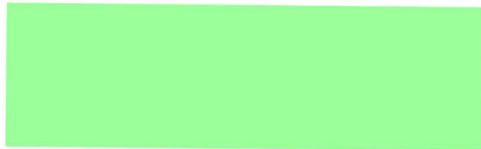


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



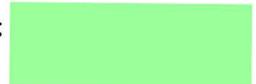
U.S. Citizenship
and Immigration
Services

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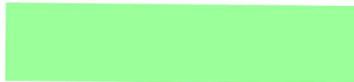


DATE: OCT 03 2013 OFFICE: NEBRASKA SERVICE CENTER

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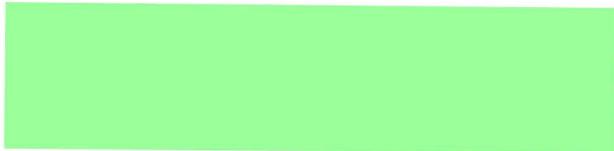


IN RE: Petitioner:
Beneficiary:



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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Rachel Nizario
for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The approval of the preference visa petition was revoked by the Director, Nebraska Service Center (director) and the Administrative Appeals Office (AAO) dismissed the petitioner's subsequent appeal. The matter is now before the AAO as a motion to reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a mosque. It seeks to employ the beneficiary permanently in the United States as a religious assistant pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). 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).

The director revoked the approval of the Form I-140, Petition for Immigrant Worker, based on his determination that the petitioner had failed to establish its ability to pay the beneficiary the proffered wage. On appeal, the AAO found that the record did not demonstrate the petitioner's ability to pay the proffered wage and affirmed the director's revocation of the approval of the petition. The AAO further concluded that the visa petition could not be approved as the petitioner had not established that the beneficiary was qualified for the offered position.

On motion, counsel contends that the petitioner has established its ability to pay the proffered wage to the beneficiary, having submitted relevant and probative evidence that was not considered by the AAO. He also asserts that the AAO has misinterpreted the regulatory requirements for demonstrating a beneficiary's qualifying experience. In conclusion, counsel states that the AAO has erred in its review of the record and regulations.

The requirements for a motion reconsider are found at 8 C.F.R. § 103.5(a)(3):

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The record reflects that the motion to reconsider is properly filed and timely, and states the reasons for reconsideration, referencing court decisions that, counsel asserts, preclude the submission of evidence that the AAO requires to establish the petitioner's ability to pay. Accordingly, the AAO will grant the motion and reopen the matter. Consideration of the record will be limited to the issues raised by the petitioner's counsel on motion.

Ability to Pay

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.

A petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by any office within the employment system of DOL. See 8 C.F.R. § 204.5(d). Here, the labor certification was accepted for processing by DOL on August 12, 2002. The proffered wage stated on the Form ETA 750 is \$27,082.00 per year. Accordingly, to satisfy the requirements of 8 C.F.R. § 204.5(g)(2), the petitioner in the present matter must demonstrate that it had the ability to pay the beneficiary an annual salary of \$27,082.00 from August 12, 2002 until October 20, 2011, the date on which the record before the director closed.¹

As fully discussed on appeal, United States Citizenship and Immigration Services (USCIS) in determining a petitioner's ability to pay first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continued to do so throughout the required period. In such cases, if the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during this period, that evidence is considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS next examines the net income figure reflected on the petitioner's federal income tax returns, 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). If the petitioner's net income during the required period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither the employer's net income nor its net current assets establish a consistent ability to pay the proffered wage, USCIS may also consider the overall magnitude of a petitioner's business activities. *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances to determine ability to pay, USCIS may look at such factors as the number of years a petitioner has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

On appeal, the AAO conducted the above analysis and, at its conclusion, concluded that the record

¹ October 20, 2011 is the date on which USCIS received the petitioner's response to the Notice of Intent to Revoke issued by the director on September 20, 2011.

did not establish the petitioner's continuing ability to pay the proffered wage.

