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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC-02-211-51641

Office: VERMONT SERVICE CENTER

Date: AUG 26 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Korean Presbyterian Church. It seeks to employ the beneficiary permanently in the United States as a teacher. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

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 or seasonal nature, for which qualified workers are not available in the United States.

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$21,000.00 per year. On the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 25, 2002. On the petition, the petitioner claimed to currently have three employees. The item on the petition for the date on which the petitioner was established was left blank. In the item for gross annual income were written the words "See attached budget." In the item for net annual income was written "Not applicable/." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated October 2, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and additional evidence relevant to the beneficiary's work experience. In response to the RFE, the petitioner submitted additional evidence.

In a decision dated March 3, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits additional evidence and no brief. Counsel states on appeal that the evidence before the director included reviewed financial statements and that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period. Counsel states that the petitioner began employing the beneficiary in November 2003, as soon as the beneficiary was granted employment authorization and received a social security number. Counsel states that the lack of employment authorization was the reason the petitioner did not employ the beneficiary prior to November 2003.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

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. 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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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).

In determining the petitioner's ability to pay the proffered wage CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 9, 2001, the beneficiary did not claim to have worked for the petitioner. However, the evidence indicates that the beneficiary began working for the petitioner in 2003.

The record contains copies of pay statements for the beneficiary dated from August 10, 2003 until February 22, 2003. Those statements show payments to the beneficiary at the rate of \$1,750.00 per month, a rate equivalent to \$21,000.00 per year. The last pay statement for 2003, dated December 21, 2003 shows gross pay for the year to date as \$10,500.00. The record also contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2003 showing compensation received from the petitioner in the amount of \$10,500.00. Although the beneficiary's pay from September 2003 until December 2003 was at the rate of \$21,000.000, the total for the year was only \$10,500.00. Therefore the pay records and the beneficiary's Form W-2 for 2003 fail to establish the petitioner's ability to pay the full proffered wage in the year 2003.

For the year 2004 the latest pay statement in the record is dated February 22, 2004. That statement shows gross pay for the year to date in the amount of \$3,500.00. The record contains no copy of a Form W-2 for the beneficiary for 2004. Since the amount of \$3,500.00 actually received by the beneficiary in 2004 was less than the proffered wage, the pay statements in the record fail to establish the petitioner's ability to pay the proffered wage in the year 2004.

No evidence in the record indicates any compensation paid to the beneficiary by the petitioner in the years 2001 or 2002.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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. Tex. 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 the instant case, however, the record contains no copies of federal income tax returns for the petitioner. In a letter dated March 25, 2005 the petitioner's pastor states that the petitioner is a tax exempt organization and that it therefore is not required to file federal income tax returns.

The record includes copies of financial statements for the petitioner for the years 2001 and 2002. The name of the petitioner on the statements contains the abbreviation "Inc.," indicating that the petitioner is a corporation. The statements are not audited financial statements, but are reviewed financial statements. An accountants' report accompanying the financial statement for 2001 states the following:

A review consists principally of inquiries of company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.

(Accountants' Report, January 18, 2002, at 1).

Identical statements are contained in the accountants' report accompanying the petitioner's financial statement for 2002. (Accountants' Report, June 30, 2003, at 1)

The regulation at 8 C.F.R. § 204.5(g)(2) requires that evidence of a petitioner's ability to pay the proffered wage be "either in the form of copies of annual reports, federal tax returns, or audited financial statements." No annual reports or federal tax returns of the petitioner were submitted for the record.

Financial statements of the petitioner for 2001 and 2002 were submitted for the record, but the accountant's reports state that the financial statements do not reflect audits, but only reviews. A review is described as a process "substantially less in scope than an audit . . ." (Accountants' Report, January 18, 2002, at 1).

Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited.

For the above reasons, the record lacks evidence in one of the three alternative required forms specified by the regulation at 8 C.F.R. § 204.5(g)(2).

For a petitioner which has at least 100 employees, the regulation states an additional form of acceptable evidence: "a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." 8 C.F.R. § 204.5(g)(2). However, the instant I-140 petition states that the petitioner has three employees, and no other evidence in the record indicates that the petitioner has 100 or more employees. Therefore that additional form of acceptable evidence is not applicable to the instant petition.

