



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER

Date:

MAR 23 2006

SRC 01 010 51829

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved this employment-based immigrant visa petition. On further review, the acting director determined that the petitioner was not eligible for the visa preference classification. Accordingly, the acting director properly served the petitioner with a Notice of Intent to Revoke the approval of the preference visa petition and her reasons therefore, and subsequently exercised her discretion to revoke the approval of the petition on July 14, 2005. Prior counsel filed a Form EOIR-29, Notice of Appeal to the Board of Immigration Appeals from a Decision of an INS Officer.¹ Pursuant to 8 C.F.R. § 204.5(n)(2), jurisdiction for an appeal of the denial of an employment based visa petition lies with the Associate Commissioner of Examinations (the Administrative Appeals Office ((AAO)). The appeal will be dismissed.

The petitioner is a mosque. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services a religious instructor. The director determined that the petitioner had not established that it is a bona fide nonprofit religious organization, that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition, that the petitioner had extended a qualifying job offer to the beneficiary or that it has the ability to pay the beneficiary the proffered wage.

On appeal, counsel submits a brief and additional documentation.

Counsel asserts on appeal that Citizenship and Immigration Services (CIS) should be equitably estopped from revocation of its approval of the Form I-360, Petition for Amerasian, Widow or Special Immigrant, that it initially approved on January 18, 2001. Counsel argues that CIS engaged in “affirmative misconduct” by its delay between the approval of the Form I-360 and its processing of the beneficiary’s Form I-485, Application to Register Permanent Residence or Adjust Status. Counsel argues that this delay was “unconscionable and resulted in petitioner and beneficiary having settled expectations that Beneficiary would remain in the United States on a permanent basis.” Counsel also argues that CIS engaged in further “affirmative misconduct” by misapplying “the applicable legal standards in making its determination to issue the NOID [sic] and ultimately to deny the previously approved Form I-360.”

Section 205 of the Act, 8 U.S.C. § 1155, states that the Secretary of the 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.”

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In Matter of Estime, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, 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 decision to revoke will be sustained where the evidence of record at the time the decision is rendered,

¹ Different counsel represented the petitioner during the initial stages of these proceedings, and will be referred as “prior counsel” in this decision. Present counsel, who will be referred to as “counsel” in this decision, entered his appearance after the appeal was filed.

including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the issuance of a notice of intent to revoke an immigrant petition. *Id.*

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of CIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

However, we note that approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Matter of Ho*, 19 I&N Dec. 582. Further, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The first issue on appeal is whether the petitioner established that it is a bona fide nonprofit religious organization.

The regulation at 8 C.F.R. § 204.5(m)(3)(i) states, in pertinent part:

(3) *Initial evidence.* Unless otherwise specified, each petition for a religious worker must be accompanied by:

(i) Evidence that the organization qualifies as a nonprofit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under § 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organization.

To meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(A), a copy of a letter of recognition of tax exemption issued by the Internal Revenue Service (IRS) is required. In the alternative, to meet the requirements of 8 C.F.R. § 204.5(m)(3)(i)(B), a petitioner may submit such documentation as is required by the IRS to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code (IRC) of 1986 as it relates to religious organizations. This documentation includes, at a minimum, a completed IRS Form 1023, the Schedule A supplement, if applicable, and a copy of the organizing instrument of the organization, which contains a proper dissolution clause and which specifies the purposes of the organization.

With the petition, the petitioner submitted a copy of a January 6, 1995 letter from the IRS, informing it that the IRS could not process its application for exemption under section 501(c)(3) of the IRC because it had failed to provide the requested additional information.

In her decision, the acting director erroneously stated that the petitioner had submitted no other evidence to establish this statutory requirement. However, in response to the acting director's Notice of Intent to Revoke (NOIR) approval of the visa petition, the petitioner submitted a copy of a June 3, 2005 letter from the IRS, confirming that it had issued the petitioner a determination letter in June 1995, recognizing it as a tax-exempt organization under 501(c)(3) of the IRC as an organization described in sections 509(a)(1) and 170(b)(1)(A)(i) of the IRC.

