

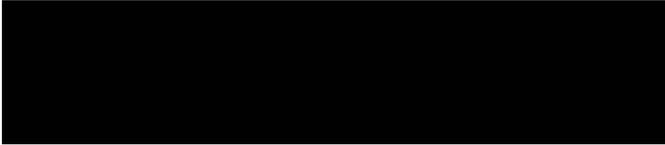
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington DC 20529-2090



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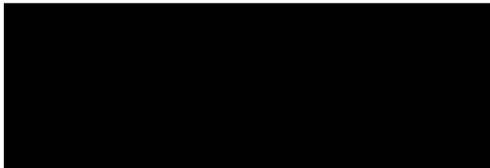
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom

Acting Chief, Administrative Appeals Office

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

The petitioner is a non-profit religious organization. It seeks to employ the beneficiary permanently in the United States as a music leader. As required by statute, an ETA 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 the requirements set forth on the approved labor certification were consistent with the visa classification sought. The director also determined that the petitioner had failed to establish that it had the ability to pay the proffered wage or that the beneficiary had obtained the required work experience. The director denied the petition on April 15, 2008.

On appeal, the petitioner, through counsel, submits additional evidence relating to the petitioner's ability to pay the proffered wage and the beneficiary's work experience. Counsel asserts that the director should have exercised discretion to correct the visa classification.

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).

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)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other 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 not available in the United States.

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

(4) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

Part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on February 26, 2007, indicates that the petitioner currently employs four workers, reported a gross annual income of \$286,452.69 and a net annual income of \$45,689.49. The petitioner sought visa classification (Part 2, paragraph g of I-140) of the beneficiary as an unskilled worker (requiring less than two years of training or experience) under section 203(b)(3)(A)(iii) of the Act. The ETA Form 9089 submitted in support of this visa classification required forty-eight months (four years) of experience in the job offered as a music leader.

Citing 8 C.F.R. § 204.5(l)(2), and as mentioned above, the director observed that the certified position described on the ETA Form 9089 required forty-eight months of experience. As the visa classification sought on the I-140 petition designated the unskilled worker category (paragraph g), the I-140 petition was not approvable because it was not supported by the appropriate ETA Form 9089. In order to be classified as an unskilled worker, the ETA Form 9089 must require less than two years of training or experience. The director denied the petition on this basis because the petitioner did not demonstrate that the position required less than two years of training or experience.

On appeal, counsel asserts that the both categories are within third preference classification under section 203(b)(3) of the Act and whether box “e” or box “g” is designated is irrelevant. Counsel maintains that the director should have exercised discretion to select the appropriate visa category. The AAO does not concur. The regulation at 8 C.F.R. § 103.2(b)(8)(ii) clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, if evidence of ineligibility is present. It is noted that neither the law nor the regulations require the director to consider other classifications if the petition is not approvable under the classification requested. We cannot conclude that the director committed reversible error by adjudicating the petition under the classification requested by the petitioner. Further, there are no provisions permitting the petitioner to amend the petition on appeal in order to reflect a request under another classification.

With respect to the petitioner’s ability to pay the proffered wage, it is noted that 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 [United States Citizenship and Immigration Services (USCIS)].

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage. It must also demonstrate that the beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The filing date or priority date of the ETA Form 9089 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted for processing on September 27, 2006. The proffered wage as set forth on the ETA Form 9089 is \$952.00 bi-weekly, which amounts to \$24,572 per year.

In support of its ability to pay the proffered wage, the petitioner provided a copy of a 2006 Florida Not-for-Profit Corporation Annual Report, which listed the officers and directors but did not provide any financial information. The petitioner also provided a copy of its articles of incorporation, copies of unaudited financial statements for 2006, and copies of its bank statements for the last three months of 2006, as well as a copy of a certificate of deposit held.

The director declined to accept the petitioner's bank statements and unaudited financial statements as evidence of its continuing ability to pay the proffered wage consistent with the requirements of 8 C.F.R. 204.5(g)(2). While acknowledging that the petitioner may not be required to file a federal income tax return,¹ the director noted that the petitioner had not shown

¹The record does not contain any evidence of the petitioner's tax status with the Internal Revenue Service (IRS). It is noted that the special tax rules that may apply to churches do not

that other evidence required by the regulation such as an audited financial statement was inapplicable, inaccurate or unavailable.

On appeal, the petitioner submitted an audited financial statement from a certified public accountant, [REDACTED]. It covers 2007 and reflects that the petitioner had \$336,877 in current assets and no liabilities in 2007, yielding \$336,877 in net current assets.² Total revenue was reported as \$370,415, which exceeded total expenses of \$294,011 by \$76,404. Based on this audited financial statement, either the petitioner's net current assets of \$336,877 or its net revenue of \$76,404 was sufficient to pay the proffered salary and establish the ability to pay. This part of the director's decision has been overcome.

