor at the rate of \$1,100.00 per month.

Counsel contends that although "... there does not appear to be sufficient funds available to pay ... [the beneficiary's] salary and cover the living expenses of other personnel," that the realty report indicating the total appraised valuation of \$277,970.00 evidences the ability to pay the proffered wage.

Counsel further states that the petitioner does not have to show that it pays the beneficiary the proffered wage. Until the beneficiary should receive his preference visa, the petitioner is not obligated to pay the beneficiary the proffered wage for purposes of the determination of the ability to pay the proffered wage. However, the argument of the petitioner's counsel that the Director erred in requesting the W-2 form showing wages paid to the beneficiary is incorrect. The Director did not require that the petitioner submit that W-2 form, but only suggested it to petitioner as one avenue to pursue in demonstrating the petitioner's ability to pay the proffered wage. Submission of W-2 forms showing wages paid to the beneficiary is one means of showing that the petitioner was able to pay at least some portion of the proffered wage, and may be used with other financial information to prove the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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.

The assertion by the petitioner's counsel that the petitioner's ability to pay the proffered wage is demonstrated by its having paid wages of \$2,600.00 monthly 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 states that its realty assets are evidence of the petitioner's ability to pay the proffered wage. The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage. Moreover, at least of the assets cited by counsel is property of the church itself, so it is not likely that the petitioner will liquidate the church to pay for a church employee. Should the petitioner continue to pursue this petition, this issue should be addressed further.

Counsel advocates the use of the cash balance of the business accounts to show the ability to pay the proffered wage. 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. As a church, the petitioner may not be required to pay income tax or file a tax return, but the regulations provide an alternative way to demonstrate the ability to pay the proffered wage by audited statements. Nevertheless, the record of proceeding does not contain a Form 990 or any other required evidence.

The petitioner submitted no reliable evidence of any funds at its disposal during that year that it could have used to pay additional wages. The petitioner has not demonstrated the ability to pay the proffered wage.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.