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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

JUN 30 2004

FILE: WAC 02 259 51954 Office: CALIFORNIA SERVICE CENTER Date:

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: 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

DISCUSSION: The employment based immigrant visa petition was denied by the Director, California Service Center. The Administrative Appeals Office (AAO) dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

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 nursery school. It sought to employ the beneficiary permanently in the United States as a pre-school teacher. 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, a religious based tax-exempt nursery school, 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. On December 17, 2003, the AAO dismissed the petitioner's appeal, concluding that the petitioner's financial documentation contained in the record did not overcome the director's grounds for denial of the petition.

On motion, the petitioner submits additional information and asserts that its financial data establishes its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(2) provides that a motion to reopen must present new facts and be supported by affidavits or other documentary evidence. In the present case, the petitioner has submitted new evidence consisting of letters from the pastor of the Malibu United Methodist Church and the district superintendent of the Los Angeles District of the California-Pacific Annual Conference of the United Methodist Church, as well as financial reports from those two entities. Thus the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(2).

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) 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 beneficiary's proposed salary as stated on the labor certification is $12.59 per hour or $26,187.20 per year, based on a 40-hour week. The petition's priority date is September 16, 1999. The visa petition

indicates that the petitioner was established in 1962 and has 13 employees. The record further reflects that the petitioner has employed the beneficiary, paying her $2,557 during the last two quarters of 1999 and $4,613 during the first two quarters of 2000. The record contains no other evidence of payment of wages to the beneficiary, and, as noted in the previous AAO decision, these sums appear to represent compensation at a level substantially less than the proffered wage.

On motion, the petitioner submits audited financial reports of the California-Pacific Annual Conference of the United Methodist Church covering the period from January 1, 1999 through December 31, 2002. A letter from the superintendent of the Los Angeles District of this Annual Conference was also submitted. The superintendent states that the Malibu United Methodist Church and Nursery School are connected to the California-Pacific Annual Conference by the Los Angeles District and that although the petitioner has been self-sufficient for many years, "beyond what the District can provide, the California-Pacific Annual Conference maintains funds to help churches and staffs carry out ministry to all ages."

It is noted that the prospective U.S. employer named on the approved labor certification and the visa petition is the "Malibu Methodist Nursery School & Infant/Toddler Center." 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 September 16, 1999 and continue until the beneficiary obtains lawful permanent resident status. The evidence submitted by the petitioner relating to the assets of the California-Pacific Annual Conference of the United Methodist Church is irrelevant since it is not the petitioning employer or the entity paying the wages of the local workers, including this beneficiary. *See Avena v. I.N.S.*, 989 F. Supp. 1, 7 (D.D.C. 1997). It is additionally noted that, according to the evidence presented on motion, the California-Pacific Annual Conference of United Methodist Church represents an entity at least two levels removed from the petitioning pre-school.

The petitioner also submits on motion, various unaudited balance sheets, and unaudited financial summary income statements of the Malibu United Methodist Church and of the petitioner. Although the Malibu United Methodist Church is an entity more closely connected to the petitioning pre-school as shown by the pastor's letter of support, it is noted that 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 an *unaudited* document may be submitted in lieu of its explicit requirements. An audit is performed by a certified public accountant and is an examination of financial statements, accounting records, and other supporting evidence both within and outside the organization. As noted by the AAO decision of December 17, 2003, unaudited, internally generated financial statements such as the ones the petitioner previously submitted to the record, cannot be regarded as a reliable evidence of a petitioner's ability to pay the proffered wage. They are based on the representations of the management of an organization and are not subject to the scrutiny of anyone outside the organization. For example, an unaudited income statement, initially submitted to the record, shows that the petitioner declared net income of $1,908.66 as of December 31, 1999. Submitted on appeal is a subsequent version of the same unaudited income statement covering the same reporting period with the same categories of revenues and expenses, but which shows $1,847.97 as net income. Also submitted on appeal, referenced in "signed annual reports" are similar unaudited statements showing $1,847.97 as net income for the period ending December 31, 1999.

Submitted with its motion to reopen, however, the petitioner's unaudited statement summarizing its net income for 1999-2001 shows that its 1999 "net income before church donation" was $57,000. This net income figure includes only two categories of revenues and expenses. Neither statement of the petitioner's

1999 net income can be reliably classified as competent evidence of its ability to pay the beneficiary's proffered wage during that period of time.

Accordingly, based on a review of the evidence contained in the record, audited financial statements of the conference and unaudited financial statements of the petitioner and affiliated church, and the foregoing discussion, the AAO cannot conclude that the petitioner has presented sufficient persuasive evidence to demonstrate its continuing ability pay the proffered salary as of the priority date of the petition. As such, the petitioner's motion to reopen does not overcome the grounds of dismissal as set forth in the AAO decision of December 17, 2003.

Upon further review of the record, and beyond the decision of the director and the previous AAO decision, it is additionally noted that the petitioner failed to provide any proof that the beneficiary has completed two years of college as set forth in the terms of the labor certification. Although Part B of the ETA 750, as well as the petitioner's assertions reference the beneficiary's attendance at a California college, the record does not contain any official diploma or grade transcript supporting this assertion. The petitioner's response to the director's original November 8, 2002, request for evidence only included documentation that the beneficiary had completed two semesters of post-secondary education at a Brazilian institution.

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 met that burden.

ORDER: The AAO's decision of December 17, 2003 dismissing the petitioner's appeal is affirmed. The petition remains denied.