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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



B6

Date: **APR 27 2011**

Office: TEXAS SERVICE CENTER

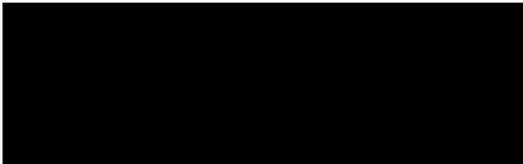
FILE: 
SRC 07 096 53550

IN RE: Petitioner:
 Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
 of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

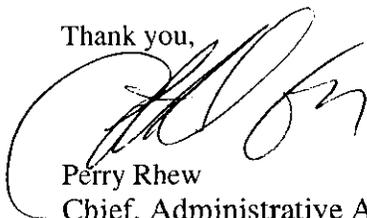


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner purports to be a national religious organization with numerous affiliated churches located throughout the United States. It seeks to employ the beneficiary permanently in the United States as a Director of Religious Activities at its church in North Lauderdale, Florida. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, 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 February 22, 2008 denial, the issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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(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, 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 DOL. 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 DOL 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 9, 2004. The proffered wage as stated on the Form ETA 750 is \$13.00 per hour (\$27,040 per year). The Form ETA 750 states that the position requires a high school education, three years of training in Theology and five years experience in the related occupation of "Working in [a] Pentecostal Church," and other special requirements, being "active in religious work/faith."

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is a religious organization. The petitioner submitted a letter from the Internal Revenue Service (IRS) addressed to [REDACTED] Employer Identification Number [REDACTED] stating that organization was exempt from federal income tax under the provisions of section 101(6) of the Internal Revenue Code of 1939, which corresponds to section 501(c)(3) of the 1986 Code. The petitioner listed on the Form ETA 750 and Form I-140 is [REDACTED], with an address of [REDACTED] Lauderdale, Florida. According to the Form I-140, the petitioner was established in 1982, has a net annual income of \$4,893,198 and employs 75 workers. The petitioner did not list its tax identification number on the Form I-140. On the Form ETA 750B, signed by the beneficiary on June 28, 2004, the beneficiary claims to have worked for the petitioner from May 1999.

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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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 has not established

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).

that it employed and paid the beneficiary the full proffered wage, or any wages for that matter, during any relevant timeframe including the period from the priority date in 2004 or subsequently.²

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. Texas 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the

² The beneficiary claims to have worked for the petitioner from May 1999. In a request for evidence (RFE) dated September 28, 2007, the director noted that the beneficiary claimed to have been employed by the petitioner "for the last seven (7) years." The director asked that the petitioner provide copies of the beneficiary's W-2 Forms, Forms 1099 or other evidence of wages paid for years 2004 through 2007. The petitioner provided no proof of wages paid to the beneficiary despite the director's request. Instead, the beneficiary submitted a statement that he has worked as a painter "during the years 2004, 2005 [and] 2006." This conflicts with the experience listed on Form ETA 750B, which states that the beneficiary was employed as a missionary/preacher until June 28, 2004 (date of signature). 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Total assets will not be considered in the determination of the ability to pay the proffered wage. The petitioner’s total assets include depreciable assets that the petitioner uses in its business, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner’s current assets and current liabilities.³ On a tax return, a corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

³ 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.

The record before the director closed on December 11, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. In this instance, the petitioner claims tax exempt status and, as such, if tax exempt would not be required to file federal income tax returns. Thus, its net income and net current assets cannot be determined without the submission of audited financial statements which the petitioner did not provide.

As stated above, 8 C.F.R. § 204.5(g)(2) requires the petitioner to demonstrate its ability to pay the proffered wage through evidence in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner states that it is tax exempt based on 501(c)(3) of the Internal Revenue Code (the Code) and not required to file federal tax returns. As previously noted an IRS letter addressed to [REDACTED]

Princeton, Florida, Employer Identification Number [REDACTED] exempted that organization from federal income tax. From the record, however, it is not clear that the petitioner, [REDACTED]

[REDACTED] Florida, operates under the same tax identification number. To assure continued tax exemption, an exempted party should maintain records to show that funds are expended only for purposes listed in section 501(c)(3) of the Code. If funds are distributed by an exempt organization to other organizations, records should show whether they are exempt under Section 501(c)(3). In support of the Form I-140 petition the petitioner submitted unaudited financial reports for 2004, 2005, 2006 and 2007. The financial reports were supported by either reviews or compilation letters from the petitioner's accountant but nothing shows that they were audited. 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Additionally, the statements submitted encompass over sixty or seventy individual churches depending on the year of the statement. If an individual church operates under a separate tax identification number, a statement for that individual church alone would be required. Nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Based upon the tax identification numbers in the record, it is unclear what information specifically covers the petitioning entity. Only the IRS letter to the [REDACTED]

[REDACTED] Florida, states a tax identification number of [REDACTED] Form I-140 does not specify what tax identification number the petitioner operates under. 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).

On appeal, counsel states that the petitioning church is a part of a larger organization, the [REDACTED] [REDACTED] with churches located throughout the United States. It is noted however, that the Form I-140 petition does not appear to have been filed by a local church, but by [REDACTED]

[REDACTED] The unaudited financial statements submitted in support of the petition are for [REDACTED] [REDACTED] which, according to the petitioner's accountant, is a single organization consisting of numerous affiliated churches. The petitioner states, on appeal, that all churches are supported by each other and that its national fund is located in New Jersey. Based upon the tax identification numbers in the record, it is unclear what information specifically covers the petitioning entity. 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).

