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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

[Redacted]

DATE: **SEP 28 2012** OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

[Redacted]

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,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed an untimely appeal, which the director considered as a motion. The director dismissed the motion. The petitioner appealed the dismissal of the motion to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a Christian church. It seeks to employ the beneficiary permanently in the United States as a teacher. 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).

At issue in this case is whether or not the petitioner has had the 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.<sup>1</sup>

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.

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.

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<sup>1</sup> 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).

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 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 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 March 24, 2005. The proffered wage as stated on the Form ETA 750 is \$24.49 per hour (\$50,939 per year.) The Form ETA 750 states that the position requires a two-year Bachelor of Arts in theology.

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, at part 5, section 2 that the organization was established in 1975 and employs six workers. On the Form ETA 750B, that was signed by the beneficiary on March 17, 2005, the beneficiary indicated that she was employed by the petitioner from April 4, 2001 to March 2005.

On appeal, counsel asserts that since the petitioner is specifically exempt for filing Form 990 with the Internal Revenue Service, it should not be penalized for failing to provide documentation which is not required under federal law. Counsel also asserts that because of the petitioner's extensive financial holdings, its bank statements should be considered in determining that the petitioner had the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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.

The record of proceeding contains a copy of IRS W-2 Forms that were issued by the petitioner to the beneficiary for 2005 and 2006 as shown in the table below.

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- In 2005, the Form W-2 stated Wages, tips and other compensation of \$17,336.
- In 2006, the Form W-2 stated Wages, tips and other compensation of \$18,000.

Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of March 24, 2005.

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 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 (1<sup>st</sup> Cir. 2009).

The record before the AAO closed on June 27, 2012, with the receipt by the AAO of the petitioner's response to the AAO's Notice of Intent to Dismiss and Request for Evidence and Notice of Derogatory Information (hereinafter "Notice").

The AAO's Notice specifically requested the petitioner submit updated monthly statements for the petitioner's three Bank of America accounts it submitted in the initial filing, and a letter from an officer of the Bank of America, or any other institution the petitioner may have an account, that stated any restrictions on the petitioner's bank accounts. The AAO also requested copies of meeting minutes, resolutions, or any other evidence from the petitioner that establishes how the funds in these various accounts are to be allocated or used.

The petitioner submitted updated monthly statements for its business checking accounts, and a letter from the Bank of America Customer Service and Support, stating the balances of the petitioner's business accounts. However, this letter does not indicate the balances of the petitioner's parsonage, construction, or any other accounts maintained by the petitioner. Further, this letter gives no indication of any restrictions that may be in place on any of the petitioner's existing accounts. Further, the petitioner failed to submit copies of meeting minutes, resolutions, or any other evidence from the petitioner that establishes how the funds in these various accounts are to be allocated or used.

Additionally, the director's August 18, 2007 request for evidence specifically requested audited financial statements or the petitioner's annual reports. The petitioner failed to submit either of the requested documents in its response submitted on November 13, 2007.

Therefore, the petitioner's failure to submit these documents cannot be excused. 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 stated above, the regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the petitioner's ability to pay shall be either in the form of copies of annual reports, federal tax returns, or audited financial

statements. 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 the Service.

The petitioner failed to submit copies of annual reports or audited financial statements requested by the director. Bank records **may** be considered as **additional** evidence in addition to the evidence required by 8 C.F.R. § 204.5(g)(2).

Counsel's assertions and the evidence presented on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Finally, the petitioner submitted a letter from [REDACTED] Accountant Registrar, stating the petitioner guaranteed to provide the beneficiary's monthly wages. However, again this guarantee is not one of the required forms of acceptable evidence required by 8 C.F.R. § 204.5(g)(2) to establish the petitioner's ability to pay the proffered wage. In addition, evidence is required of a sponsoring employer's ability to pay the proffered wage as of the priority date, not a guaranty to support the beneficiary in the future. *See* 8 C.F.R. § 204.5(g)(2). A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or through annual reports, or audited financial statements.

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. 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.

In this matter, the totality of the circumstances does not establish that the petitioner had the ability to pay the proffered wage. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee or that it entails outsourced services. The record does not establish that the petitioner had the ability to pay the proffered wage in 2005 through 2011, and no facts paralleling those in *Sonegawa* are present to establish that the petitioner had the ability to pay the proffered wage. Accordingly, the petitioner has not established that totality of the circumstances demonstrate that it could pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.<sup>2</sup> The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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'r 1986). See also, *Madany 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 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires a two years of study towards a bachelor's degree in theology. On the labor certification, the beneficiary claims to qualify for the offered position based on a two-year Bachelor of Arts in Theology from the [REDACTED] completed in December 1999.

The AAO's May 2, 2012 notice advised the petitioner that the [REDACTED] was not recognized by the U.S. Department of Education.<sup>3</sup>

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<sup>2</sup> 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 (9<sup>th</sup> 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).

<sup>3</sup> The AAO will not consider education from an unaccredited educational institution. A college or university must have been accredited by the relevant authority at the time the beneficiary attended the institution. This ensures that the college or university was evaluated by a credible institution to possess a basic level of quality by applying specific criteria and procedures

In its response, the petitioner submitted a letter from [REDACTED] Assistant Registrar for the [REDACTED] stating the beneficiary completed the requirements of the Diploma in Theology – CLD program at [REDACTED] states the beneficiary entered the program February 3, 1997 and graduated on December 17, 2004.

There is no explanation in the record how the beneficiary could have been attending school in [REDACTED] at the same time she was attending school in [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Further, the petitioner failed to submit copies of transcripts or other evidence to establish this “Diploma in Theology – CDA” is the equivalent of a bachelor degree. Finally, a bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm’r 1977). Therefore, the beneficiary’s diploma from the Golden Gate Baptist Theological Seminary cannot be considered a bachelor degree.

Therefore, the evidence in the record does not establish that the beneficiary possessed the required education, training, and experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.

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reflecting the qualities of a sound educational program. Accordingly, the AAO will not recognize a degree from an unaccredited educational institution for purposes of satisfying the educational requirements of a labor certification or for preference classification.