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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
WAC 06 066 50289

Office: TEXAS SERVICE CENTER Date: NOV 6 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Other Worker pursuant to § 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 Director, Texas 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 an administrative assistant. As required by statute, a Form 9089 Application for Permanent Employment Certification, approved by the Department of Labor (DOL) 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

The regulation at 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 either 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, the day the Form ETA 9089 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the Form ETA 9089 was accepted for processing on August 15, 2005. The proffered wage as stated on the Form ETA 9089 is \$14.25 per hour, which equals \$29,640 per year.

The Form I-140 petition in this matter was submitted on December 22, 2005. On the petition, the petitioner stated that it was established during 1997 and that it employs four workers. The petition states that the petitioner's gross annual income is \$295,000. In the space reserved for the petitioner to report its net annual income "n/a" was entered. On the Form ETA 9089 the beneficiary indicated that she had no experience that qualified her for the proffered position¹ and had not worked within the previous three years. The petition and the Form ETA 9089 both indicate that the petitioner would employ the beneficiary in Pomona, California.

¹ No experience is required for the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.² In the instant case the record contains (1) the petitioner's unaudited Statement of Financial Condition, (2) a letter dated July 5, 2000 from the IRS, (3) 2005 Form 1099 Miscellaneous Income statements the petitioner issued during that year, including the beneficiary, (4) a 2005 Form W-2 Wage and Tax Statement showing the wages the petitioner paid to the beneficiary during that year, (5) a grant deed dated September 4, 2005 and related documents, (6) state quarterly reports of wages the petitioner paid to its employees, including the beneficiary, during the first and third quarters of 2005, (7) the petitioner's Statements of Deposits pertinent to the third and fourth quarters of 2003, the third and fourth quarters of 2004, all four quarters of 2005 and the first quarter of 2006 and issued by a tax filing service pertinent to FICA payments to the Federal government (8) the petitioner's annual statement of deposits and filings pertinent to 2005, and (9) spreadsheets pertinent to the petitioner's Federal and state withholdings from its employees salaries for the fourth quarter of 2004 and the first, third, and fourth quarters of 2005. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The July 5, 2000 IRS letter states that IRS recognizes that the petitioner is exempt from income taxation and is also not required to file a Form 990, Return of Organization Exempt from Income Tax.

The beneficiary's 2005 Form 1099 shows that the petitioner paid her \$900 in non-employee compensation during that year. The 2005 W-2 form shows that the petitioner paid the beneficiary wages of \$15,404.25 during that year.

The September 4, 2005 grant deed and related documents show that on that date a Baptist church transferred real property, possibly a church building or a site for building a church, to the petitioner.

The state quarterly wage reports show that the petitioner paid the beneficiary gross wages of \$3,933 during the first quarter of 2003, \$4,004.25 during the last quarter of 2004, and 3,776.25 during the third quarter of 2005.

The proposition the petitioner intended to support with its Federal and State withholding spreadsheets is unstated and unknown to this office. The proposition that the petitioner intended to support with its FICA Deposit Statements is unstated and unknown to this office. The reason the petitioner omitted some of its deposit statements from its submission is also unstated and unknown.

The director denied the petition on July 27, 2006.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On appeal, counsel asserted that the director had incorrectly considered the facts of the case and that the evidence in the record demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Subsequently, in a letter dated September 18, 2006, counsel cited a figure derived from the unaudited 2005 Statement of Financial Condition, specifically the difference between the petitioner's total assets and its total liabilities at the end of 2005, as evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

This matter is complicated by the fact that the petitioner, a nonprofit company, is not required to file a tax return nor even a Form 990, Return of Organization Exempt from Income Tax. That the petitioner is exempted from filing income tax or other documents with the IRS, however, does not exempt it from the burden of proving its continuing ability to pay the proffered wage beginning on the priority date with reliable evidence as required by 8 C.F.R. § 204.5(g)(2).

Much of the evidence pertinent to the petitioner's finances appears to have been provided to demonstrate that the petitioner paid wages during the salient years. However, showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's total revenue exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. The petitioner is obliged to show the ability to pay the wage proffered *in addition to* the expenses it actually incurred during a given year.

Although counsel provided documents pertinent to the petitioner's ownership of real estate, he did not argue that they support the proposition that the petitioner is able to pay additional wages. This office notes, in any event, that equity in real estate is not the sort of liquid asset generally considered to be available to pay wages. Further, although the petitioner could likely borrow against its equity, if any, in its real estate, any amount so borrowed, although it would discharge the petitioner's obligation to pay wages, would become an additional obligation, probably in a somewhat larger amount. This office requires that the petitioner show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. Ordinarily, equity in real estate and credit available to the petitioner are not part of the calculation of the funds available to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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 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, the petitioner established that it paid the beneficiary \$16,304.25 during 2005.³ The petitioner must establish that it was able to pay the remaining \$13,335.75 during that year.

