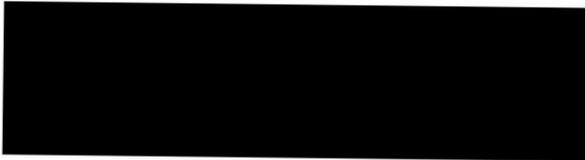




U.S. Citizenship
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Services

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Office: NEBRASKA SERVICE CENTER

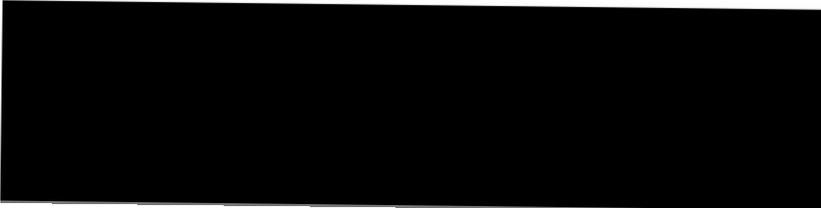
Date: JUN 14 2007

IN RE: Petitioner:
Beneficiary:



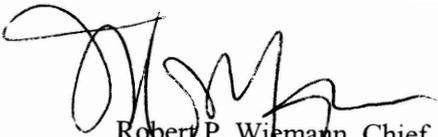
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Director (Director), Nebraska Service Center, and a subsequent motion to reopen/reconsider was dismissed. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a choral director (music director). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the evidence did not establish that a baccalaureate degree is the minimum requirement for entry into the occupation, and therefore the position does not qualify as a professional one. The director also holds that the education must be relevant to the proffered position, and therefore, the beneficiary was ineligible for classification sought. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 3, 2005 denial, the two issues in this case are whether or not the proffered position is a professional one, and whether or not the petitioner has demonstrated that the beneficiary possessed the requisite minimum requirement for the proffered position prior to the priority date under regulations.

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence in the record includes the beneficiary's bachelor degree certificate from Pusan National University, transcripts for 22 credit courses in a music program offered by Pusan Christian Music Association, and an experience letter for the beneficiary's 13 years services as an accompanist. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the proffered position in the instant case is that of a professional in nature, and that the beneficiary's 13 years of experience with course work in music makes her qualified for the proffered position.

DOL's certification of the Form ETA 750 does not supercede Citizenship and Immigration Services' (CIS) review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that

¹ 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by sections 203(b)(3)(A)(i) and (ii) of the Act and 8 C.F.R. § 204.5(l)(3). CIS has the authority to evaluate whether the alien is eligible for the classification sought and whether the alien is qualified for the job offered.

The petitioner checked the box e. "A skilled worker or professional" in Part 2. Petition type on the Form I-140. The initial filing and response to the director's request for evidence (RFE) did not clearly indicate whether the petitioner was filed under section 203(b)(3)(A)(i) as a skilled worker or (ii) as a professional. However, on motion to reopen and appeal counsel argues that the proffered position is that of a professional in nature and the petition was filed to seek the benefit under the third preference category as a professional. The petitioner must first of all prove statutory and regulatory eligibility under the category sought and the director must determine which category of the third preference, professional or skilled worker, is applicable to the case.

To determine whether a proffered position is eligible for an employment based immigrant visa under the third preference as professional or skilled worker, CIS must examine the requirements set forth in the labor certification. In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of music director. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | |
|-------------------------|-----------------|
| 14. Education | |
| Grade School | 8 |
| High School | 4 |
| College | 4 |
| College Degree Required | Bachelor of Art |
| Major Field of Study | Any field |

The applicant must also have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

Section 203(b)(3)(A)(ii) of the Act defines professionals as qualified immigrants who hold baccalaureate degrees and who are members of the professions. The regulation at 8 C.F.R. § 204.5(l)(2) defines that "*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The proffered position requires a bachelor's degree and one year of experience. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 27-2041.01, music directors, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=152.047-010+&g+Go> (accessed March 19, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five requiring "extensive preparation" for the occupation type closest to the proffered position. According to DOL, more than five years of extensive skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means "[a] bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school." See <http://online.onetcenter.org/link/summary/27-2041.00#JobZone> (accessed March 19, 2007).

The AAO finds that the proffered position may be properly analyzed as a professional position since it requires a bachelor's degree and one year of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C)

and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements. Therefore, the AAO concurs with counsel's assertions that the proffered position in the instant case is professional in nature, and the portion of the director's decision that the position does not qualify as a professional one will be withdrawn.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 was accepted on July 21, 2003.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended Pusan National University in Pusan, Korea in the field of "Japanese" from March 1982 through February 1986, culminating in the receipt of a "B.A." degree. She provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided the beneficiary's Certificate of Graduation from Pusan National University, which show that the beneficiary completed her four years of studies in the Department of Japanese Language & Literature, College of Humanities, Pusan National University from March 1, 1982 to February 22, 1986 and was awarded a Bachelor of Arts degree.

The director determined that the petitioner did not establish that the beneficiary obtained the required Bachelor's Degree prior to the priority date because CIS holds that the education must be relevant to the proffered position although part 14 of the submitted Form ETA 750 indicates that the position requires a B.A. in "any field". Counsel relies upon a combination of the beneficiary's education and work experience to demonstrate the beneficiary's qualifications for the proffered position. Counsel's reliance on a combination of education and work experience is misplaced. The rule to equate three years of experience for one year of education applies to

non-immigrant H1B petitions, but not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner did not indicate that it would accept any combination of education and experience on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the DOL. Since that was not done, the requirements cannot be changed now at the appellate stage.

