

(b)(6)

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

DATE: NOV 12 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded to the director for additional proceedings commensurate with the directives of this decision.

The petitioner describes itself as a nonprofit religious organization. It seeks to employ the beneficiary permanently in the United States as a pastor. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (priority date – February 14, 2012) approved by the United States Department of Labor (the DOL). 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 petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2). *See also* 8 C.F.R. § 204.5(k)(1).

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is February 14, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The Immigrant Petition for Alien Worker (Form I-140) was filed on June 29, 2012.

Upon review of the entire record, including evidence submitted on appeal,¹ the AAO would conclude that the petitioner can establish that the petitioner has the ability to pay the proffered wage of the present beneficiary in the year of the priority date based on the audited financial statements provided. It has come to the AAO's attention, however, that the petitioner has also filed additional Form I-140 petitions on behalf of other workers. USCIS records show that the petitioner has filed other Form I-129 and Form I-140 petitions on behalf of other workers. It should be noted that the petitioner states that it only has one employee on both the ETA Form 9089 and Form I-140. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. *See Matter of Great*

¹ The petitioner submitted, on appeal, an audited financial statement from the petitioner's Certified Public Accountant (CPA). The audited petitioner's Statement of Financial Position states that as of December 31, 2012, the petitioner had net current assets \$73,645, an amount which would be sufficient to pay the proffered wage (\$30,000) of the present beneficiary, but not the wages of the petitioner's other sponsored workers.

Wall, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). The priority dates and wage information for all sponsored workers is unknown, thus, it cannot be determined that the petitioner had the ability to pay the required wages of all sponsored workers from the priority date of the present petition onward. In order to establish that the petitioner can pay this beneficiary, it must establish its ability to pay the proffered wage of all of its sponsored workers relevant to the time period of the present filing. Without this information, the AAO cannot conclude that the petitioner can pay the proffered wage of the instant beneficiary, or any of its other sponsored workers.

It is unclear, however, if these additional filings were filed by the petitioner under its Federal Employer Identification Number (FEIN) [REDACTED] listed on the ETA Form 9089 and Form I-140, or if the additional filings were made by another branch of the [REDACTED] under a different FEIN. If the filings were made by another church or parent religious entity under a different FEIN, the petitioner would not be responsible for establishing the ability to pay the wages of those workers. This issue must be resolved before the petitioner's ability to pay the proffered wage can be established.

Accordingly, the director should request such evidence as he deems necessary to determine the petitioner's ability to pay the wages of all its sponsored Form I-140 beneficiary's from their respective priority dates onward. Such evidence could include, but is not limited to, the following information for each beneficiary for whom the petitioner has filed a Form I-140:

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The wage paid to each beneficiary from the priority date of the instant petition to the present.
- Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.
- Evidence of taxpayer identification related to the sponsoring entity to determine whether they are attributable to the petitioner.

Finally, the job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. The petitioner must establish a *bona fide* job offer from the priority date onward. As stated above, records reflect that the petitioner has sponsored a number of other workers, but

states that it only has one employee on the Form I-140. Forms 941 submitted similarly show only one employee in three quarters represented, and two employees in the fourth quarter. For the record, it is not clear that the petitioner has a bona fide full-time job offer for this beneficiary or any other sponsored workers. This issue must be addressed on remand.

The director's decision of February 7, 2013 decision is withdrawn and the matter remanded to the director for additional proceedings. The director shall issue a new decision as to whether the petitioner has established the continuing ability to pay the proffered wage of all applicable Form I-140 beneficiaries from their respective priority dates onward, and whether the position is for full-time bona fide employment. If adverse to the petitioner, that decision shall be certified to the AAO for additional proceedings.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter 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 which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.