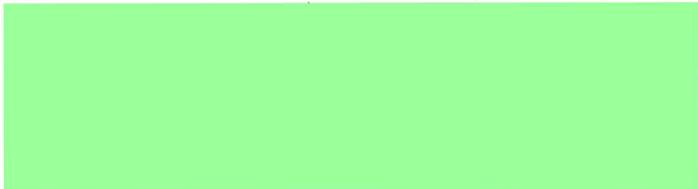


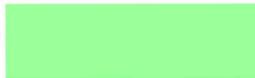


U.S. Citizenship
and Immigration
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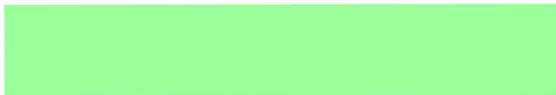
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DATE **FEB 05 2013**

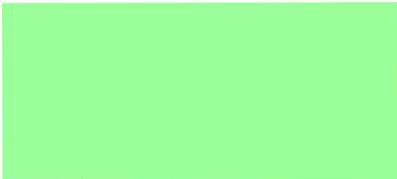
OFFICE: NEBRASKA SERVICE CENTER FILE: 

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, Nebraska Service Center. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reopen and motion to reconsider. The motion to reopen and reconsider will be granted. The prior decision of the AAO will be affirmed and the appeal will remain dismissed.

The petitioner is a parochial school. It seeks to employ the beneficiary permanently in the United States as an elementary teacher. As required by statute, Form ETA 750, Application for Alien Employment Certification, approved by the United States 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 proffered wage¹ as of the priority date of the visa petition and denied the petition, accordingly.

The AAO dismissed the petitioner's appeal² on March 31, 2011 and affirmed the director's denial, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage from the priority date onward.³

On May 2, 2011, the petitioner, through counsel, has filed a motion to reopen and to reconsider. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Included

¹ 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.

² The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

³ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

with the motion, counsel submits new evidence related to the petitioner's ability to pay the proffered wage of \$44,510 from the priority date of October 25, 2002 onward.

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

In its previous decision the AAO explained the process of reviewing a petitioner's ability to pay a proffered wage offer to a beneficiary through an examination of wages paid to the beneficiary by the petitioner, or the petitioner's net income or net current assets. For the reasons set forth therein, the AAO rejected the petitioner's assertion that the beneficiary's benefits should be considered as part of the proffered wage. In its decision, the AAO reviewed the beneficiary's Wage and Tax Statements (W-2s) for 2002 through 2007 and the assertions of the petitioner that although it was not required to file a tax return as a tax exempted organization, it had the ability to pay the proffered wage to the beneficiary through its income combined with a subsidy from the Church. The petitioner submitted a copy of the petitioner's 2009 annual budget.

In its March 31, 2011 decision, the AAO noted that the copy of the petitioner's projected 2009 budget did not suggest that it had the ability to pay the beneficiary's proffered wage of \$44,510. The budget summary set forth on the first page (line 600) indicated that total expenses of \$1,537,276 were expected to exceed total revenue of \$1,481,950 by (\$55,326). Moreover, this document was a projection and did not represent an audited financial statement⁴ or annual report (supported by audited financial statements) in accordance with 8 C.F.R. § 204.5(g)(2) covering the period beginning in 2002, the year of the priority date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Additionally, the AAO noted that the petitioner has sponsored other workers. USCIS records reflect that the petitioner has sponsored an additional worker with a 2003 priority date. Where multiple petitions are filed, the petitioner is obligated to show that it has

⁴ 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.

sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2).

On motion, counsel renews the assertion that the petitioner has established the continuing ability to pay the proffered wage from the priority date onward. In support of that contention, counsel has submitted copies of the petitioner's bank statements for 2002 through 2008, excepting April 2007, April 2008 through July 2008, October 2008, December 2008, January 2009, July through December 2009, January and February 2010, July and August 2010, and January 2011, accompanied by copies of the front of various checks paid in 2008, 2009 and 2010.

Selected bank statements do not establish the continuing ability to pay the proffered wage. They 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 otherwise paints an inaccurate financial picture of the petitioner. For example, as noted in the AAO's previous decision, the petitioner could have submitted audited financial statements for the relevant period of time as required by 8 C.F.R. § 204.5(g)(2), but elected otherwise. Further, it is noted that bank statements show the amount in an account on a given date and do not reflect other encumbrances and expenses that would affect the petitioner's financial profile.

Counsel also submitted copies of the petitioner's projected 2010 and 2011 budgets. They list various streams of revenue including the church, daycare, pre-K, and the grammar school. Expenses are also stated. These documents are projections and do not represent historical evidence that the petitioner had the ability to pay the proffered wage in those years such as would be shown by an audited financial statement.⁵ Moreover, it is noted that the 2010 budget summary set forth on the first page (line 600) indicates that total expenses were expected to exceed total revenue resulting in -\$83,176. In the 2011 budget summary, the surplus after debt (line 600) was shown to be \$10,461. These documents do not establish the petitioner's ability to pay the proffered wage.

Additionally, on motion, counsel submitted copies of the beneficiary's W-2s for 2008, 2009, and 2010, showing that the petitioner paid her \$29,053.20 in 2008; \$29,227.20 in 2009; and \$29,227.20 in 2010. This compensation was \$15,456.80 less than the proffered wage of \$44,510 in 2008; \$15,282.80 less in 2009; and \$15,282.80 less than the proffered wage in 2010.

⁵ 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 petitioner did not submit sufficient evidence establishing its continuing financial ability to pay the proffered wage in accordance with 8 C.F.R. § 204.5(g)(2) covering the period beginning in 2002 onward. Further, the petitioner failed to address the additional beneficiary that the petitioner sponsored as stated in the AAO's prior decision. As stated therein, a petitioner must establish its continuing ability to pay each beneficiary his respective proffered wage from each priority date until each beneficiary obtains lawful permanent residence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, on motion, counsel submitted a letter, dated April 18, 2011, signed by the petitioner's principal expressing the petitioner's willingness to pay the \$44,510 proffered wage to the beneficiary. This letter appears to be redundant as the proffered wage certified by the petitioner to the Department of Labor on the Form ETA 750 was already amended to \$44,510 in 2007. Counsel submitted five additional letters from individuals that appear to describe the petitioning school's long-term relationship to the community or to vouch for the beneficiary's value. As noted in the AAO's previous decision, although the record indicates that the petitioner is a long-established entity, the record also lacks persuasive documentation consistent with 8 C.F.R. § 204.5(g)(2), which establishes the petitioner's continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.⁶

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 motion to reopen and reconsider is granted. The AAO affirms its previous decision of March 31, 2011. The appeal remains dismissed.

⁶ It is also noted that the petitioner did not address the deficiencies of the labor certification and the nature of the job offer to the beneficiary as an elementary school teacher, which must be statutorily considered as a professional occupation. However, as the labor certification does not state a degree requirement, the labor certification does not support a petition for a professional and the skilled worker category is not available because the position is statutorily a professional occupation.