While the AAO noted that the beneficiary had been employed by the petitioner in 2002 and 2003, it found that the beneficiary's Internal Revenue Service (IRS) Form 1099-MISC for 2002 and the wage receipts signed by the beneficiary in 2003 did not demonstrate that the petitioner had paid the beneficiary the proffered wage during those years. As the record contained no other evidence of income the beneficiary had received from the petitioner, the AAO determined that the record did not establish the petitioner's ability to pay, based on the wages it had paid to the beneficiary.

The AAO also concluded that the evidence of record did not demonstrate that the petitioner's net income or net current assets during the required period demonstrated its ability to pay the proffered wage. It noted that the petitioner, a tax exempt organization, had submitted no evidence of any filings with IRS during the required period and that the annual income and expense reports it had provided for the years 2002 through 2007 were not audited and, therefore, did not meet the requirements of the regulation at 8 C.F.R. §204.5(g)(2). The AAO further found that the petitioner had submitted no financial documentation for any years beyond 2007.

In determining that the totality of the petitioner's circumstances also failed to establish its ability to pay, the AAO reviewed several pledge statements submitted by the petitioner's members, but concluded that these pledges, in the absence of supporting documentary evidence, offered insufficient proof of the donors' ability to pay the pledged amounts. Although, on appeal, counsel for the petitioner, asserted that the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F.Supp. 441 (D.D.C. 1988) required the consideration of the potential income represented by these pledges, the AAO noted that it was not bound by the decision of a U.S. district court.² Moreover, the AAO distinguished the instant case from *Full Gospel Portland Church*, noting that the petitioner, unlike the plaintiff in *Full Gospel Portland Church*, had not submitted financial statements that established its ability to pay the proffered wage and was not part of a national organization able to pay the proffered wage on its behalf.

On motion, counsel for the petitioner again asserts that the submitted pledge statements are relevant and probative evidence of the petitioner's ability to pay the proffered wage. He contends that the AAO's requirement that the petitioner support these pledges with the financial records of its members places an unconstitutional evidentiary burden on the petitioner and that no church should

² On motion, counsel finds the AAO's "disregard" for the decision in *Full Gospel Portland Church* to be troubling based on its use of five district court cases to illustrate the evidence required to establish ability to pay. However, counsel has misread the AAO's reference to the five U.S. district court cases in its discussion of ability to pay. Citing to the decisions in *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) was intended to illustrate the broad acceptance of the use of federal tax returns in determining ability to pay, not that the AAO felt itself bound by such decisions.

be compelled to explain the source and use of each dollar. Such a requirement, counsel states, would have a potentially chilling effect on a church's privacy, as well as its donors, members and those who associate with it. He asserts that requiring the petitioner to disclose the financial resources of its members goes beyond the evidentiary standard and into the realm of unconstitutional inquiry. To support his assertions that the AAO has "brushed aside" the rights of association and financial privacy, counsel references the decisions in *Buckley v. Valeo*, 424 U.S. 1, 96 (1976); *Kusper v. Pontikes*, 414 U.S. 51, 57 (1974); *Shelton v. Tucker*, 364 U.S. 479, 481 (1960); *Bates v. Little Rock*, 361 U.S. 516, 522-23 (1960); *NAACP v. Button*, 371 U.S. 415, 431 (1963); *Talley v. California*, 362 U.S. 60, 80 (1960).

The AAO finds that counsel, however, is mistaken in his assessment of the evidentiary burden imposed on the petitioner by the AAO's refusal to accept the submitted pledge statements as probative evidence of its ability to pay. The AAO's finding that these statements must be supported with proof of the donors' ability to pay does not, as counsel asserts, require the petitioner to provide information on the financial resources of these members. The petitioner may document the pledges and resulting donations made by these individuals from its own records, submitting, for example, copies of whatever type of receipt was issued to them for tax purposes.

