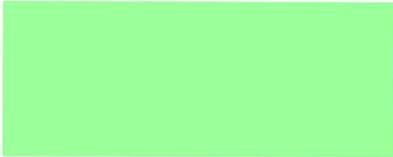


(b)(6)

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



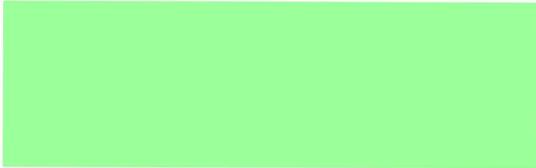
DATE **MAY 16 2013** OFFICE: NEBRASKA SERVICE CENTER

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: On January 11, 2008, United States Citizenship and Immigration Services (USCIS) received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved on February 4, 2009. The Director for the Nebraska Service Center (the director), however, revoked the approval of the immigrant petition on November 2, 2011, and the petitioner subsequently appealed the director's decision to revoke to the Administrative Appeals Office (AAO). The appeal will be dismissed and the director's decision to revoke the approval of the petition will be affirmed.

The petitioner is a religious organization and seeks to employ the beneficiary permanently in the United States as a religious assistant.¹ On January 11 2008, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on behalf of the above-named beneficiary. As required by statute, an ETA Form 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The petition was approved on February 4, 2009. However upon further review of the record and the petitioner's response to the Notice of Intent to Revoke (NOIR), the director concluded that the petitioner failed to demonstrate that it had the ability to pay the proffered wage as of the priority date and onward and revoked the petition accordingly.²

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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

¹ 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.

² The AAO notes that in its decision to revoke the petition, the director made references to the petitioner's noncompliance with an on-site inspection conducted by a USCIS officer. However, because the director's decision is solely based on the petitioner's ability to pay the proffered wage and not the petitioner's noncompliance with the on-site inspection, the AAO will not address counsel's assertions regarding the petitioner's noncompliance.

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).

On September 20, 2011, the director sent a NOIR, informing the petitioner that its failure of a compliance review pertaining to its nonimmigrant religious worker petition raised questions regarding whether the instant petition was based on a *bona fide* job offer. In his NOIR, the director specifically requested evidence regarding the petitioner's ability to pay, copies of the employment contracts between the petitioner and the beneficiary, and other documentary evidence establishing that a *bona fide* job offer continues to exist. Upon review of the petitioner response to the NOIR, the director concluded that the petitioner failed to demonstrate that it had the ability to pay the proffered wage. The director revoked the approval of the petition accordingly.

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The NOIR sufficiently detailed the doubt raised by the petitioner's failure of the compliance review and requested specific evidence for the petitioner to overcome such doubt regarding whether the job offer is *bona fide*. A lack of *bona fide* job offer would warrant a denial if unexplained and un rebutted, and thus the NOIR was properly issued for good and sufficient cause.

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 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 August 12, 2002. The proffered wage as stated on the Form ETA 750 is \$27,082 per year. The Form ETA 750 indicates that the position requires two years of experience in the job offered.

With respect to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2), in pertinent part, provides:

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 record before the director closed on October 20, 2011 with the receipt by the director of the petitioner's response to his notice of intent to revoke. On the petition, the petitioner claimed to have been established in 1989 and to employ two employees. On the Form ETA 750, signed by

the beneficiary on July 16, 2002, the beneficiary indicated that he began working for the petitioner in February 2002. As evidence of its ability to pay the proffered wage, or \$27,082 per year, the petitioner submitted a copy of the beneficiary's Internal Revenue Service (IRS) Form 1099-MISC for 2002, indicating that the petitioner paid the beneficiary \$18,332. The record also contains receipts signed by the beneficiary and the petitioner indicating that the petitioner paid the beneficiary \$1668.00 per month from January 2003 until August 2003, and \$834 in September 2003, which totals to \$14,178. The AAO notes that the payments the beneficiary received from the petitioner in 2002 and 2003 are \$8,750 and \$12,904 less than the proffered wage respectively. The record contains no evidence that the petitioner paid the beneficiary any salary since 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the applicable period, U.S. Citizenship and Immigration Services (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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

The petitioner is a tax exempt organization. A 1995 letter that was sent to the petitioner by the IRS indicates that the petitioner is required to file the Form 990 if its gross receipts each year are more than \$25,000. The petitioner submitted copies of account transcripts issued by the IRS for 2002 and 2003. However, these transcripts do not reflect any information regarding the petitioner's income; rather, they indicate the petitioner's account balances with the IRS. The petitioner submitted no evidence of any Forms 990 that it may have filed with the IRS, which suggests that its gross receipts were less than \$25,000, which is less than the proffered wage. Considering that the petitioner reported employing one other employee, the record does not demonstrate that the petitioner has the net income to pay the proffered wage. However, if the petitioner's gross receipts were more than \$25,000 per year, the petitioner has not submitted any evidence of his filings with the IRS for the applicable years.

