B6

U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 00 105 51750 Office: VERMONT SERVICE CENTER Date: 11 JAN 2002

IN RE: Petitioner:
Beneficiary: [redacted]

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)

IN BEHALF OF PETITIONER: SELF-REPRESENTED

Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Helen E. Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary permanently as an iconographer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary had the requisite experience as of the petition's filing date. The director further determined that the petitioner had not established that it had the financial ability to pay the proffered wage as of the filing date of the petition.

On appeal, the petitioner submits a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 153(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 or seasonal nature, for which qualified workers are not available in the United States.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date which is the date on which any office within the employment system of the Department of Labor accepted the request for labor certification. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, the filing date of the petition is June 30, 1999.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of iconographer required two years of training. The director determined that the petitioner had not established that the beneficiary had the required two years of training and denied the petition.

On appeal, the petitioner argues that "[t]wo years of training as an iconographer is to be understood as working under the supervision of the clergy. (The Labor Department accepted that evidence from Bishop Vasyl Semeniuk, Vicar General of Diocese of Ternopil)."

The petitioner's argument is not persuasive. Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for

decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the Service's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

The record does not establish that the beneficiary had the requisite training as required on the labor certificate. Consequently, the petitioner has not overcome this portion of the director's decision.

The other issue in this proceeding is whether the petitioner has the ability to pay the proffered wage of $29,120 annually as of June 30, 1999, the petition's filing date.

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 petitioner initially did not submit any evidence of its ability to pay the proffered wage of $29,120.00 per year. On August 11, 2000, the petitioner was requested to submit evidence of its ability to pay the proffered wage to include the petitioner's 1999 federal income tax return. The petitioner failed to respond. The director denied the petition, noting that the petitioner had not demonstrated its ability to pay the proffered wage.

On appeal, the petitioner submits a copy of an unaudited financial statement dated September 30, 1999, and states that "[e]vidence of ability pay the proffered salary were submitted with other documents."

The unaudited income statement which was submitted as proof of the petitioner's ability to pay the proffered wage is in the record. However, it has little evidentiary value as it is based solely on the representations of management. 8 C.F.R. 204.5(g)(2), already quoted above in part, states that:

> Evidence of this ability [to pay the proffered wage] <u>shall be</u> either in the form of copies of annual reports, federal tax returns, or audited financial statements.

> . . . In appropriate cases, additional evidence . . . may be submitted by the petitioner.

This regulation neither states nor implies that an unaudited statement may be submitted in lieu of annual reports, federal tax returns, or audited financial statements. In addition, the unaudited statement is for Lemko Housing Corporation, not the Historic Village of St. Mary's Assumption Church.

No additional evidence of the ability to pay the proffered wage has been received. Therefore, the petitioner has not overcome this portion of the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.