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 examine the reliable evidence in the record to determine what other funds the petitioner has demonstrated were available to it during the salient years.

The regulation at 8 C.F.R. § 204.5(g)(2) indicates that copies of annual reports, federal tax returns, or audited financial statements are the preferred evidence of a petitioner's ability to pay the proffered wage. Each of those types of evidence comes with a index of reliability. Annual reports, whether the glossies distributed to encourage investors or the Forms 10-K certain corporations are required to file with the Securities and Exchange Commission, may be subjected to scrutiny, and their falsification carries severe penalties, both for the company and for individuals. Federal tax returns, similarly, are subject to review and verification, and falsification may earn a miscreant serious penalties. Further still, a taxpayer is unlikely to overstate its net income on its tax returns, as this would typically increase its tax liability. The auditor's report that may accompany financial statements assures the reader that the auditor has verified key values in the statements and that their preparation and presentation is in accord with generally accepted accounting principles.

In the instant case, the record demonstrates that the petitioner does not file tax returns. It is unlikely to issue an annual report, within the meaning of that term as used in 8 C.F.R. § 204.5(g)(2). Because of the withering expense of securing an audit, it is unlikely to have audited financial statements.

Notwithstanding that those documents, copies of annual reports, federal tax returns, or audited financial statements, appear to be specifically required by the regulation, the policy of this office is to accept other documents with similar indices of reliability. If a petitioner provides a Form W-2 Wage and Tax Statement showing that it paid the beneficiary an amount equal to or greater than the proffered wage during a given year, for instance, this office, absent any suspicions about the authenticity of the document, typically accepts the W-2 form as evidence of the petitioner's ability to pay the proffered wage during that year.

This office will, similarly, accept other documents that it finds have some assurance of reliability. The mere unavailability of the documents usually required, however, is insufficient to render other documents reliable. If the petitioner is unable to provide reliable evidence, then it is unable to demonstrate its continuing ability to pay the proffered wage beginning on the priority date as required by 8 C.F.R. § 204.5(g)(2).

In the instant case, counsel relies upon the petitioner's 2005 Statement of Financial Position to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Various reasons exist that this document is insufficient.

First, that document is equivalent, essentially, to an unaudited balance sheet and income statement. It is not a document that was previously filed with a governmental body and subjected to scrutiny and verification. Whoever produced that document is unidentified and, in any event, does not seem to have risked sanction if it were found to be inaccurate. 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. The unaudited financial statements will not, therefore, be considered.

³ That amount includes \$15,404.25 shown on a W-2 form and \$900 shown on a Form 1099.

Second, one statistic that counsel relied upon from that document is the difference between the petitioner's total assets and its total liabilities. The petitioner's total assets, however, are not available to pay wages. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's balance sheet appears to show that it had 2005 end-of-year cash of \$25,810 and no other current assets.⁴ It appears to show, too, that the petitioner had no 2005 end-of-year current liabilities. Even if the petitioner's Statement of Financial Position were deemed reliable evidence, it would show net current assets of \$25,810, an amount less than the annual amount of the proffered wage, and would not in itself, therefore, demonstrate the petitioner's ability to pay the proffered wage during 2005 with its net current assets.

The proffered wage is \$29,640 per year. The priority date is August 15, 2005. The petitioner submitted no reliable evidence of its ability to pay the proffered wage during 2005. The petitioner has failed, therefore, to demonstrate its ability to pay the proffered wage during 2005.

The petition in this matter was submitted on December 22, 2005. On that date complete evidence pertinent to the petitioner's finances during 2006 tax return was unavailable. On April 17, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. CIS received counsel's response to that request on June 30, 2006, and the record is deemed to have closed on that date. On that date perfected evidence of the petitioner's finances during 2006 was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that the petitioner had the ability to pay the proffered wage during 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date. The petition was correctly denied on this basis, which has not been overcome on appeal.

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.

⁴ Although a church may be unlikely to have accounts and notes receivable, this office is surprised that the petitioner had not other current assets, such as stationery and similar supplies that it expects to use during the coming year. Further, a caption at the bottom of each page of the Statement of Financial Position reads, "The accompanying notes are an integral part of these financial statements." No such notes were provided with the financial statements. Even if the financial statements were audited, the absence of those notes would decrease their reliability.