The record contains copies of monthly bank statements for an account of the petitioner for the months of August 2003 through January 2004. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the ending balances do not show monthly increases by amounts which would be sufficient to pay the proffered wage.

In any event, in the instant petition, no bank statements for 2001 or 2002 were submitted. The record contains no explanation for the absence of any bank statements for those years. Therefore, even if the petitioner's evidence concerning its bank statements met the criteria described above, the bank statement evidence would fail to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

The record also contains a copy of a property deed showing the transfer of a piece of real property in Bayside, New York to the petitioner for the price of \$975,000.00 on August 31, 1995 and a copy of an amendment to a title insurance policy presumably relating to that purchase, though the amendment identifies only the policy number and not the name of the policy holder or the location of the property. In his letter dated March 25, 2004, the petitioner's pastor states that the petitioner's purchase of its own church building is evidence that the petitioner is financially viable. Nonetheless, the property documents in evidence do not indicate the extent of any mortgage liability incurred by the petitioner in connection with that purchase. Moreover, the absence of audited financial reports prevents any meaningful analysis of the relationship of that property purchase to the petitioner's overall financial situation.

The financial statements in the record for 2001 and 2002 contain year-end balance sheets. The balance sheet for December 31, 2001 shows a liability of "Mortgage Payable (Note)" in the amount of \$700,000.00. Similarly, the balance sheet for December 31, 2002 shows a liability of "Mortgage Payable (Note)" in the amount of \$683,301.00. The statements give no further details on those liabilities.

The record also contains copies of Form W-3 Transmittal of Wage and Tax Statements of the petitioner for 2001, 2002 and 2003, and copies of Form W-2 Wage and Tax Statements issued by the petitioner to its employees in 2001, 2002 and 2003. Those forms show total compensation paid by the petitioner as follows: \$65,100.00 in 2001, to four employees; \$123,883.38 in 2002, to eight employees; and \$178,500.12 in 2003, to nine employees. One of the employees shown on the W-2's for 2003 is the beneficiary of the instant petition. That W-2 form is discussed above in the analysis of the beneficiary's compensation received from the petitioner.

Although the petitioner's Form W-3's and Form W-2's show payments of compensation to employees of the petitioner in 2001, 2002 and 2003, those forms do not contain information indicating that the petitioner had additional resources available to pay compensation to the beneficiary during 2001 and 2002, or that the petitioner had additional resources available in 2003 to have paid the beneficiary the full proffered wage of \$21,000.00 during 2003.

Aside from the deficiencies in the evidence as discussed above, CIS electronic records show that the petitioner has filed ten I-129 petitions since 2001. For I-129 petitions, which pertain to temporary workers, the regulations do not require evidence to establish a petitioner's ability to pay the proffered wages. Nonetheless, the added costs to a petitioner of hiring temporary workers authorized by I-129 petitions are relevant to any I-140 petition for a permanent worker filed by that same petitioner, since the regulations do require the petitioner to establish its ability to pay the proffered wages to the beneficiary of any I-140 petition.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-129 petitions filed by the petitioner. No information is provided about the names or the current employment status of each potential beneficiary of an I-129 petition. Furthermore, no information is provided about the current immigration status of any of the beneficiaries.

Lacking sufficient evidence about the beneficiaries of other petitions submitted by the petitioner, even if the record contained acceptable and sufficient evidence about the petitioner's finances, the record in the instant petition would still fail to establish the ability of the petitioner to pay the proffered wage to each beneficiary for whom it has filed a petition, since the record fails to provide a basis for calculating the petitioner's total proffered wage obligations during the relevant period.

In his decision, the director correctly noted that the financial statements of the petitioner in the record were not audited. The director incorrectly referred to the financial statements as compilations. As noted above, the financial statements in the record are not compilations, which are statements based solely on the representations of managements, but are reviewed financial statements. Although a review indicates a greater level of involvement by an outside auditor than a compilation, the accountants' reports in the record state that a review is less extensive than an audit. For this reason, the director was correct in not relying on the financial statements of the petition in the record. The director also noted that canceled checks in the record failed to establish the petitioner's ability to pay the proffered wage. The director was therefore correct in denying the petition, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

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.