The petitioner also submitted income and expense reports generated by [REDACTED] the president for the petitioner, indicating the following figures for the years 2002 through 2007:

Year	Income	Total Expense	Net Profit
2002	\$60,450	\$39,798	\$20,652 ⁴

⁴ The 2002 document indicates the figure reported for the net profit is for 2003, which may have been a typographical error.

2003	\$63,000	\$22,541	\$40,459
2004	\$82,990	\$52,456	\$30,534
2005	\$76,338	\$32,374	\$43,964
2006	\$80,233	\$39,329	\$40,904
2007	\$74,761	\$33,548	\$40,213

The AAO notes that these figures are reported by the petitioner's president and are not audited; therefore, they do not meet the requirements set by the regulation. See 8 C.F.R. § 204.5(g)(2). Furthermore, the petitioner submitted no financial information for the years 2008 and onward.

In his brief accompanying the appeal, counsel asserts that the regulation to require the petitioner to attain audited financial records and annual reports "places a heavy monetary strain" on the religious organization. Counsel further asserts that "forcing" a religious organization to make a choice between the benefits it seeks and its operation to further its religious views is unconstitutional. However, the AAO has no jurisdiction to rule upon the constitutionality of the Act or regulations. See, e.g., *Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997); *Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

The petitioner also submitted copies of several pledge statements from its members. Counsel, citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, further asserts that potential financial resources through income pledged by members must be considered. The AAO disagrees. We note first that, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In the *Full Gospel Portland Church* decision, after reviewing relevant financial statements, the court found that the petitioner's working capital and revenue established that it had the ability to pay the beneficiary the proffered wage for every year after the priority date was established, and that if the petitioner was not individually able to establish its ability to pay, legacy Immigration and Naturalization Service should consider the resources of its national organization, with which it was financially linked. In the present case, in contrast to the church in *Full Gospel Portland Church*, the petitioner has not provided the financial statements required by regulation showing that that it alone has the ability to pay the proffered wage, or evidence from a larger national organization showing that it can pay the proffered wage on behalf of the petitioner. Furthermore, the record contains no evidence demonstrating that the individuals, who made the pledges, have the ability to pay the pledged amounts. Absent supporting documentation, these assertions are insufficient proof of the petitioner's ability to pay. Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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)). The petitioner has not established that it had the ability to pay the beneficiary the proffered wage from the priority date in 2002 onward.

Beyond the director's decision, the AAO concludes that the petitioner also has failed to demonstrate that the beneficiary is qualified for the offered position. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

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. 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). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In this case, the Form ETA 750, items 14 and 15, set forth the minimum education, training, and experience that a beneficiary must have for the position of a religious assistant. Specifically, in the instant case, the petitioner indicated that the proffered position requires a minimum of two years of experience in the job offered. The duties listed by the petitioner at Item 13 of the Form ETA 750 are:

Assist Imam in conducting worship services; provide spiritual guidance to mosque members; and plan and arrange Islamic educational, social, and recreational programs for the Mosque: Assist Imam in conducting worship, wedding, funeral, and other services and in coordinating activities of lay participants. Assist in the preparation of prayer schedules. Visit mosque members in hospitals and convalescent facilities or at home to offer spiritual guidance and assistance, such as emergency financial aid or referral to community support services. Assist Imam and lay teachers in selecting books and reference materials for Islamic education classes and in adapting content to meet needs of different age groups. Write and deliver prayers and religious speeches. Teach Islamic history and doctrine of mosque to mosque members. Assist Imam in coordinating committees that oversee social and recreational programs.

The petitioner indicated on the labor certification that the beneficiary qualifies for the offered position based on his experience as a religious assistant at [REDACTED] from May 1984 until May 1999. The petitioner also indicated that the beneficiary was self-employed/unemployed from June 1999 until January 2002. As noted earlier, the beneficiary signed the labor certification on July 16, 2002, under a declaration that the contents are true and correct under penalty of perjury.

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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(1)(3)(ii)(A). The record contains an experience letter from [REDACTED] indicating that the beneficiary served as a naib-imam in the mosque from May 17, 1973 to March 31, 1976. The AAO notes that the petitioner did not list [REDACTED] on the labor certification as one of the beneficiary's employers. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's ETA Form 750B, lessens the credibility of the evidence and facts asserted. The petitioner submits no experience letter from [REDACTED] the employer that is listed on the labor certification. Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary meets the qualification as required by the labor certification.

The approval of the petition will remain revoked for the above stated reasons, with each considered as an independent and alternative basis for revocation. 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.