As previously noted, the petitioner submitted unaudited financial statements in support of its petition, and unaudited financial statements will not establish the petitioner's ability to pay the proffered wage from the priority date onward as those statements were prepared based upon the assertions of management and were not audited in accordance with generally accepted auditing principles. The petitioner also submitted a copy of a bank statements from Commerce Bank, Cherry Hill, NJ showing a "national fund" non-profit interest checking account for the time period November 30, 2007 through December 31, 2007 with a statement balance of \$255,011.28 as of December 31, 2007. The petitioner did not submit bank records for any other time period from the 2004 priority date onward. A bank record for a single month in 2007 will not establish the petitioner's continuing ability to pay the proffered wage from 2004 onward. Further, counsel's reliance on the balances in 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 would otherwise paint an inaccurate financial picture of the petitioner had such information been submitted. 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 would not be allocated toward payment of current liabilities. Finally, counsel stated that the national fund is a fund that could be used not only to support the petitioner's ability to pay the proffered wage in this instance, but which is used to support other affiliated churches and their independent needs. The record contains no information about the financial demands of other affiliated churches which could also impact the petitioner's ability to pay the proffered wage of the present beneficiary. As noted above, it is unclear whether all of the churches operate under the same tax identification number and whether the funds could be considered as an asset of the actual petitioner.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The record of proceeding does not contain primary regulatory prescribed evidence in accordance with 8 C.F.R. § 204.5(g)(2) or sufficient financial documentation to establish the petitioner's ability to pay the proffered wage from the priority date onward. The only documentation submitted in this regard, as previously noted, was the unaudited financial statements and a bank statement for a single month in 2007. Both of these documents seem to cover the consolidated churches and not the individual church. For the reasons set forth above, those documents are insufficient to meet the petitioner's burden of proof. The record does not establish that the petitioner's reputation as a religious organization is such that it may be concluded that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. The record does not establish that, considering the totality of the circumstances, the petitioner has established the continuing ability to pay the proffered wage from the priority date.

Beyond the decision of the director, the petitioner has not established that the beneficiary has a high school education, three years of training in theology and five years of experience in the related occupation of "working in [the] Pentecostal Church" as required by the Form ETA 750. As previously stated, 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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). 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (the AAO reviews appeals on a de novo basis). 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.

The petitioner submitted a statement from the [REDACTED] located in Cali – Colombia which states that the beneficiary completed five semesters of Biblical Theology study from January 1996 to June 1998. The referenced period of study does not equal or exceed the three years of theology training required by the Form ETA 750. A letter from the United Pentecostal Church of Colombia dated November 29, 2002 states that the beneficiary was “a member” of that church from 1994 and that he performed functions as follows: leader of family group Bible studies; Sunday School teacher; evangelism group member; and preached in the jail ministry. The letter does not detail the periods of time in which these functions were performed and does not establish the five years of experience working in a Pentecostal Church required by the Form ETA 750. A letter from “United National Association Of Imprisonment And Penitentiary Of Colombia” dated January 22, 2007 states that the beneficiary was a member of that organization and “a collaborator with his ministry during the years 1997 – 1998,” performing ministry in prisons as a preacher. This experience was not specifically listed on Form ETA 750B. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted. The letter, taken in conjunction with the letter from the United Pentecostal Church of Colombia does not establish the beneficiary has the required five years of experience working in a Pentecostal Church required by the Form ETA 750. Finally, a letter from the petitioner detailing the beneficiary’s activities since 2006 does not establish the beneficiary’s qualifications since, as previously stated, the beneficiary must be fully qualified as of the July 9, 2004 priority date.

Finally, it is noted that the petitioner indicated on the Form I-140 that the petition was being filed for “any other worker” under section 203(b)(3)(A)(iii) of the Act. The Form ETA 750, however, requires at three years of training in theology and five years experience working in a Pentecostal Church to be qualified for the offered position.

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 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.

Here, the Form I-140 was filed on February 2, 2007. On Part 2.g. of the Form I-140, the petitioner indicated that it was filing the petition for "Any other worker (requiring less than two years of training or experience.)"

The regulation at 8 C.F.R. § 204.5(i) provides 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.

In this case, the labor certification indicates that the proffered position requires a high school education, three years of training in theology and five years of experience in the related occupation of "[w]orking in [a] Pentecostal [c]hurch." The labor certification also list other special requirements for the position, that the beneficiary must be "active in religious work/faith." The required experience exceeds that of an "other worker." However, the petitioner requested the "any other worker" classification on the Form I-140. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage from the priority date onward, or that the beneficiary met the education, training or experience requirements set forth on the Form ETA 750. Further, the petition is not supported by a valid labor certification in that the Form ETA 750 was certified for a position requiring a high school education, three years training in Theology and five years experience in the related occupation of "[W]orking in [a] Pentecostal [c]hurch," and the Form I-140 was filed for "Any other worker (requiring less than two years of training or experience.)"

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.