



U.S. Citizenship  
and Immigration  
Services

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**



B6

FILE: [REDACTED]  
LIN 04 011 51800

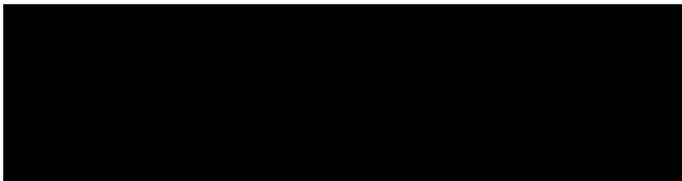
Office: NEBRASKA SERVICE CENTER

Date: NOV 07 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Ukrainian dance production company. It seeks to employ the beneficiary permanently in the United States as a choreographer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, the petitioner submits a brief.

Section 203(b)(3)(A)(i) of 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 or seasonal nature, for which qualified workers are not available in the United States.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on April 27, 2001. The proffered salary as stated on the labor certification is \$41,538 per year.

With the petition, counsel submitted a copy of the petitioner's 2002-combined budget for performances, workshops and music programs, a letter from the director of the dance ensemble, and a list of performances and workshops for the period October 10, 2001 through September 30, 2002 and for the 2003 year. The 2002 combined budget reflected total income of \$153,442, total expenses of \$154,549, and a net loss of -\$1,207. The ensemble's director's letter indicated that the 2003 estimated gross income was \$155,000. The center's director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on November 5, 2003, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to the present to include copies of annual reports, audited financial statements, or tax returns. The director specifically requested copies of the beneficiary's 2001 and 2002 Forms W-2, Wage and Tax

Statements, a copy of the beneficiary's most recent pay stub with year to date totals, and copies of the petitioner's monthly bank balances from April 2001 through the present.

In response, counsel provided letters from the dance ensemble, letters of support from additional individuals, unaudited financial statements for 2001, 2002, and 2003, bank statements for the period April 2001 through December 2003 for Folkdancing on the Terrace and Danceophile, bank statements for the period April 2003 through December 2003 Boulder Postoley Dance Ensemble, a copy of a reserve fund in the ensemble's director's name, copies of grants, copies of contributions/donations, copies of the beneficiary's 2000 through 2002 Forms 1040, U.S. Individual Income Tax Returns, and evidence of payments to the beneficiary for his expenses. The bank statements for Folkdancing on the Terrace reflected balances from a low \$723.78 to a high of \$3,064.65. The bank statements for Danceophile reflected balances from a low of \$3,538.60 to a high of \$27,994.50. The bank statements for Boulder Postoley Dance Ensemble reflected balances from a low of \$3,496.79 to a high of \$5,091.82. A letter from the ensemble's director indicated that the petitioner has separate accounts for Postoley doing business as Danceophile, as Folkdancing on the Terrace, and a reserve fund in the director's name. However, there is little first-hand evidence to support this statement, and counsel's assertions do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. The petitioner's 2001 budget summary reflected total income as \$145,535.93, total expenses as \$145,391.55, and net profit as \$144.38. The petitioner's 2003 budget summary reflected total income as \$160,956.51, total expenses as \$156,430.11, and net profit of \$4,526.40. The beneficiary's 2000 tax return reflected wages of \$15,996, business income of \$700, and an adjusted gross income of \$16,646. The beneficiary's 2001 tax return reflected wages of \$4,336, business income of \$12,760, and an adjusted gross income of \$16,194. The beneficiary's 2002 tax return reflected wages of \$2,400, business income of \$13,005, and an adjusted gross income of \$14,486. The petitioner did not submit copies of the beneficiary's Forms W-2, Wage and Tax Statements, or Forms 1099, Miscellaneous Income. The money market fund in the director's name reflected a balance of \$96,694.06 as of December 31, 2002 and \$96,763.29 as of January 31, 2003. However, there is nothing in the record that shows those funds are to be used by the Postoley Dance Ensemble, and there is nothing to show what amount was available in 2001.

In a letter, the ensemble's director indicated that the petitioner is a non-profit dance company, and, therefore, is not required to file tax returns. A copy of the petitioner's exemption from federal income tax under section 501(c)(3) of the Internal Revenue Code (IRS) letter was not, however, submitted as proof of the director's claims. The ensemble's director also stated:

Each year since 2000 we have held a **benefit dance** to raise additional funds to support [REDACTED] Each year this dance has raised \$4,000 - \$5,000 to support [REDACTED]

**Donations** to [REDACTED] for the year 2003 include cash (\$3,250 + 100 + 500), foundation cash grant (\$600), benefit dance proceeds (\$4,247), a computer (\$500), an auto (\$1,972), auto lease/use (\$954), rent (\$14,400), utilities (\$1,800). This totals **\$28,323**. In addition, he has also received in-kind legal and administrative support (for

which anyone else would have had to pay cash) totaling **\$27,500**. Totals **\$55,823**. Please see the attached documentation for 2003 donations.

**Donations** to [REDACTED] for 2002 were at least (\$4,399 benefit + \$400 foundation grant + \$7,980 [REDACTED] fund + \$12,000 rent + \$1,800 utilities) totaling **\$26,579**. In-kind for 2002 totaled approximately **\$24,000**. Totals **\$54,579**.