We therefore withdraw this determination by the director, as the record establishes that the petitioner is a bona fide nonprofit tax-exempt religious organization.

The second issue on appeal is whether the petitioner established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition.

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that “[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States.” The regulation indicates that the “religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition.”

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

(ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:

(A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on October 3, 2000. Therefore, the petitioner must establish that the beneficiary was continuously working as a religious instructor throughout the two-year period immediately preceding that date.

In its September 25, 2000 letter accompanying the petition, the petitioner stated:

Currently, [the beneficiary] is performing all the duties of an Islamic Religious Instructor for our Mosque pursuant to our approved R-1 non-immigrant visa filed on his behalf from October 1999 to the present time. Previously, he performed all the duties of an Islamic Religious Instructor for the [redacted] of Mombasa, Kenya on a full time basis.

The full time duties that [the beneficiary] has performed as an Islamic Religious Instructor continuously from 1997 to the present time and the duties he will perform for our organization on a full time, permanent basis upon this immigrant visa being approved include, but are not limited, to the following:

1. Teaching Koranic Arabic language. This involves teaching the more ancient form of Arabic used in the Koran, the most sacred book of scriptures in Islam. Knowledge of the Koranic language is essential to being able to read the Koran and learning the message of the prophet Mohammed.
2. Teaching the doctrines of the Koran and the [sic] preaching Islamic faith to male members and children . . .
3. Teaching the role of men in Islamic culture.
4. Teaching Islamic History including the life of the Prophet Mohammed . . .

5. Teaching Jurisprudence and Law in Islam.
6. Grading exams, assignments and papers. Meeting with students and parents. Mentoring children and teenagers.
7. Conducting special workshops in Islamic Law, supervising learning camps and seminars. Organizing social reconciliation in the Muslim community.
8. Preparing male members in funeral services according to the laws of Islam.

The petitioner submitted a copy of a February 28, 2000 letter from the deputy principal of the [REDACTED] in Mombasa, "confirming" that the beneficiary "has been a teacher at this institution as from February 1997." The letter did not indicate the terms and conditions of the beneficiary's work with the organization. The petitioner also submitted a copy of a February 24, 2000 letter from the [REDACTED] in Mombasa, Kenya, "certifying" that the beneficiary "is of tremendous service in various activities" with that organization, such as conducting religious activities after prayers, "burial land funeral services etc." This letter also did not state that terms and conditions of the beneficiary's work with the organization. The petitioner submitted no other evidence to corroborate the work done by the beneficiary during the qualifying two-year period. 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)).

However, in support of his Form I-485 application for adjustment of status, the beneficiary submitted a copy of a Form W-2, Wage and Tax Statement, indicating that he received \$6,400 in wages from the petitioner in 2000. The beneficiary reported these wages on his year 2000 Form 1040, U.S. Individual income Tax Return, which he filed jointly with his spouse, who listed her occupation as "housewife." On his Form 1040, the petitioner also reported additional income of \$13,022 and listed his occupation as "courier."

In her NOIR, the acting director instructed the petitioner to:

1. Submit a detailed description of the beneficiary's prior work experience including duties, hours, and compensation, accompanied by appropriate evidence (such as original pay stubs or cancelled checks, earning statements, W-2's or other probative evidence) . . . All evidence should be submitted for the time frames of October 03, 1998 up to October 03, 2000.
2. If, during the two-year period, the beneficiary had not yet begun work for your organization, please describe the prior organization for whom he worked during the two-year period and explain how that prior organization is closely associated with your organization and submit documentary evidence in support of your response . . .
3. If the beneficiary did not receive a salary or other compensation between October 03, 1998 and October 03, 2000, explain and submit evidence of how the beneficiary supported himself and his family during this time frame.

4. Submit detailed time sheets, weekly time logs and schedules, work logs or reports, etc. clearly establishing that the beneficiary has performed the claimed religious services for the time period in question.

