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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

IDENTITY

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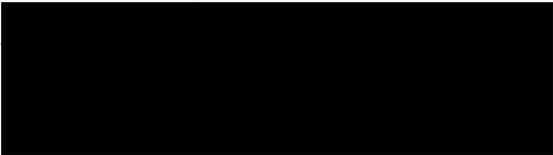


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-040-57617

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

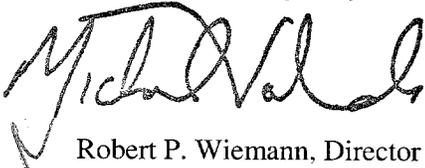
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California 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 a secretary. 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 that the petitioner had not established that the beneficiary had the experience required on the ETA 750. The director accordingly denied the petition.

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 March 23, 2001. The proffered wage as stated on the Form ETA 750 is \$3,099.20 per month, which amounts to \$37,190.40 annually. On the Form ETA 750B, signed by the beneficiary on February 26, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on November 14, 2002. On the petition, the petitioner claimed to have been established on February 23, 1986, to currently have ten employees, and to have a gross annual income of \$1,610,518.00. In the item for net annual income, the petitioner wrote the words "Non Profit Org." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 1, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and also requested additional evidence of the beneficiary's work experience. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the

priority date. The director specifically requested this information for the period from March 23, 2001 to the present.

In response to the RFE, the petitioner submitted additional evidence.

In a second RFE dated July 21, 2003, the petitioner again requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and additional evidence of the beneficiary's work experience.

In response to the second RFE, the petitioner submitted additional evidence.

In a decision dated January 20, 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. The director also determined that the evidence did not establish that the beneficiary had the experience required by the ETA 750. The director accordingly denied the petition.

On appeal, counsel submits a brief a brief and additional evidence. Counsel states on appeal that the petitioner is a church, which is not required to submit informational tax returns. Counsel states that the other forms of evidence submitted by the petitioner are sufficient to establish the petitioner's ability to pay the proffered wage. Counsel also states that the evidence establishes that the beneficiary has the experience required on the ETA 750.

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, the only evidentiary document submitted on appeal is a written declaration from a person who had signed a previously-submitted certificate confirming the beneficiary's work experience. The written declaration attempts to clarify the earlier certificate. The written declaration is undated, but it was apparently written after the director's decision. Therefore no grounds would exist to preclude that document from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

Also submitted on appeal is a copy of an excerpt from Internal Revenue Service Instructions pertaining to tax filing requirements for charities and non-profit organizations. That document is not an evidentiary document, but it is submitted as legal authority by counsel to help explain the absence of tax return evidence of the petitioner from the record.

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 Sonogawa*, 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 February 26, 2001, the beneficiary did not claim to have worked for the petitioner. However, the record contains a copy of a Form W-2 Wage and Tax Statement of the beneficiary for 2002 which shows that the petitioner paid the beneficiary \$13,200.00 that year. Since that amount is less than the proffered wage of \$37,190.40, the Form W-2 for 2002 fails to establish the petitioner's ability to pay the proffered wage that year. Moreover, the record contains no evidence of the beneficiary's employment by the petitioner in 2001, the year of the priority date.

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 *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record contains a copy of the petitioner's articles of incorporation showing its incorporation in the state of California as a religious corporation. The record in the instant case contains no federal income tax returns of the petitioner. The excerpt in the record from instructions of the IRS pertaining to charities and non-profit organizations states that tax-exempt organizations, other than private foundations, must file Form 990 Return of Organization Exempt from Income Tax, or Form 990-EZ, Short Form Return of Organization Exempt from Income Tax. However, the instruction states that churches and religious organizations are generally exempt from any requirement to file the Form 990. The copy of the instruction in the record does not identify the title of the instruction, but it appears to have been printed from the IRS Internet website, and counsel in his brief states that the material submitted for the record is an excerpt from IRS Publication 557.

Even assuming that the petitioner was under no obligation to submit any federal income tax returns and that no such returns exists, the burden of proof remains on the petitioner to establish its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires evidence on that issue to be either in the form of annual reports, tax returns, or audited financial statements. Therefore, if no tax returns are available, the petitioner must submit copies of either annual reports or copies of audited financial reports. Churches do not generally issue "Annual Reports" and are not required, as certain publicly held corporations are, to do so. Nonetheless, the record contains no copies of any audited financial statement of the petitioner.

The record contains a copy of a financial statement of the petitioner for the period December 1, 2000 to November 30, 2001 in the Korean language, with certified English translation. But the record contains no indication that that financial statement is an audited statement. 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 its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record also contains copies of bank statements for a checking account of the petitioner for the period from February 2001 through March 2003. Counsel asserts that that CIS customarily accepts secondary evidence when primary evidence is unavailable and that bank statements are acceptable secondary evidence. However, counsel's assertions overlook the language of the regulation at 8 C.F.R. § 204.5(g)(2), which states that any evidence other than annual reports, tax returns and audited financial statements is "additional" evidence which may be submitted by the petitioner or requested by CIS in "appropriate cases." That is, such evidence may supplement one of the required forms of evidence, but it may not substitute for the required evidence.

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.