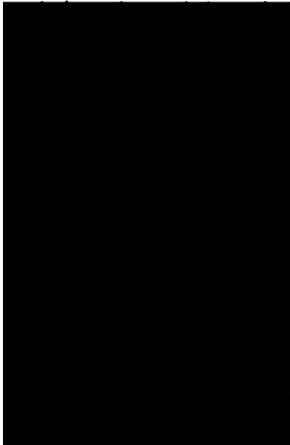
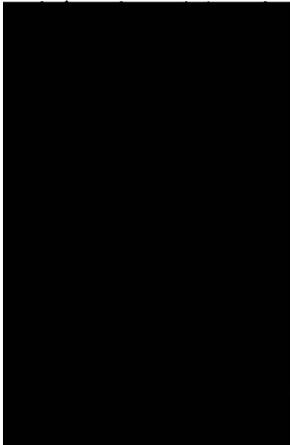
Relevant to the requirements of the position of music leader, the Form ETA 9089 describes the job's duties on Part H, no. 11, where it states:

apply to religious organizations as classified by the IRS. However, all tax-exempt organizations, including churches and religious organizations (regardless of whether tax exempt status is claimed) are required to maintain books of accounting and other records to support any claim for exemption. Religious organizations that are not recognized as churches may include nondenominational ministries, interdenominational and ecumenical organizations or other organizations whose main purpose is the study or advancement of religion. Generally, all religious organizations must file Form 990, Return of Organizations Exempt from Income tax subject to certain dollar thresholds. Churches, interchurch organizations of local units of a church, certain mission societies, or an exclusively religious activity of any religious order are some exceptions to the required filing of a Form 990. Unrelated gross business income of \$1,000 or more for a taxable year must be reported on a Form 990-T, Exempt Organization Business Income Tax Return by both churches or religious organizations. See *Tax Guide for Churches and Religious Organizations*, <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (accessed 9/16/09).

² Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Lead and coordinate worship and other church musical activities. Provide music lessons, including guitar, piano, drums and bass to interested congregation members. Some experience recording music.

With reference to the beneficiary's work experience, the ETA Form 9089 directs that all jobs should be listed that the beneficiary has performed in the last three years and additionally to include any jobs that qualify the beneficiary for the certified position. The beneficiary signed the ETA Form 9089 on February 20, 2007. He claims the following employment:

	Employer	Job	Dates	Hours per Week
1.	Petitioner	Volunteer deacon	1/01/03 to 09/27/06	15 hrs.
2.		Worship music teacher	01/15/99 to 11/01/2000	25 hrs.
3.		Professor (music, art, & Illegible)	02/15/96 to 11/15/96	40 hrs.
4.		Music Leader	02/01/86 to 08/15/98	30 hrs.

The petitioner's resume was also submitted to the record. It contained an additional job not listed on the ETA Form 9089. The beneficiary asserts that from 2001 to 2003 he worked for the Comunidades de Formacion Cristiana in Homestead, Florida as a musician for the church worship group.

The record additionally contains copies of various certificates indicating the beneficiary's attendance in music or religious programs,³ as well as a copy of a letter in Spanish from Pastor  of the Palabra de Vida in San Pedro Sula, Honduras. The English translation, which does not comply with the terms of 8 C.F.R. § 103.2(b)(3) providing for an accompanying translator's certification⁴ merely indicates that it was dated June 24, 2002 and states that the

³ The ETA Form 9089 does not indicate that any training is required for the proffered position.

⁴ *Translations.* Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

beneficiary was an active member of the ministry and was a music teacher for the church.

Three employment verification letters identified as “acknowledgements” have been submitted on appeal. They are each dated May 12, 2008. The first is from [REDACTED] of the Palabra de Vida in San Pedro Sula, Honduras. The original Spanish letter, which was submitted in the underlying record is not provided here. The letter states that the beneficiary worked from January 15, 1999 to November 1, 2000 and was in charge of teaching music theory and also played keyboard and guitar. The letter does not verify how many hours per week the beneficiary worked. The second acknowledgement is from the Polivalente Renacer in Tegucigalpa, Honduras and states that the beneficiary worked as a professor from February 15 through November 15, 1996 teaching music appreciation, mathematics, and technical drawing, working 30 hours per week rather than the 40 hours per week as claimed on the Form ETA 9089. The signature is illegible. The third acknowledgement is from the “Asociacion Brigadas de Amor Cristiano” in Tegucigalpa, Honduras. This letter states that the beneficiary worked from February 1, 1986 to August 15, 1998 and summarizes his duties during that time as coordinating music classes from January 1991 to November 1996, and played various instruments during these years for church activities as well as participated as a musician in a recording in 1989. Both signatures on this acknowledgement are illegible and are otherwise not identified. The letter does not verify whether this employment was full-time or part-time or how many hours per week.

An additional letter, dated May 11, 2008 has been provided from [REDACTED] of the Ministerios Ebenezer in Miami, Florida. He states that from December 24, 2000 through June 1, 2003, the beneficiary was serving in that ministry as a music minister and was responsible for teaching music theory and training. [REDACTED] also states that the beneficiary played keyboard and guitar and lead the praise and worship of the services. It is noted that this job was omitted from both the ETA Form 9089 and the beneficiary’s resume, with the ETA Form 9089 claiming employment with the petitioner beginning in January 2003 and the resume claiming employment with the Comunidades de Formacion Cristiana in Homestead, Florida. It is further noted that the letter does not specify whether the beneficiary worked part-time or full-time or specify how many hours per week he was employed.

Even if considered for a third preference skilled worker visa category, based on the omissions and inconsistencies as set forth above relating to the employment verification letters, it may not be concluded that the petitioner has demonstrated that the beneficiary acquired the requisite forty-eight months of full-time work experience as a music leader as of the priority date. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Based on a review of the underlying record and the argument submitted on appeal, it may not be concluded that the labor certification provided supports the approval of the petition for an unskilled worker visa classification initially sought by the petitioner. Additionally, there was insufficient evidence that the beneficiary had obtained forty-eight months as a full-time music leader as of the priority date. Therefore, the appeal will be dismissed on these bases.

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.