In response, the petitioner resubmitted the February 24, 2000 letter from the [REDACTED] and submitted an additional statement from that organization's education board indicating that the beneficiary served on the board as a committee member and assistant secretary, responsible for the recruitment of teachers. Neither of these documents provided information on the terms and conditions of the beneficiary's work with the [REDACTED], and the petitioner submitted no other evidence to corroborate the beneficiary's work with the organization. *Id.* A February 28, 2000 letter from The [REDACTED] indicated that the beneficiary was a "member of the madrasah managing committee responsible for teacher's training and organizing crash courses and seminars." The petitioner submitted no documentary evidence to confirm the beneficiary's work with this organization. *Id.*

In response to the RFE, the petitioner also submitted a June 3, 2005 letter signed by [REDACTED] its president, who stated:

I hereby certify that [the beneficiary] has successfully been in active service since 2000 as the IMAM, the Chief Priest, of our congregation and continues to serve this fast growing Community with diligence and sincerity and selflessly to date . . .

[H]is services include but are not limited to:

- Conducting of daily Regulatory Prayers at the Center in the Evening
- Conducting of all Friday Sermons and Prayers.
- Conducting of all Sunday Morning services at the Center.
- Conducting Adult Religious Classes every evening after Regulatory Prayers
- Teaching Religious Jurisprudence to the Senior and Junior students in the Madrasah . . .

Mr. [REDACTED] provided a weekly schedule for the beneficiary indicating that he worked approximately 40 hours per week. The petitioner also submitted a letter from [REDACTED] principal of the Islamic Education Center, which lists its address as that of the petitioner. Mr. [REDACTED] stated that the beneficiary "has been a teacher at this institution for over 4 years . . . He is in charge of teaching the teenage boys and girls different aspects of religious studies." Included are copies of yearly "day schedules" of the Islamic Education Center, for the period 2000-2001 through 2005-2006. The schedules reflect that classes are held for only half of the day but do not indicate the frequency of the classes, whose times and instructors appear to overlap. The beneficiary is listed as one of the instructors.

The petitioner submitted a copy of an "employment agreement" between it and the beneficiary, dated August 28, 2000 with an effective date of September 1, 2000. The agreement did not identify the position for which the beneficiary was allegedly hired, but stated that the beneficiary would "undertake all duties relating to the establishment of Prayers, Sermons, Classes, Teaching, Teacher training, Seminars, matrimonial Affairs, Burial & Funeral Rites and all such religious services that the Center may need from time to time." The agreement indicated that the beneficiary would be expected to work at least 40 hours per week at an annual salary of \$20,800 plus "reasonable travel expenses."

The petitioner submitted copies of what appear to be check stubs reflecting that, in 2000, it paid the beneficiary \$800 twice monthly beginning in September, with the year 2000 compensation from the petitioner totaling

\$6,400. The petitioner also resubmitted copies of the beneficiary's year 2000 Forms W-2 and 1040. A copy of a Form 1099-MISC, Miscellaneous Income, attached to the beneficiary's Form 1040, indicates that he received approximately \$13,022 in "other income" from [REDACTED]. The address of [REDACTED] is also that of the beneficiary, and the evidence of record indicates that the beneficiary owns a courier service and issued himself the Form 1099-MISC.

The petitioner submitted no evidence to establish that the beneficiary had worked for the petitioning organization from October 1999 through August 2000 during the qualifying period. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner also failed to submit evidence regarding the capacity in which the beneficiary allegedly worked for it during the qualifying period or to explain the beneficiary's statement that he worked as a courier during 2000. 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).

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

Later decisions on religious workers conclude that, if the worker is to receive no salary for church work, the assumption is that he/she would be required to earn a living by obtaining other employment. *Matter of Bisulca*, 10 I&N Dec. 712 (Reg. Comm. 1963) and *Matter of Sinha*, 10 I&N Dec. 758 (Reg. Comm. 1963).

