identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

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

U.S. Citizenship and Immigration Services

B6

[redacted]

File: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 07 2007

SRC-06-122-51397

In re: Petitioner:
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:

[redacted]

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, Texas Service Center ("director"), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner operates an educational institution, and seeks to employ the beneficiary permanently in the United States as a teacher, secondary school ("Science and Literature Teacher"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). As set forth in the director's June 14, 2006 decision, the case was denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[1]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

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

[1] The instructions to Form I-290B allow submission of additional evidence on appeal. The I-290B instructions are incorporated into the regulations 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).

> 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 the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 15, 2001. The proffered wage as stated on Form ETA 750 is $32,130 per year, based on a 40 hour work week. The labor certification was approved on February 6, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on March 9, 2006. On the I-140, the petitioner listed the following information: date established: 1951; gross annual income: "non-profit organization;" net annual income: not listed; current number of employees: seventy-three.

On March 24, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: proof related to the petitioner's ability to pay the proffered wage, including audited financial statements, audits, bank statements, or evidence of wages paid to employees, and/or wages paid to the beneficiary. The petitioner responded. Following consideration of the petitioner's response, on June 14, 2006, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner employed and paid 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. In the case at hand, the petitioner provided the following evidence of payment to the beneficiary:

Year	W-2 wages
2005	$31,123.76
2004	$31,441.75
2003	$26,828.10
2002	$28,258.35
2001	$27,373.05

The petitioner also provided paystubs dated January 30, 2006, through March 30, 2006, showing that the beneficiary earned $1,344.66 for the two week time period represented on each paystub. In each year, the beneficiary was paid less than the proffered wage, so that the W-2 Forms and paystubs alone would be insufficient to establish the petitioner's ability to pay the proffered wage from the priority date of March 2001 until the beneficiary obtains permanent residence. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage in 2001, 2002, 2003, 2004, and 2005.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. 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. Texas 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. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner submitted a letter from the Internal Revenue Service to the Associate General Counsel for United States Conference of Catholic Bishops, dated July 1, 2005, along with guidance from the Associate General Counsel to Archbishops, Bishops, Diocesan Attorneys, and State Conference Directors concerning the IRS 2005 Group Ruling. The IRS letter set forth that in a ruling dated March 25, 1946, the IRS held:

> That the agencies and instrumentalities and all educational, charitable, and religious institutions operated, supervised, or controlled by or in connection with the Roman Catholic Church in the United States, its territories, or possessions appearing in *The Official Catholic Directory 1946*, are entitled to exemption from federal income tax under the provisions of section 101(6) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the 1986 Code. This ruling has been updated annually to cover the activities added to or deleted from the Directory.
>
> . . . .
>
> *The Official Catholic Directory* for 2005 shows the names and addresses of all agencies and instrumentalities and all educational, charitable, and religious institutions operated by the Roman Catholic Church in the United States, its territories and possessions in existence at the time that the Directory was published.

The explanatory memo from the Associate General Counsel for the U.S. Conference of Catholic Bishops provides that an organization listed in *The Official Catholic Directory* ("OCD") would not be required to pay federal income tax, or federal unemployment tax. Further, the memo provides that "all organizations included in the OCD must file Form 990, Return of Organization Exempt from Income Tax, unless they are eligible for a mandatory or discretionary exception. There is no automatic exemption from the Form 990 filing requirement simply because an organization is listed in the OCD."

The petitioner did not provide evidence that it filed Form 990 or specific evidence that the entity was listed as a qualifying institution in the most recent *Official Catholic Directory*. The petitioner should provide such evidence in any further filings.

In the absence of federal tax returns, a petitioner may provide other regulatory prescribed evidence, such as audited financial statements, or an annual report. The RFE also provided that bank statements would be accepted. The petitioner failed to provide any information beyond the W-2 statements, which alone were deficient to show that the petitioner had the ability to pay the proffered wage.

On appeal, counsel cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo) in support of this premise. The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary. Counsel contends that as the petitioner is presently paying the beneficiary the proffered wage, and, therefore, the petitioner has the ability to pay the proffered wage.

Although the petitioner may now be employing and paying the beneficiary the proffered wage, the May 4 Yates Memo does not negate the petitioner's regulatory requirement to show that it can pay the beneficiary the proffered wage from the priority date of May 2001 to the time that the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

The petitioner additionally submitted income and expense summaries for the petitioner's last five fiscal years. The summaries are not regulatory prescribed evidence in the form of audited financial statements or annual reports. The petitioner did not provide that it is unable to provide such evidence. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited statements submitted are not persuasive evidence.

Accordingly, based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. [2] The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[2] In any further proceeding, the petitioner should submit evidence that the school itself is specifically exempt from paying taxes, and regulatory prescribed evidence to allow us to conclude that the petitioner can pay the proffered wage.