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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: APR 30 2012 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition and subsequent motion to reopen were denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director is withdrawn, and the matter is remanded to the director for further consideration and issuance of a new decision.

The petitioner is a non-profit religious organization. It seeks to employ the beneficiary permanently in the United States as a piano instructor. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Parts A & B, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL). 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. The director also determined that the petitioner had not established that the educational part of the church consisting of its "College and the Pre-school" operates as part of the church and that the beneficiary would be employed full-time.

Section 203(b)(3)(A)(i) of the 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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 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 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the USDOL. *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 750 as certified by the USDOL 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 750 that was accepted for processing on January 3, 2005 shows the proffered wage as $19.10 per hour which equates to $39,728 per year based on a 40-hour workweek. The position requires a four year bachelor of arts degree in "Piano Music."

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows the petitioner is structured as a non-profit, Christian-based church. On the Form I-140 filed on January 24, 2008, the petitioner indicated that the organization was established in 1985 and employed 27 workers. On the Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on December 22, 2004, she stated she had been employed by the petitioner since October 2000.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. 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 a 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, United States Citizenship and Immigration Services (USCIS) 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay. The beneficiary's IRS Forms W-2, Wage and Tax Statement, show compensation received from the petitioner on or after the priority date, as follows:

2005	2006	2007
$9,600	$12,680	$16,728

In this case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $39,728 per year.

If, as in this case, 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 would normally examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses.[1] However, the petitioner explains that because the petitioner is a

[1] 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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011). 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.

church and a tax exempt organization, it is not required to file, and does not file, income tax returns with the federal government. Consequently, the petitioner's federal tax returns are not available to the USCIS for analysis.

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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, 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The educational part of the church claimed by the petitioner and referred to in the director's decision consists of "[redacted]" and "[redacted]" The record reflects that the petitioner is licensed by the State of California to operate and maintain a facility named [redacted] at its [redacted] and that [redacted] operates at the same location. [redacted] enrolls Korean Americans over the age of 65 and offers them continuing education combined with sport and community pastoral activities. The record contains a declaration dated June 29, 2009 from [redacted] who states that the [redacted] are not separate entities and that they represent programs that are integrated within the petitioning organization. The petitioner has overcome the director's finding and established that the educational part(s) of the church consisting of its college and pre-school operate as part of the church.

On appeal, counsel argues that the proffered position of piano instructor will be a full time job requiring 40 hours per week. To support this argument, counsel submits a letter dated June 29, 2009 from [redacted] outlining the projected 40 hour per week schedule of work that the beneficiary would perform if the visa petition is approved and she became a lawful permanent resident of the United States. This estimate is consistent with the projection that the petitioner made to the USDOL when the labor certification application was filed. Although there is uncertainty in any prediction of a future event, it is determined the petitioner has overcome the director's objection that the beneficiary would not be employed full-time should the visa petition be approved and should she be granted permanent residence.

Counsel states the petitioner has established its ability to pay the beneficiary the proffered wage. The record contains the following financial information provided by the petitioner.

1. IRS Forms 941, Employer's Quarterly Federal Tax Return, from [redacted] for the quarters ending March 31, 2001 and June 30, 2001.

2. [redacted] monthly bank statements for an account ending in the digits 3187 from Pacific Union Bank in Pomona, California, from April 30, 2001 through September 28, 2001.

3. The Church's Quarterly Wage and Withholding Reports, DE-6, filed with the State of California showing payments made to the staff employed by the petitioner in 2001, 2007, 2008 and 2009.

4. [redacted] monthly business bank statements for an account ending in the digits 3187 from Hanmi Bank in Los Angeles, California, from January 31, 2005 through September 30, 2007 showing balances ranging from $49,611.90 to $182,269.07.

5. [redacted] monthly construction fund account bank statements for an account with digits ending in 5841 from Center Bank in Los Angeles, California, for April 29, 2005 and from June 30, 2005 through November 2008 showing balances ranging from $201,478.31 to $757,680.22.

6. [redacted] financial statements dated December 31, 2006, 2007 and 2008 with a statement of review stated September 7, 2009 from [redacted] The statements of review indicates that "It is substantially less in scope than an audit" and that the objective of the reviews is an expression of an opinion regarding the financial statement as a whole.

7. An [redacted] statement of activities for the year ending September 30, 2007.

8. An [redacted] statement of financial position dated September 30, 2007.

9. The petitioner's 2007 and 2008 income statements and accompanying certificate of translation dated September 10, 2009 from [redacted]

10. The petitioner's 2007 and 2008 annual reports and accompanying certificates of translation dated September 25, 2009 from [redacted]

11. [redacted]

12. [redacted] monthly bank statements for an account ending in the digits 5817 from Center Bank in Los Angeles, California, from December 31, 2008 through February 27, 2009 showing average balances ranging from $60,572.80 to $96,862.67.

The petitioner'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 audit reports 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.

Nevertheless, considering the record as a whole and the totality of the circumstances, from the date the Form ETA 750 was accepted for processing by the USDOL, the petitioner has established that it more likely than not had the continuing ability to pay the beneficiary the proffered wage as of the priority date. The director's decision regarding the petitioner's ability to pay the proffered wage is therefore withdrawn.

However, it appears that the petition cannot be approved for an additional reason not noted by the director. Specifically, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158. As noted *supra,* the labor certification application was accepted on January 3, 2005 and states that the position requires a four-year bachelor of arts degree in "Piano Music."

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

On the Form ETA 750 Part B, statement of qualifications of alien, signed by the beneficiary on December 22, 2004, she stated she received a bachelor degree from Chugye University of the Arts in Seoul, Korea, in the piano music field of study after attending the university from March 1980 until February 1984.

The priority date of the petition is January 3, 2005, which is the date the labor certification was accepted for processing by the USDOL. *See* 8 C.F.R. § 204.5(d).[2] The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the USDOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

The regulation at the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

To establish that the beneficiary holds a foreign equivalent of a United States baccalaureate degree, the petitioner forwarded a certificate of graduation for the beneficiary dated [redacted] states "This is to certify that the above mentioned completed the full course of study at Chugye School of Arts, an accredited four-year college in Seoul." The certification does not establish that the beneficiary earned the equivalent of a baccalaureate degree and does not specify her area of concentration of study.

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the United States Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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. Accordingly, the matter is remanded to the director for a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.