The term "continuously" also is discussed in a 1980 decision where the Board of Immigration Appeals determined that a minister of religion was not continuously carrying on the vocation of minister when he was a full-time student who was devoting only nine hours a week to religious duties. *Matter of Varughese*, 17 I&N Dec. 399 (BIA 1980).

In line with these past decisions and the intent of Congress, it is clear, therefore that to be continuously carrying on the religious work means to do so on a full-time basis. That the qualifying work should be paid employment, not volunteering, is inherent in those past decisions which hold that, if the religious worker is not paid, the assumption is that he/she is engaged in other, secular employment. The idea that a religious undertaking would be unsalaried is applicable only to those in a religious vocation who in accordance with their vocation live in a clearly unsalaried environment, the primary examples in the regulations being nuns, monks, and religious brothers and sisters. Clearly, therefore, the qualifying two years of religious work must be full-time and generally salaried. To hold otherwise would be contrary to the intent of Congress.

On appeal, counsel takes issue with the CIS interpretation of *Matter of B*, asserting that the case does not stand for the proposition that the term “continuously” means that one did not take up any other occupation or vocation. Counsel argues that *Matter of B* stands for the proposition that “certain interruptions in the carrying on of a vocation do not result in a determination that the alien has failed to be continuously involved in such occupation.”

In finding that the alien in *Matter of B* was deemed to have been continuously carrying on his occupation as a professor, the commissioner found that the beneficiary’s dismissal or resignation from his position was beyond his control, that he had not exhibited any intent to abandon his vocation, and that he had not engaged in activities that were inconsistent with the theory that he was attempting to carry on his vocation.

In the present petition, the petitioner submitted no evidence that the beneficiary’s work as a courier is consistent with his work as a religious instructor, and that his working as a courier and not as a full-time religious instructor was caused by a situation beyond his control. The petitioner submitted no corroborative evidence such as canceled paychecks, pay vouchers, contemporaneous work schedules or other documentary evidence to confirm the beneficiary’s employment during the qualifying period from October 1998 to September 1999. The petitioner submitted copies of pay stubs, a copy of the W-2 that it issued to the beneficiary and a copy of the beneficiary’s Form 1040 to verify his employment during 2000, the year the petition was filed. However, the pay stubs reflect an address that is different from that claimed by the petitioner. Further, the Form 1040 indicates that the beneficiary worked as a courier, which is inconsistent with the petitioner’s contention that the beneficiary worked continuously as a religious instructor throughout the qualifying period.

Therefore, the evidence does not establish that the beneficiary worked continuously as a religious instructor for two full years preceding the filing of the visa petition.

The third issue on appeal is whether the petitioner established that it had extended a qualifying job offer to the beneficiary. The regulation at 8 C.F.R. § 204.5(m)(4) states, in pertinent part, that:

Job offer. The letter from the authorized official of the religious organization in the United States must state how the alien will be solely carrying on the vocation of a minister, or how the alien will be paid or remunerated if the alien will work in a professional capacity or in other religious work. The documentation should clearly indicate that the alien will not be solely dependent on supplemental employment or the solicitation of funds for support.

In its letter of September 25, 2000, the petitioner stated that the proffered position was that of religious instructor, and stated, “After the position of Imam (Islamic Priest), who is the principal minister of religion in the Islamic faith, the Islamic Religious Instructor is the most important traditional religious occupation.” The petitioner stated that it would pay the beneficiary \$400 per week for this full-time position.

In response to the acting director’s NOIR, the petitioner stated that the proffered position was that of imam and that the beneficiary, who held the position of “Chief Priest,” had served as the organization’s imam since 2000. While the petitioner stated that the position encompassed 40 hours per week, it did not indicate the compensation associated with the position. An “employment agreement” signed by both parties does not specify the proffered position; however, it identifies an expansive list of duties that appear to include every job associated with the mosque. The agreement indicates that the beneficiary would receive \$20,800 per year for a minimum of 40 hours work per week.

The director determined that the petitioner had failed to establish that the position offered full-time employment or the qualifying credentials or training needed for the position. The petitioner does not address this issue on appeal.