Even if the AAO were to accept counsel's assertions regarding the evidentiary value of the submitted pledge statements, it would not find them to establish the petitioner's ability to pay as of the August 12, 2002 priority date. The AAO observes that some of the pledges were notarized in December 2011 while others are undated, but were submitted as part of the petitioner's response to the Notice of Intent to Revoke issued by the director on September 20, 2011. As a result, they appear to represent financial resources available to the petitioner as of 2011 and, even if found to establish the petitioner's ability to pay in 2011, would not demonstrate that it had the ability to pay the proffered wage in any prior year. The AAO notes that some of the pledges submitted for the record contain statements from donors who attest that they would have been willing to provide continuing financial support to the petitioner as of January 2002 had they been asked to do so. While the willingness of these individuals to have provided the petitioner with financial support in prior years is noted, it does not retroactively place their financial support at the petitioner's disposal. Accordingly, the submitted pledges would not establish the petitioner's continuing ability to pay the proffered wage from the priority date onward, as required by the regulation at 8 C.F.R. § 204.5(g)(2).

Beneficiary Qualifications

In evaluating a beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. It may not ignore a term of the labor certification, nor may it impose additional requirements. See *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 (1st Cir. 1981). To be eligible for approval, a beneficiary must have 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 (Act. Reg. Com. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49

(Reg. Comm. 1971).

The record reflects that the petitioner is seeking to employ the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 203(b)(3)(A)(i), which requires the beneficiary to have at least two years of training or experience.

To document that training or experience, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states the following requirements:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

On appeal, the AAO noted that the record contained a letter from [REDACTED] Pakistan, which indicated that the beneficiary had served as a [REDACTED] from May 17, 1973 to March 31, 1976, experience that had not been claimed by the beneficiary on the labor certification, which he had signed under a declaration that the contents were true and correct under penalty of perjury. It also observed that the record did not include a letter from the [REDACTED] where the labor certification indicated that the beneficiary had worked as a religious assistant from May 1984 to May 1999. Citing to Board of Immigration Appeals (BIA) dicta in *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the AAO questioned the credibility of the submitted letter as the experience it described had not been listed on the labor certification and found that the record did not establish that the beneficiary had the required two years of experience before the priority date.

Counsel asserts that the AAO's interpretation of the above regulations is in error and that there is no requirement that "all employers" provide a letter of support to establish a beneficiary's qualifying experience. He contends that the fact that an employer listed on the labor certification has not provided an experience letter is irrelevant if the required experience is established independently from the beneficiary's other work history. Counsel finds proof of the AAO's error in the fact that the issue of the beneficiary's qualifications was raised for the first time on appeal. While the AAO acknowledges counsel's assertions, it does not find them to be persuasive.

Initially, the AAO notes that it conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Therefore, a petition that fails to comply with the technical requirements of the law may be denied by the AAO on grounds that were not identified by the director in the initial decision.³ It also observes that the burden of proof in this matter is on the petitioner to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361.

³ 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).

On appeal, the AAO found that the experience letter submitted by [REDACTED] regarding employment not claimed by the beneficiary on the labor certification did not credibly establish his qualifications for the offered position. While counsel asserts that the beneficiary's qualifying work experience has been reliably established by this letter, he offers no explanation for the beneficiary's failure to list this employment in Part B. 15. of the Form ETA 750, which specifically instructed the beneficiary to list all jobs he had held during the previous three years, as well as any other jobs related to the occupation for which certification was being sought. Counsel has also submitted no statement from the petitioner or the beneficiary explaining why the beneficiary's nearly three years of employment as a naib or assistant imam was omitted from the labor certification. In the absence of such an explanation, the AAO finds no reason to reconsider its evaluation of the evidence submitted to demonstrate the beneficiary's qualifications for the offered position.

Further, having again reviewed the experience letter from [REDACTED] the AAO does not find it to satisfy the requirements of the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) as it does not provide the title of its author and, therefore, fails to indicate that it was written by an individual who served as the beneficiary's trainer or employer, with direct knowledgeable of his experience. As a result, even if considered by the AAO, the submitted experience letter would not establish the beneficiary's qualifications.

Having reopened the present case in response to the petitioner's motion to reconsider, the AAO will affirm its prior decision. For the reasons previously discussed, it finds that the evidence of record does not establish the petitioner's ability to pay the proffered wage or demonstrate the beneficiary's qualifications for the offered position.

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)).

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden with regard to establishing its ability to pay or the beneficiary's qualifications.

ORDER: The motion to reconsider is granted and the decision of the AAO dated May 16, 2013 is affirmed. The petition is denied.