The record contains no other evidence relevant to the petitioner's ability to pay the proffered wage. The evidence therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated that the petitioner had failed to submit any annual reports, federal tax returns or audited financial statements, as required by the regulation at 8 C.F.R. § 204.5(g)(2). The director also correctly stated that the compensation paid by the petitioner to the beneficiary in 2002 was insufficient to establish the petitioner's ability to pay the proffered wage. The director's analysis was therefore correct concerning the issue of the petitioner's ability to pay the proffered wage.

The other issue raised by the evidence is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the priority date in the instant petition is March 23, 2001.

The Form ETA 750 states that the position of secretary requires two years of experience in the job offered. On the ETA 750B, signed by the beneficiary on February 26, 2001, the beneficiary states that her relevant experience consists of work as a freelance secretary from January 1999 to the date of the ETA 750B.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The evidence in the record relevant to the beneficiary's qualifications consists of the following documents: a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Returns for 1999; a copy of the beneficiary's Form 1040EZ Income Tax Return for Single and Joint Files with No Dependents for 2001; an affidavit of the beneficiary dated June 16, 2003; a certificate of experience dated September 12, 2003 by the president, Immanuel Grace University, Walnut, California, stating the beneficiary's experience as a freelance secretary from January 1999 to February 2001; and a written declaration of the president, Immanuel Grace University offering a clarification of the certificate of experience which he had submitted previously on behalf of the beneficiary. The file also contains a copy of the beneficiary's Form 1040 U.S. Individual Income Tax Return for 2000, which is found in the record of proceeding of the beneficiary's I-485 Application to Register Permanent Residence of Adjust Status, an application which was filed concurrently with the instant I-140 petition.

On the Schedule C's attached to the beneficiary's tax returns for 1999 and 2000 the beneficiary's business is stated as "Freelance Secretary" and the occupation of the beneficiary as stated beside the signature line on each return is "S/E Secretary."

In an affidavit dated June 16, 2003, the beneficiary states that she worked as a free lance secretary in 1999 and 2000, "mostly for Korean churches in Los Angeles, California." The beneficiary states that she cannot remember the names of all of the churches for which she worked, and she states the names and addresses of only two such churches, Immanuel Grace University (Seminary School), of Los Angeles, California, and [REDACTED] or [REDACTED]. The beneficiary's affidavit lacks the level of detail which would be expected of a person operating a business as a self-employed secretary.

The beneficiary's work experience is corroborated by information from only one person, the president of Immanuel Grace University. A document titled Certificate of Experience dated September 12, 2003 is on the letterhead of that university and is signed by its president. The certificate states the beneficiary's job title as "Freelance Secretary," states the dates of the beneficiary's employment as January 1999 to February 2001, states the job duties of the beneficiary, which include typing, making photocopies, and answering the telephone. The certificate also contains the following line: "Number of Hours Worked Per Week: 35 to 40+ hours."

The information on the certificate of experience is inconsistent with the beneficiary's affidavit, in which the beneficiary claims to have worked for several different Korean churches during the same period covered by the certificate of experience.

In an undated declaration submitted for the first time on appeal, the president of Immanuel Grace University attempts to resolve the evidentiary inconsistencies created by the certificate of experience which he had submitted prior to the director's decision. In the declaration, the president states that when certifying that the beneficiary had worked full-time during the period of January 1999 to February 2001 he had not meant that all of the beneficiary's work was for Immanuel Grace University. In the declaration, the president states that he was aware that the beneficiary was working for several other Korean churches in the Los Angeles area based upon conversations with the beneficiary during the period that she worked with Immanuel Grace University. The president states that such conversations would take place in the context of scheduling the beneficiary's services.

The undated declaration of the president of Immanuel Grace University is insufficient to resolve the evidentiary inconsistencies mentioned above. The certificate of experience is presented in outline form, rather than in prose form. For this reason it contains no complete sentences, and it therefore conveys some ambiguity in meaning. For example, as noted above, the line concerning the beneficiary's hours worked per week states: "Number of Hours Worked Per Week: 35 to 40+ hours." Nonetheless, since the certificate is on the letterhead of Immanuel Grace University and is captioned as "Certificate of Experience," with the name stated as that of the beneficiary, the only reasonable inference is that it is a certification that the beneficiary worked for 35 to 45+ hours per week for Immanuel Grace University. In the undated declaration submitted on appeal, the president attempts to deny that such an inference was an intended meaning of the certificate of experience which he signed. But in fact, the factual affirmations made by the president in the certificate of experience cannot be reconciled with the factual affirmations made by him in the written declaration submitted on appeal.

In any event, the regulation at 8 C.F.R. § 204.5(g)(1) requires that evidence of the beneficiary's relevant experience be in the form of a letter or letters from the beneficiary's former employer or employers, on the letterhead of any such employer. Written statements by the president of Immanuel Grace University are not an acceptable form of evidence of the beneficiary's experience with any employers other than that university.

In his decision, the director correctly analyzed the evidence then in the record concerning the beneficiary's experience. The director found that the evidence contained inconsistencies, and that it therefore failed to establish that the beneficiary had the required experience as of the priority date of the instant petition. The director's analysis was correct, based on the evidence then in the record.

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted for the first time on appeal fail to overcome the director's decision on the issue of the beneficiary's qualifications for the offered job.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and fails to establish that the beneficiary had two years of experience in the offered job as of the priority date of the petition.

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.