While the regulation requires the petitioner to establish that the alien is qualified for the particular position for which the petition is filed, neither the statute nor the regulation impose a specific criterion of training (except for religious professionals) or credentialing (except for ministers for which the petitioner must establish that the alien has authority to perform services as a member of the clergy). Accordingly, the director's finding that the petitioner failed to establish the training or the credentials for the position is withdrawn.

The petitioner, however, has failed to establish the nature of the proffered position. In its September 25, 2000 letter, the petitioner stated that the position of religious instructor was the second "most important traditional religious occupation" exceeded only by the imam. In its September 2000 letter, the petitioner stated that the beneficiary worked as a religious instructor. However, in its June 3, 2005 letter, the petitioner stated that the beneficiary served as its imam (and had since the year 2000) and, in fact, served as the head priest. The petitioner submitted no evidence to resolve this inconsistency. *Matter of Ho*, 19 I&N Dec. at 591. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th 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).

Because it offered conflicting evidence as to the position it expects the beneficiary to fill, the petitioner has not established that it has extended a qualifying job offer to the beneficiary.

The fourth issue is whether the petitioner established that it has the ability to pay the beneficiary the proffered wage. 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.

The petition was filed on October 3, 2000. Therefore, the petitioner must establish its continuing ability to pay the beneficiary the proffered wage as of that date. In its September 25, 2000 letter the petitioner stated that it would pay the beneficiary \$400 a week (\$20,800 per year) as a religious instructor. The employment agreement also indicates that the beneficiary would be paid \$20,800 per year as an employee.

The petitioner submitted copies of pay stubs indicating that the beneficiary was paid \$800 biweekly beginning in September 2000. A copy of the beneficiary's Form W-2 for 2000 reflects that the petitioner reported that it paid the beneficiary \$6,400 in wages for the year. The petitioner also submitted copies of the beneficiary's pay stubs for 2001, January through November 2002, January through December 19, 2003, and January through December 2004, and copies of the beneficiary's Forms W-2 and/or Forms 1040 for the corresponding periods, which reflect that he received wages of \$20,800, \$19,200, \$20,000 and \$20,800, respectively.

The petitioner also submitted unaudited copies of its profit and loss statements for the years 2000 through 2004, a copy of its payroll summary for the period January 2000 through March 2005, and a more detailed payroll summary for the period January 1, 2000 through June 3, 2005, which purports to show that the beneficiary was paid \$96,000 during that four and a half year period. The petitioner also submitted copies of its Form 941, Employer's Quarterly Federal Tax Return for the quarters ending June 2003 through December 2004.

On appeal, the petitioner submits an unaudited copy of its profit and loss statement for January through August 2005 and unaudited financial statements for 2000. Counsel asserts that the documentation submitted clearly establishes the petitioner's ability to pay the proffered wage as its assets exceed the amount of the proffered salary.

Nonetheless, the above-cited regulation states that evidence of ability to pay "shall be" in the form of tax returns, audited financial statements, or annual reports. The petitioner is free to submit other kinds of documentation, but only in addition to, rather than in place of, the types of documentation required by the regulation. The petitioner submitted copies of its Forms 941 for three quarters of 2003 and the year 2004. However, these do not indicate that the beneficiary was included in the number of employees or that his wages were reported for the period. The petitioner did not pay the beneficiary the proffered wage for the years 2002 and 2003. Further, the petitioner submitted none of the required types of primary evidence to establish that it had the ability to pay these wages during that time frame.

The pay stubs and Forms W-2 reflect that the petitioner did not pay the beneficiary the proffered wage in 2002 and 2003. The petitioner submitted no explanation as to why the beneficiary was paid less than the proffered wage during those years, and submitted no competent evidence that it could have paid the beneficiary the proffered amount during those years.

Accordingly, the petitioner has failed to establish that it had the continuing ability to pay the beneficiary the proffered wage as of the filing date of the petition and continuing until the beneficiary received permanent residency.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.