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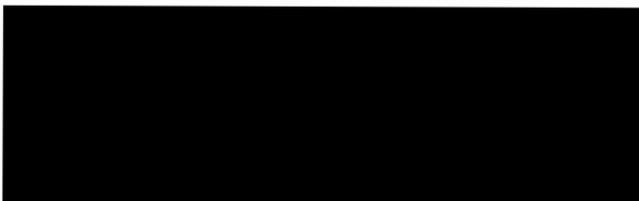
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: OCT 24 2006
EAC 03 164 51497

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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.

A handwritten signature in black ink, appearing to read "Michael Valdes".

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 a church. It seeks to employ the beneficiary permanently in the United States as a pastoral assistant. 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 petitioner, through counsel, filed an untimely appeal. Pursuant to 8 C.F.R. § 103.3(a)(2)(v)(B)(2), the director treated the untimely appeal as a motion to reopen as described in 8 C.F.R. §103.5(a)(2) and rendered a decision on August 4, 2004. The director affirmed her previous decision denying the petition based on the petitioner's failure to establish its ability to pay the proffered wage.

On appeal, counsel asserts that the proffered wage may be lowered based on the consent of the senior pastor, and the beneficiary, [REDACTED]

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 at 8 C.F.R. § 204.5(g)(2) provides:

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. 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 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 September 27, 1999. The proffered wage as stated on the Form ETA 750 is \$26.00 per hour, which amounts to \$54,080 per year. The current beneficiary is a substitution for the original beneficiary.

Following an examination of the petitioner's 1999, 2000, 2001, 2002, 2003, Form 990, Return of Organization Exempt from Income Tax, as well as the other evidence submitted to the underlying record and with the petitioner's motion, the director determined that the petitioner failed to establish its continuing ability to pay the proffered wage of \$54,080 during all of the relevant years. On August 4, 2004, the director concluded that the grounds for the denial of the petition had not been overcome and affirmed the denial of the petition.

Although counsel's "Motion to Appeal" is styled as an attempt to continue the beneficiary's Application to Adjust Status (I-485), he addresses the director's decision of August 4, 2004, by asserting that the proffered wage of \$26.00 per hour should be amended to \$16.56 per hour. Counsel maintains that the lower prevailing wage is more realistic than the \$26.00 per hour and reflects the appropriate salary for a pastoral assistant performing the duties set forth in the ETA 750 A. He attaches a letter, dated August 30, 2004, signed by the senior pastor and the beneficiary, that sets forth the terms of the beneficiary's employment as a pastoral assistant at \$16.56 per hour and contends that it is reasonable to amend the prevailing wage by agreement between these parties.

We do not agree. Amending the prevailing wage is not within the purview of CIS. Although the Dept. of Labor¹ and the former Immigration and Naturalization Service (INS) had a long standing agreement that changes on the labor certification relating to changes to the name and address of the employer would be made by INS, no such agreement included changes in the job requirements (items 14 and 15) or (prevailing wage rates) because it relates to the process which tests the U.S. labor market. CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). It is not current CIS policy to, in effect, alter the job specifications set forth on the Dept. of Labor Form ETA 750 in order to cure even inadvertent errors made by a petitioner. If the petitioner believes that the wage or job title is incorrect, it may file a new application for a labor certification with the Department of Labor.

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.

¹DOL policy bars amendments of the approved labor certification except to correct mistakes made by the certifying officers, e.g., in spelling of the employer or alien's name. The only amendments to the substantive elements that may be made by a certifying officer is where the amendment was approved prior to the issuance of certification. *See* DOL Field Memorandum No. 47-92, dated May 7, 1992, published in 57 Fed. Reg. 31219 (1992).