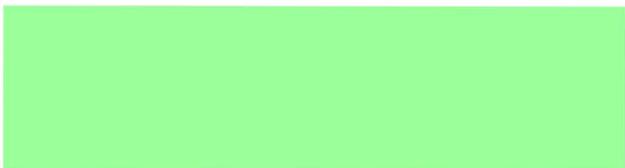


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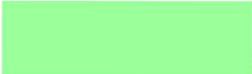
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

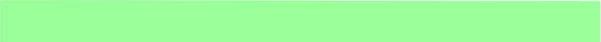


U.S. Citizenship
and Immigration
Services



DATE: **DEC 03 2012** OFFICE: TEXAS SERVICE CENTER

FILE: 

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:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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). The appeal will be dismissed.

The petitioner describes itself as a nonprofit religious organization. It seeks to employ the beneficiary permanently in the United States as an assistant pastor. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The priority date of the petition is December 1, 2003.²

At issue in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date.

The record shows that the appeal is properly filed 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.

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.³

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). 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

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

³ 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).

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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The proffered wage in the instant case is \$39,000 per year.

The petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, that it was established in 2002 and employs one worker. On the Form ETA 750B, signed by the beneficiary on April 5, 2007, the beneficiary did not claim to have been employed by the petitioner.

On appeal, counsel asserts that the petitioner submitted copies of bank account statements that show the monthly bank balance for the entire period of time at issue, and that the director failed to acknowledge its reviewed financial statements for 2005 through 2007.

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. The record contains no evidence that the petitioner employed and paid the beneficiary at any time since the priority date of December 1, 2003.

If, as in this case, 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 petitioner's net income and net current assets. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *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. 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). USCIS may also 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 (Reg. Comm'r 1967).

The record before the director closed on March 5, 2008, with the receipt by the director of the petitioner's response to the director's request for evidence (RFE). The RFE requested the petitioner submit copies of its 2003 through 2006 federal tax returns, annual reports or audited financial statements; and evidence of any wages paid to the beneficiary.

The petitioner did not submit any financial statements for 2003 or 2004. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* The petitioner did not submit tax returns, annual reports or audited financial statements covering the period from the priority date. The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation

Further, the submitted financial statements for 2005, 2006 and 2007 are not 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. The submitted reviewed financial statements only contain limited assurances from the accountant who prepared them. Reviewed financial statements are based on the representations of management, and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are therefore insufficient to demonstrate the ability to pay the proffered wage.

Regarding the petitioner’s bank statements, bank records *may* be considered as *additional* evidence in addition to the evidence required by 8 C.F.R. § 204.5(g)(2). In this case, as is discussed above, the petitioner failed to submit the required evidence. Further, many of the bank statements pertained to entities other than the petitioner. The bank accounts of other entities cannot be considered when determining the petitioner’s ability to pay the proffered wage. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation’s ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm’r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “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.”

Counsel’s assertions and the evidence submitted on appeal do not outweigh the petitioner’s failure to provide the evidence required by 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage.

Beyond the decision of the director,⁴ it is also concluded that the petitioner has failed to establish that the labor certification describes a *bona fide* offer of employment. First, the beneficiary

⁴ 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

appears to be related to the petitioner's senior pastor, [REDACTED]. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 00-INA-93 (BALCA May 15, 2000). Not only does the beneficiary have the same last name as the senior pastor of the petitioner, but, according to the petition, they reside together.

In addition, based upon a search of public records, the address listed for the petitioner, [REDACTED] is a three-bedroom condo and a private residence. Likewise, according to the petition and the labor certification, the location where the beneficiary is to be employed, [REDACTED] is a private home in a residential area. According to the petitioner's letter filed with the Form I-140, the petitioner utilizes rented facilities to hold its church meetings. The record contains no documentation to establish the existence of any facilities rented by the petitioner in Irving, Texas. It is also unclear how an organization in Virginia that operates out of a private residence with one employee intends to employ a pastor in Texas. Further, the record contains no evidence of an actual congregation for the petitioner in Texas.

It is also noted that the petitioner's corporate status was revived on September 21, 2010, at a new address of [REDACTED]. This also appears to be a private residence. Therefore, it appears the petitioner was not in operation as a nonprofit corporation in the state of Virginia at all times during the pendency of the petition, and is no longer a corporation within the state of Virginia. Additionally, the location where the beneficiary is to work in Texas, [REDACTED] is a private residence.

Taken together, it is concluded that the petitioner has failed to establish that the employment set forth on the labor certification constitutes a *bona fide* job offer that was open to U.S. workers, and the petition must also be denied for this reason.

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.

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) (noting that the AAO conducts appellate review on a *de novo* basis).