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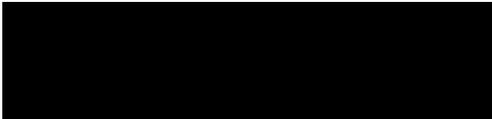

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Office: VERMONT SERVICE CENTER

Date: NOV 10 2005

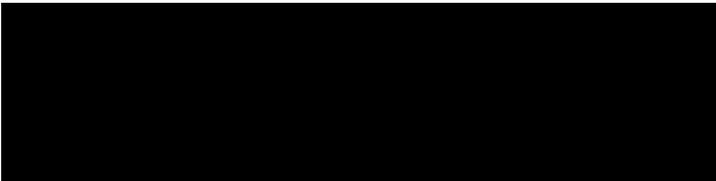
IN RE:

Petitioner:
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:



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 Acting Director, Vermont Service Center, denied the preference visa petition that 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 denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 granting 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.

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 priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$15.35 per hour, which equals \$31,928 per year.

On the petition, the petitioner stated that it was established on June 10, 1969 and that it employs 25 workers. The petition states that the petitioner's gross annual income is \$3,339,349 and that its net annual income is \$189,858. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 2001. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in [REDACTED]

In support of the petition the petitioner submitted an unaudited income statement for the fiscal year ended June 30, 2002. The petitioner also submitted a notarized letter from its pastor stating that the petitioner has employed the beneficiary since January 2001, that her current salary was \$15.35 per hour, and that her gross pay during 2002 was \$31,928.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on December 17, 2003, requested, *inter alia*, additional evidence pertinent to that ability.

The Service Center also specifically requested that the petitioner submit its 2001 Federal income tax return or, in the alternative, "annual reports for 2001 which are accompanied by audited or reviewed financial statements." Finally, the Service Center requested that, if the petitioner employed the beneficiary during 2002, it submit Form W-2 Wage and Tax Statements showing the amount it paid the beneficiary during that year.

In response, the petitioner submitted a letter, dated January 28, 2004, from a paralegal in counsel's office. With that letter the petitioner submitted unaudited profit and loss statements for the fiscal years ended June 30, 2001, June 30, 2002, and June 30, 2003. Although each of those documents is entitled "Annual Parish Report," they are in substance income statements, rather than the Form 10-K annual report contemplated by 8 C.F.R. § 204.5(g)(2). Counsel did not provide the requested W-2 forms and did not explain its failure to provide them.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 19, 2004, denied the petition.

On appeal, counsel states that, as a non-profit organization, the petitioner is exempt from income tax and does not file income tax returns. Counsel also argues that the petitioner provided its annual reports and, pursuant to 8 C.F.R. § 204.5(g)(2), may not be required to submit copies of federal tax returns, or audited financial statements. Counsel states that, as per 8 C.F.R. § 204.5(g)(2), the Service Center may only request one of the three alternative types of primary evidence, copies of annual reports, federal tax returns, or audited financial statements. Although counsel concedes that 8 C.F.R. § 204.5(g)(2) permits the Service Center to request additional evidence in appropriate cases, counsel adds, "No where [sic] does it say that [a Request for Evidence] may request, 'annual reports for 2001 which are accompanied by audited or reviewed financial statements.'"

With the appeal counsel submitted copies of the petitioner's Form 941 Quarterly Federal Tax Returns for all four quarters of 2001. Those returns indicate that the petitioner paid wages of between \$88,784.85 and \$210,882.90 for a total of \$499,282.82 during the entire 2001 calendar year. Those returns do not, however, show that the petitioner employed the beneficiary during any of those quarters.

Counsel is correct that 8 C.F.R. § 204.5(g)(2) does not mention "annual reports for 2001 which are accompanied by audited or reviewed financial statements." The regulation states, instead, that, "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 [CIS]." [Emphasis supplied.] The types of evidence

requested may include, but is not limited to, profit/loss statements, bank account records, and personnel records. Counsel is incorrect in stating that the wording of that regulation precludes a request for annual reports that are accompanied by audited or reviewed financial statements.¹

Counsel has asserted that the petitioner has no tax returns. Because the petitioner is a church, and therefore overwhelmingly likely to be organized as a not-for-profit entity, this office finds that assertion compelling, even without formal evidence. That the petitioner has no tax returns protects it from dismissal pursuant to 8 C.F.R. § 103.2(b)(14) for failure to provide the requested tax returns. That the petitioner does not file income tax returns, however, does not release it from the obligation of demonstrating its continuing ability to pay the proffered wage beginning on the priority date in accordance with the regulations.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, although the petitioner alleges that it has employed the beneficiary since January of 2001, it provided no contemporaneous evidence of that assertion even in the face of a specific request for W-2 forms showing the amount it paid to the beneficiary. The petitioner did not, therefore, establish that it employed and paid the beneficiary.

Counsel's reliance on the unaudited financial statements in the record 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. 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax returns, audited financial statements, or annual reports, without consideration of depreciation or other expenses. The AAO will also consider the net current assets shown on those documents as an alternative index of a petitioner's ability to pay additional wages during a given year. As the petitioner provided none of those documents, this office can consider neither of those figures.

The petitioner failed to submit sufficient competent, reliable evidence to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Therefore the petition was correctly denied on that ground.

An additional issue exists in this case that was not addressed in the decision of denial. In the December 17, 2003 Request for Evidence the Service Center requested that if, as it claims, the petitioner has been employing the beneficiary, it provide a 2002 W-2 form showing the amount it paid to him during that year. The petitioner submitted neither the requested W-2 form nor any reason for that omission. Failure to submit

¹ In fact, in offering to consider reviewed financial statements as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Service Center was too permissive. Only audited financial statements, rather than reviewed or compiled, are competent evidence of a petitioner's ability to pay the proffered wage. This point is discussed further elsewhere in today's decision.

requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional ground. Because that issue was not raised by the Service Center, however, and the petitioner has not been accorded an opportunity to address it, today's decision does not rely, even in part, on that additional issue. The appeal will be dismissed based solely upon the petitioner's failure to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.