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U.S. Department of Homeland Security
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Washington DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 02 2009

EAC 04 071 52832

IN RE: Petitioner: [redacted]
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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Acting 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 an evangelist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), 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.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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. *See also* 8 C.F.R. § 204.5(l)(2).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of 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 [United States Citizenship and Immigration Services (USCIS)].

The petitioner must establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); Matter *of Wing's Tea House,* 16 I&N Dec. 158 (Act. Reg. Comm. 1971).

Here, the ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on Part A of the ETA 750 is $18.58 per hour, which amounts to $38,646.40 per year. On Part B of the ETA 750, signed by the beneficiary on April 23, 2001, the beneficiary claims to have worked for the petitioner as an evangelist since 1991. It is unclear if this position was as a paid employee or as a volunteer. The petitioner did not submit any evidence of wages paid to the beneficiary during the relevant period of time from 2001 to the present.

On Part 5 of the Immigrant Petition for Alien Worker (I-140) which was filed on January 9, 2004, the petitioner states that it was established in 1991, reports a gross annual income of $97,800, no net annual income and currently employs "1 +" workers.

The I-140 petition was signed by The accompanying employment verification letter, dated June 10, 1997 and submitted with the I-140, was also signed by He affirmed that the beneficiary had been serving as an evangelist for the petitioner since January 1, 1990. He further stated that he had been serving as pastor for the petitioner since 1988. This contradicts the statement on the I-140 petition that the church was established in 1991. The record contains no explanation of this discrepancy. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In support of its ability to pay the proffered wage, the petitioner provided a copy of a letter from the Internal Revenue Service (IRS), dated March 26, 1997, which informed the petitioner that it was exempt from federal income tax under the Internal Revenue Code. The letter also informed the petitioner that it was not required to file Form 990, Return of Organization Exempt From Income Tax. If an entity is required to file Form 990, it must do so where its gross receipts are normally more than $25,000.

The petitioner's initial financial documentation of its ability to pay the proffered wage consisted of copies of two unaudited financial statements. They provided information for the period(s) from January 1 to December 31, 2001 and from January 1 to December 31, 2003, respectively.

Each was accompanied by a letter from who affirmed the accuracy of the statements.

The director denied the petition on August 9, 2004. She reviewed the financial statements offered and noted that the December 31, 2001, financial statement failed to demonstrate that the remaining sum of $20,142.65 left after subtracting total expenditures of $74,977.40 from total income of $95,120.04 was not sufficient to pay the proffered wage of $38,646.40. Similarly, in 2003, the difference of $20,367.45 remaining after subtracting total expenditures of $77,462.80 from total income of $97,830.25 was not sufficient to cover the proffered wage.

On appeal, the petitioner, through counsel, provided a copy of a similar financial statement and accountant's letter covering the calendar year of 2002. The difference between total income and expenditures was $15,184.16. An additional letter, dated August 27, 2004 from [redacted] states that surpluses from Church activities has provided a cash balance of $60,387 as of December 31, 2003, which has been used to support the beneficiary's employment. He adds that education programs in prior years had been performed by outside teachers, but that these sums would support the beneficiary's salary.

The petitioner has failed to establish the petitioner's continuing ability to pay the proffered salary of $38,646.40 beginning as of the priority date of April 27, 2001. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application 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. As noted above, the language set forth in the regulation at 8 C.F.R. § 204.5(g)(2) clearly requires that the ability to pay the certified wage is demonstrated at the time the priority date is established and is *continuing* until the beneficiary obtains lawful permanent residence. (Emphasis added.) *See also Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

The financial statements submitted to the record are not audited. Further, they did not establish the petitioner's ability to pay the proffered wage. 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 whether the financial statements of the business are free of material misstatements. The accountant's letters accompanying these three financial statements submitted to the record do not state that they were produced through an audit. As such, they are not probative of the petitioner's ability to pay the certified wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the

beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets[1] during the given period, it will be deemed to have demonstrated its ability to pay for that specified period of time.

In this case, as noted above, the financial statements provided were not audited and cannot be considered as probative of the petitioner's ability to pay the proffered salary. Additionally, no first-hand evidence was provided to show that the beneficiary has been paid a specified wage for hours worked. [redacted] statement that her employment has been supported from funds raised by church activities is not sufficient to demonstrate that she has been paid a specified wage for services provided.[2] No Wage and Tax Statements (W-2s), Form 1099s (Miscellaneous Income), or payroll records including negotiated checks have been provided to show compensation paid to the beneficiary should be considered. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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, USCIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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.*

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[1]Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. The petitioner's year-end current assets and current liabilities may be shown on Schedule L of corporate federal tax returns, or may be indicated on audited financial statements.

[2]The unaudited statements list a salary of $24,000 and a $12,000 housing allowance under "pastoral services." Whether this represents wages paid to the beneficiary is unclear. However, the AAO would note that the required salary is $38,646, which must be paid in wages, and not in other compensation, such as housing.

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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105,(D. Mass. 2007). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

[redacted]s suggestion that past education expenses plus surpluses could be considered to support the beneficiary's proffered wage was not accompanied by any documentation that would identify specific employees, work performed, wages paid, verification of full-time employment or provide evidence that the employer has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. [redacted] hypothesis does not establish the petitioner's ability to pay the proffered wage.[3]

As set forth above, the petitioner has not provided sufficient evidence to demonstrate that it has had the ability to pay the proffered wage. As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a *continuing* ability to pay the proffered wage beginning on the priority date, which in this case is April 27, 2001. Based on a review of the underlying record and the arguments and evidence submitted on appeal, it may not be concluded that the petitioner established a continuing ability to pay the proffered wage.

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.

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[3] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.