



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: OFFICE: TEXAS SERVICE CENTER  
**JAN 31 2013**

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 a religious worker. 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), describing the duties as “assist ordained clergy in bible teaching for children and youth group.”<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL). The priority date of the petition is October 19, 2007.<sup>2</sup>

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.<sup>3</sup>

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

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<sup>1</sup> 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.

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

<sup>3</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).

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 \$10.00 per hour for a thirty-five hour week, or \$18,200 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 1988 and employs two workers. On the ETA Form 9089, signed by the beneficiary on October 27, 2009, the beneficiary did not claim to have been employed by the petitioner.

On appeal, counsel states that the petitioner submitted copies of statements for two bank accounts that show the monthly bank balance for the entire period of time at issue, and submitted spreadsheets prepared the petitioner's treasurer for 2007, 2008, and 2009 stating the spreadsheets are its "annual reports" for those years.<sup>4</sup> Counsel asserts this objective evidence establishes the petitioner's ability to pay the proffered wage.

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 October 19, 2007.

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 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986)

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<sup>4</sup> Publicly traded companies of a certain size are required to submit annual reports to the U.S. Securities and Exchange Commission on Form 10-K. The Form 10-K provides a comprehensive overview of the company's business and includes its audited financial statements. These companies must also issue an annual report to shareholders, which contains the company's audited financial data and is often a simplified version of the Form 10-K. Either the Form 10-K or the annual report to shareholders constitute an annual report under 8 C.F.R. § 204.5(g)(2). Annual reports of private companies that contain audited financial data may also be acceptable. However, unaudited spreadsheets cannot constitute an annual report under 8 C.F.R. § 204.5(g)(2).

(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 May 13, 2010, with the receipt by AAO of the petitioner's statements and documents submitted appeal.

First, counsel's reliance on the unaudited "annual reports" is misplaced. 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. As there is no accountant's report accompanying these annual reports, the AAO cannot conclude that they are audited reports. Unaudited annual reports are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage

If the AAO would have accepted the submitted "annual reports," reports for 2007 through 2009, the reports would reflect the year-end income and expenses as listed on the below table.

	<u>2007</u>	<u>2008</u>	<u>2009</u>
<u>INCOME:</u>	\$186,164	\$203,252	\$198,560
<u>EXPENSES:</u>	<u>\$180,599</u>	<u>\$207,918</u>	<u>\$201,507</u>
TOTAL NET INCOME:	\$ 5,565	-\$ 4,616	-\$ 2,947

Therefore, for the years 2007 through 2009, the petitioner would not have sufficient net income 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, the petitioner failed to submit the required tax returns, annual reports, or audited financial statements. 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. 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)).

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.

In addition, the petitioner has filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker at the same wage, with a priority date of November 9, 2005. Therefore, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

Therefore, the evidence submitted does not establish that the petitioner had the continuing ability to 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>5</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 twenty-four months of experience as a religious worker. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a religious worker for [REDACTED] from June 7, 2000 to September 11, 2005.

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<sup>5</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).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a work experience certificate from [REDACTED] which states the organization employed the beneficiary from June 7, 2000 to September 11, 2005. However, the certificate does not describe the duties in detail and does not state if the job was full-time. In addition, the work experience certificate does not contain a translator's certification as required by 8 C.F.R. § 103.2(b)(3) (Any translated document must be accompanied by a certification by the translator that the translation is complete and accurate and that he or she is competent to translate from the foreign language into English).

The evidence in the record does not establish that the beneficiary possessed the required 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.

Finally, although it is not the basis of the instant decision, it does not appear that the offered position is for full-time employment. According to 20 C.F.R. § 656.10(c), the employer must certify that the job opportunity is for full-time, permanent employment. The duties of the offered position are to "assist ordained clergy in Bible teaching for children and youth group." From the record it appears the petitioner has approximately seventy members. Therefore, it does not appear in this case that conducting bible teaching for the children and youth of the petitioner's members require a full-time position. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); see also *Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5<sup>th</sup> Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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.