**Donations** to [REDACTED] for 2001 were at least (\$4,355 benefit + 400 Adair Foundation + \$500 AHAB Foundation + \$12,000 rent + \$1,800 utilities + \$4,000 school tuition grant) totaling **\$23,055**. In-kind for 2001 totaled approximately **\$19,000**. Totals **\$42,055**.

Finally, the ensemble's director reported that the petitioner receives local government grants and free legal representation and that its revenue is a combination of ticket sales for performances, payments for workshops/dance lessons, contributions/donations of money, materials, equipment, and time as well as grants from government agencies.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On May 7, 2004, the director denied the petition.

On appeal, counsel reiterates his prior position and cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), in support of that position. Counsel also points to the payment of the beneficiary's expenses such as education and medical expenses for his family. Counsel states, "His compensation was a combination of direct and in-kind payments, but this does not change the fact that the petitioner was able to compensate [REDACTED] from the time the priority date was established to the present in amounts exceeding the proffered wage."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2001 through 2003. The petitioner did not provide any evidence that corroborates the wages paid to the beneficiary in the pertinent years (Forms W-2, Forms 1099, etc.).

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.

Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See also Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>1</sup> No evidence of the petitioner's net current assets was provided for the years 2001 through 2003.

Counsel has provided combined budget summaries for the years 2001 through 2003. However, those summaries are based primarily on the representations of management. In light of this, limited reliance can be placed on the validity of the facts presented in the budget summaries. The AAO acknowledges that the petitioner has stated that it is a "non-profit" entity. However, the record of proceeding does not contain any official documentation on this issue nor does the record of proceeding contain any audited financial statements or annual reports. While the petitioner has provided several affidavits detailing donations and grants, these are for limited amounts and do not show the ability to pay the proffered wage. In addition, the petitioner indicates that it paid the beneficiary above the proffered wage in 2001 through 2003. However, there is little evidence that corroborates this contention. The petitioner has not provided any Forms 1099, Miscellaneous Income, showing wages paid to the beneficiary, and the checks presented as proof the beneficiary was paid only totals \$2,969.32 in 2003. The 2003 donations made specifically to the beneficiary only totaled \$22,976, of which, \$19,126 included a car, truck, new tires, and rent. The computer was donated in 2000 and the attorney fees of \$22,500 do not specifically state the entire amount was provided on behalf of the beneficiary. Furthermore, there is no evidence that the son's rent, health insurance, and tuition was paid by the petitioner.

---

<sup>1</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel has submitted copies of the petitioner's bank statements and those of Danceophile and Folkdancing on the Terrace as evidence of the petitioner's ability to pay the proffered wage. The petitioner has not provided evidence, however, that clearly shows that Danceophile and Folkdancing on the Terrace are part of Postoley Dance Ensemble or that their bank statements can be included as part of Postoley's ability to pay the proffered wage. If Danceophile and Folkdancing on the Terrace are considered separate entities and have tax-exempt status of their own or file separate tax returns, then they may not be considered as part of Postoley. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel cites *Full Gospel Portland Church v. Thornburgh, supra* and asserts that pledges and donations should be considered in determining the petitioner's ability to pay the proffered wage. The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In the *Full Gospel Portland Church v. Thornburgh* decision, after reviewing relevant financial statements, the court found that the petitioner's working capital and revenue established 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. The court in *Full Gospel* further ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of a beneficiary. In the present case, there is no clear evidence that the petitioner has other organizations with which it is financially linked. In addition, the affidavits detailing donations are for very small amounts that do not cover the beneficiary's proffered wage, and the local government grants do not specifically state that they are to be used to pay the wages of the beneficiary, in fact, in some cases, they seem to indicate that the grants are for other specific purposes. The regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the 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, rather than in place of, the types of documentation required by the regulation. In the instance, the petitioner submitted unaudited budget summaries, and those unaudited budget summaries do not reflect that it has the ability to pay the proffered wage as of the filing date of the petition.

Counsel states that [REDACTED] expertise and reputation have been directly responsible for Postoley's growth since 2001." However, counsel has not provided any evidence to support his assertion such as press releases, awards, etc. Again, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant

visa petition, which had been filed by a small “custom dress and boutique shop” on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary’s annual wage of \$6,240 was considerably in excess of the employer’s net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner’s simple net profit, including news articles, financial data, the petitioner’s reputation and clientele, the number of employees, future business plans, and explanations of the petitioner’s temporary financial difficulties. Despite the petitioner’s obviously inadequate net income, the Regional Commissioner looked beyond the petitioner’s uncharacteristic business loss and found that the petitioner’s expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner’s circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner’s financial ability that falls outside of a petitioner’s net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner’s business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner’s reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner’s ability to pay the proffered wage. In this case, however, the petitioner has only provided unaudited budget summaries, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In addition, no unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 through 2003 were uncharacteristically unprofitable years for the petitioner.

The AAO reiterates that the petitioner has not provided any tangible evidence that it is a non-profit organization that does not have to file income tax returns.

The petitioner’s 2001 through 2003 budget summaries reflect net profits of \$144.38, -\$1,207, and \$4,526.40, respectively. The petitioner could not pay the proffered wage in any of the years from these net profits.

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.