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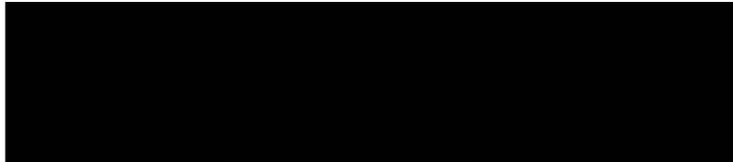
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



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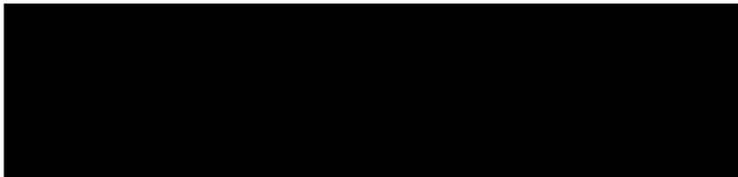


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: JAN 24 2008
SRC 06 136 52038

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a school. It seeks to employ the beneficiary permanently in the United States as an elementary school teacher. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor. 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. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated August 23, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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, which is the date the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on October 25, 2005. The proffered wage as stated on the Form ETA 9089 is \$30,123.00 per year.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor; a letter from the petitioner dated February 16, 2006; a Certificate of Good Standing dated October 7, 1999 of a non-profit, non-stock corporation named Archbishop of Agana; the beneficiary's U.S. Internal Revenue Service Form 1040EZ tax returns for 2002, 2003, 2004 and 2005 as well as Wage and Tax Statements for the same years; a certificate of exemption from the Government of Guam for the Archbishop of Agana, a non-profit, non-stock corporation dated June 6, 2006; an employee list of the petitioner dated May 1, 2006 with wage information; and the petitioner's Employer's Quarterly Tax for the Government of Guam statement dated March 31, 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a non-profit, non-stock corporation. On the petition dated March 17, 2006, the petitioner claimed to have been established in 1955 and to currently 40 employ workers. The net income and gross annual income stated on the petition were \$747,758.39 and \$1,011,587.96 respectively.² On the Form ETA 9089, signed by the beneficiary on February 17, 2006, the beneficiary did claim to have worked for the petitioner as an elementary school teacher since January 3, 2002.

On appeal, the petitioner asserts the following:

- (1) The salary Petitioner paid the Beneficiary is for school year of 9 months and a half. Therefore, his pro-rated annual salary for 12 months exceeds the prevailing wage.
- (2) Petitioner is part of the Arch Diocese of Agana, which has more than 100 employees and has the ability to pay Beneficiary's salary as determined by the prevailing wage.

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

² The source of this financial information is not stated or referenced in the record of proceeding and the financial data introduced by the petitioner into the record does not appear to correlate with those figures given for net income or gross annual income in the petition.

Accompanying the appeal, counsel submits a legal brief dated October 18, 2006.

In his brief counsel contends that the director's decision is based upon the difference between the offered salary of \$30,123.00 and the beneficiary's reported income of \$26,659.00 stated on the beneficiary's 2005 tax return.

Counsel asserts that the petitioner's ability to pay the proffered wage should be determined based upon a ten-month "school" year³ rather than a 12-month calendar year since the beneficiary's "employment" is based upon an employment contract wherein the petitioner has agreed to pay the beneficiary "\$26,000.00 annually on ... [a]10-month school year basis." Therefore according to counsel, the pro-rated 12-month salary "should be \$31,200.00."

An examination of the labor certification, ETA 9089, Block "F" demonstrates that the petitioner stated that the prevailing wage as provided by the "State Workforce Agency" for the occupation "Elementary School Teacher" skill level "II" is \$30,123.00 *per year*. In Block "G" of the labor certification the offered wage is stated as \$30,123.00 *per year*. Therefore the prevailing wage and offered wage that the petitioner shall pay the beneficiary should the subject preference visa be approved is \$30,123.00 *per year*. By signing the labor certification and agreeing to its terms and conditions, (in this case ETA 9089, Block "N," item 1.⁴) the petitioner agreed that it shall pay the beneficiary the prevailing wage on an annual basis according to the conditions of the labor certification.