However, as quoted above both the Act and regulations require an alien to hold a United States baccalaureate degree or a foreign equivalent degree to be qualified for a professional position. There is no provision in the statute or the regulations that require a connection between the area of study and the job offered regardless of the specific requirement of study fields set forth on the Form ETA 750 Part A, Item 14. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). If supported by a proper credentials evaluation, a four-year baccalaureate degree from South Korea can reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of a four-year curriculum. There are no provisions from the Act or the regulations requiring that a bachelor's degree must be in a relevant field disregarding the requirements set forth by the Form ETA 750 Part A, Item 14. Therefore, the beneficiary's degree from Pusan National University can be considered a foreign equivalent degree to a U.S. bachelor's degree, and thus meets the requirements set forth by the regulation for the professional category. CIS may not ignore a term of the labor certification, nor may it impose additional requirements when determining the beneficiary's qualifications. The certified labor certification in the instant case requires a bachelor's degree in any field. Therefore, the beneficiary's bachelor of arts degree in Japanese Language and Literature from Pusan National University in 1986, prior to the priority date of this petition, meets the educational requirements as set forth on the Form ETA 750. Moreover, the Form ETA 750 specifically requires four years of college education. The beneficiary's four years of undergraduate studies meets the four-year college studies requirement. Therefore, the beneficiary holds a U.S. bachelor's degree or a foreign equivalent degree and that beneficiary has the required number of years of college education. The record also contains an experience letter from the Changseungpo Presbyterian Church in South Korea establishing that the beneficiary had 13 years of experience as the accompanist on Piano and Organ,² and thus the petitioner demonstrated that the beneficiary meets the requirement of working experience set forth on the Form ETA 750.

Counsel's assertions on appeal have overcome the director's findings and demonstrate that the beneficiary met the educational and working experience requirements of the proffered position as designated on the Form ETA 750 prior to the priority date.

Beyond the director's decision and counsel's assertions on appeal, the AAO finds that the record of proceeding does not reflect that the petitioner has the 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),

² The record contains a notarized Confirmation of Service dated April 26, 1999 from [REDACTED] Director of The Changseungpo Presbyterian Church, Korean Christian Presbyterian Association, Korea confirming the beneficiary's experience. This confirmation of service states in pertinent part that: "This is to confirm which she has sincerely served this Church as the accompanist on Piano and Organ of Choir from March 1986 up to April 1999." This meets the regulatory requirements of 8 C.F.R. § 204.5(l)(2)(ii)(A).

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 regulation 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 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *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 Application for Alien Employment Certification as certified by the U.S. Department of Labor 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 was accepted on July 21, 2003. The proffered wage as stated on the Form ETA 750 is \$10.00 per hour (\$20,800 per year). On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of 108,849.52, to have a net annual income of \$36,286.06, and to currently employ 2 workers. On the Form ETA 750B, signed by the beneficiary on July 21, 2003, the beneficiary did not claim to have worked for the petitioner.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid 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, the petitioner did not submit any evidence showing that the petitioner paid the beneficiary any compensation, and the beneficiary did not claim to have worked for the petitioner. Thus, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 onwards.

The evidence indicates that the petitioner is structured as a church. The petitioner as a church is obligated to demonstrate that it could pay the beneficiary the proffered wage with regulatory-prescribed evidence. Although CIS considers net income to be the figure shown on line 18, excess or deficit for the year on the Form 990 Return of Organization Exempt from Income Tax for a nonprofit organization, the petitioner should submit other regulatory-prescribed evidence to establish its ability to pay the proffered wage if Form 990 Return of Organization Exempt from Income Tax of the petitioner is not required or unavailable.³ The regulation 8 C.F.R. § 204.5(g)(2) requires a petitioner to submit annual reports or audited financial statements as an alternative method to establish its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. The instant petition was filed on March

³ The AAO notes that churches may be exempt from filing Form 990.

31, 2004. The petitioner did not submit any documentary evidence such as annual report or audited financial statements for 2003.

Instead the petitioner submitted its 2003 Church Employees and Salaries, and 2003 Budget Statement. The statements submitted are from the petitioner itself, not audited, and thus cannot be considered as primary evidence to establish the petitioner's ability to pay the proffered wage from the priority date in 2003. Counsel'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 report 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.

The statements show that the petitioner was hiring and paying two employees at that time at the level of \$3,700 per month (\$44,400 per year). The statements also indicate that excess revenue over expenditures for 2003 was \$36,286.06, that the petitioner had the balance of \$20,101.58 in savings account, and thus, the total available funds to pay the petitioner's employees were \$56,387.64. However, after paying the current employees from the total available funds, the petitioner's funds to be used to pay the instant beneficiary would be \$11,987.64 only which was \$8,812.36 less than the beneficiary's proffered wage of \$20,800 per year. Therefore, even if the submitted statements were audited and considered as primary evidence, the petitioner would still have failed to establish its ability to pay the beneficiary the proffered wage as of the priority date.

The record before the director closed on May 9, 2005 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's Form 990 federal return for 2003 and 2004 should have been available. However, the petitioner did not submit its 2003 and 2004 federal returns, nor did counsel explain why the returns or other regulatory-prescribed evidence for these two years were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Without the petitioner's returns, annual reports or audited financial statements for the years from the priority date to the present in the record, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the proffered wage from the priority date until the present.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its annual report, tax return or audited financial statements since none of those regulatory-prescribed forms of evidence were submitted to the record of proceedings.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the evidence in the record did not establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage as of the priority date to the present through an examination of wages paid to the beneficiary and its net income or net current assets. The AAO notes that the director did not request the

relevant evidence that establishes the petitioner's continuing ability to pay the proffered wage in his RFE date March 22, 2005 and to properly examine the petitioner's ability to pay the proffered wage.

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. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.