As additional evidence, counsel has submitted the following documents: a letter from the petitioner dated February 16, 2006; a verification of employment from a former employer of the beneficiary dated July 17, 2006; an employment contract between the petitioner and the beneficiary dated August 1, 2006, that stated in pertinent part "That said employee [i.e. the beneficiary] shall teach for an annual salary of \$26,000.00, paid in equal installments semi-monthly for ten months;" unaudited⁵ financial statements for the petitioner for the year July 1, 2005 to June 30, 2006; an "Account Reconciliation" of the petitioner's regular bank checking account as of June 30, 2006;⁶ a certificate of exemption from the Government of Guam for the Archbishop of

³ The subject employment contract between the petitioner and the beneficiary clearly states that the annual salary is \$26,000.00. The fact that the salary is paid over ten months rather than 12 months does not alter the fact that the salary is clearly set forth as an annual salary. Further, the petitioner has offered the beneficiary a proffered wage of \$30,123.00 per year. The fact that the petitioner pays that wage in ten installments rather than 12 does not alter the requirement that the petitioner establish its ability to pay the entire proffered wage of \$30,123.00.

⁴ Item 1 stated, "The offered wage equals or exceeds the prevailing wage and I will pay the prevailing wage." According to counsel the offered wage is \$26,000.00 rather than \$30,123.00 that is the prevailing wage.

⁵ Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁶ Counsel's reliance on the balances in the petitioner's bank account is also 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)

Agana, a non-profit, non-stock corporation, dated September 5, 2006, that stated in pertinent part that "Bishop Baumgartner Memorial School, like the Academy of our Lady in Hagatna is owned by the Corporation and all other properties under the Diocese of Agana; " a certification from the Government of Guam for the Archbishop of Agana, a non-profit, non-stock corporation that indicated it was effective January 24, 1969; a "Certificate of Transacting Business under a Fictitious Name, DBA" dated September 5, 2003, one of which is Bishop Baumgartner Memorial School; a Certification dated October 7, 1999 of Archbishop of Agana, a non-profit, non-stock corporation; an Incorporation Certificate of Archbishop of Agana, a non-profit, non-stock corporation dated as of December 23, 1996; a Certificate of Good Standing dated October 7, 1999 of Archbishop of Agana; and a Certificate of Tax Exemption from the Government of Guam for the Archbishop of Agana, dated September 22, 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification 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, Citizenship and Immigration Services (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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. The petitioner has submitted the beneficiary's U.S. Internal Revenue Service Form 1040EZ tax returns for 2002, 2003, 2004 and 2005 as well as Wage and Tax Statements for the same years.

The Form ETA 9089 was accepted on October 25, 2005, which is the priority date for determination of the proffered wage. Financial data submitted for time periods before October 25, 2005 is not evidence of the petitioner's ability to pay the proffered wage from that date. In 2005, the petitioner paid the beneficiary \$26,659.00 according to the W-2 statement submitted into evidence. Therefore the petitioner must establish that it can pay the difference between the proffered wage of \$30,123.00 and the wages paid the beneficiary of \$26,659.00 which is \$3,464.00 in 2005.

The petitioner also submitted a list dated May 1, 2006 of 42 employees with wage information that identified the beneficiary and stated his wages paid were \$7,800.00. There is information that this amount was his first quarter wages in 2006. This amount indicates an annual wage of \$31,200, however as detailed above, the petitioner had agreed to pay the beneficiary \$26,000.00 and no more for the year. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

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.

No tax returns for Bishop Baumgartner Memorial School were submitted to demonstrate financial information concerning the petitioner's ability to pay. According to counsel the petitioner did not prepare or file tax returns because of its particular tax exempt status. That being the case, copies of annual reports or audited financial statements for the petitioner are required pursuant to the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁷ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

Counsel asserts that the petitioner is a "unit" of the Archbishop of Agana that has more than 100 employees and based upon this criteria⁸ this is evidence of the ability to pay the proffered wage.

Since the Archbishop of Agana, a non-profit, non-stock corporation, is not the petitioner nor did it secure the labor certification, it is not a party to this petition nor does it have standing in this review process. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Despite counsel's assertion that the petitioner was a unit of the Archbishop of Agana, a non-profit, non-stock corporation, assuming *arguendo* that such evidence is relevant, the petitioner has not provided any financial data for the Archbishop of Agana.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁷ 8 C.F.R. § 204.5(g)(2).

⁸ As already stated, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part, "... 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...."