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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: AUG 29 2012 OFFICE: TEXAS 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.

Thank you,

Kurt Porbes for

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a non-profit theater. It seeks to employ the beneficiary permanently in the United States as a Theater Development Manager. 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 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 20, 2009 denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Evidence of the Petitioner's Ability to Pay 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on March 25, 2005. The proffered wage as stated on the Form ETA 750 is $51,834 a year.[1] The Form ETA 750 states that the position requires a Bachelor of Arts degree in any field and two years of experience in the proffered position.

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.[2]

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. On the petition, the petitioner claimed to have been established in 1992, to have a gross annual income of $1 million, and to currently employ six workers. According to the tax returns in the record, the petitioner's fiscal year begins on July 1st and ends on June 30th of the following year. On the Form ETA 750B, signed by the beneficiary on March 24, 2005, the beneficiary claims to have worked for the petitioner since October 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The table below reflects wages paid to the beneficiary as shown on IRS Form W-2.

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[1] Form ETA 750 contains a handwritten correction that lists the proffered wage as either $51,834 or $57,834; the writing is not clear. The wage listed in Part 6, item 9 of Form I-140, indicates the wage is $996.80 per week ($51,833.60 per year.) On appeal, the lower of the two wages will be considered to be the proffered wage.

[2] 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).

Tax Year	Wages Paid	Difference Between Proffered Wage and Wages Paid
2005	$35,461.62	$16,372.38
2006	$38,044.42	$13,789.58
2007	$44,011.89	$7,822.11
2008	$49,473.07	$2,360.93

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of March 25, 2005. Therefore, the petitioner must establish that it can pay the difference between the proffered wage and wages paid to the beneficiary in each relevant year.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

> years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns, IRS Form 990, line 18, demonstrate its surplus (or deficit) for fiscal years 2004, 2005, 2006, and 2007 as shown in the table below.

Fiscal Year	Net Surplus/Deficit
2004[3]	$41,136
2005	-$4,942.00
2006	-$64,330.00
2007	-$137,357.00

As noted above, the Form W-2 shows that the petitioner paid the beneficiary wages during calendar year 2005. The petitioner's tax return for fiscal year 2004 shows net income of $41,136. However, the Form W-2 relates to the 2005 calendar year, whereas the 2004 tax return relates to the petitioner's fiscal year which runs from July 1, 2004 to June 30, 2005. Thus, determining the petitioner's ability to pay is not simply a matter of combining the net income from the 2004 tax return and the wages listed on the 2005 Form W-2. It is not clear how much, if any, of the petitioner's net income is attributable to the 2005 calendar year; thus, it is not clear how much, if any, of the petitioner's net income was available to pay the proffered wage. The record is devoid of evidence establishing that enough of this net income was available in calendar year 2005, and not in the second half of calendar year 2004, to make up the difference between the proffered wage and the

[3] Given the petitioner's fiscal year (FY), the 2004 tax return is relevant as it covers the period from the March 25, 2005 priority date through June 30, 2005, the end of FY 2004.

wage actually paid to the beneficiary in 2005. Further, although counsel states that the petitioner's *net assets* were $28,158.96 for the first half of the filing period and $39,963.48 for the second half of the filing period in fiscal year 2004, the petitioner must establish that it had sufficient *net current assets* to pay the proffered wage. Accordingly, the petitioner has failed to establish its ability to pay the proffered wage in either calendar year 2005 or fiscal year 2004. Further, for the fiscal years 2005 through 2007, the petitioner did not have sufficient net income to pay the difference between wages paid to the beneficiary and the proffered wage.

As an alternative means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] It is noted that the Form 990 does not permit a filer to identify its net current assets. However, USCIS accepts audited balance sheets to establish the petitioner's net current assets. In this case, the petitioner submitted an audited "Statement of Financial Position" for fiscal years 2004 and 2005. However, the statement does not include sufficient detail to establish which of the assets and liabilities are current. The current assets appear to be unrestricted cash, unrestricted unconditional promises to give and prepaid expenses and employee advances. The current liabilities appear to be a line of credit, accounts payable and accrued expenses and deferred revenue. Thus, the petitioner's net current assets appear to be -$42,125 in fiscal year 2004 and -$8,053.00 in fiscal year 2005. There were no audited financial statements submitted for 2006 and 2007. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the difference between the proffered wage and the wages paid to the beneficiary in fiscal years 2004, 2005, 2006, and 2007.

On appeal, counsel asserts that USCIS should consider the petitioner's December 2006 to December 2008 bank statements, health and dental benefits paid to the beneficiary, and the totality of the petitioner's circumstances. Additionally, counsel submits copies of decisions issued by the AAO regarding the consideration of bank statements and health benefits in determining a petitioner's ability to pay, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel also submits a copy of a May 4, 2004 USCIS policy memo regarding ability to pay.[5]

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[4] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[5] The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even

Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its audited balance sheet which was considered above in determining the petitioner's net current assets.

The record contains a February 17, 2009 letter from the petitioner that states that the petitioner provided health and dental insurance for the beneficiary from January 1, 2005 until June 30, 2009 at a cost of between $5,137.80 and $5,857.52 each fiscal year. Counsel asserts that the petitioner's expenditures toward the beneficiary's health benefits should be included in the calculation of the beneficiary's yearly wages. However, the record contains no primary evidence of the payment of these sums to the beneficiary. If the petitioner had established that the beneficiary received nontaxable fringe benefits that were not shown on her IRS Forms W-2, then the amounts paid for

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when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." Id. at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

fringe benefits would have been added to her wages in determining ability to pay.[6] However, the petitioner has not provided such evidence. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Given all of the above, counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

However, counsel is correct in that USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years 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 USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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[6] Examples of nontaxable fringe benefits include, but are not limited to, certain accident and health benefits, dependent care assistance (up to certain limits), group-term life insurance coverage, and health savings accounts (up to certain limits). *See* I.R.C. §§ 105, 129, 106.

In the instant case, the petitioner has been in business since 1992. The petitioner's longevity and stellar reputation cannot be overlooked, as it is a well-established of considerable repute. The petitioner was featured in a article detailing the petitioner's celebration of its "15th year as one of the pre-eminent in The petitioner also recently announced 14 new company members, including an Oscar nominee, and Emmy and Grammy winner, Broadway, television and movie actors, directors, playwrights, screenwriters, filmmakers and acting teachers.[8] The petitioner also demonstrated significant revenues in each relevant year. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The director's decision denying the petition based on the petitioner's inability to pay the proffered wage is withdrawn.

Beyond the Decision of the Director: Expired Labor Certification

Beyond the decision of the director, the submitted labor certification was expired at the time Form I-140 was filed. The regulation at 20 C.F.R. § 656.30(b)(1) provides: "An approved permanent labor certification *granted on or after July 16, 2007* ***expires*** *if not filed in support of a Form I–140 petition with the Department of Homeland Security within* ***180 calendar days*** of the date the Department of Labor granted the certification." (Emphasis added).

The petition was properly filed on April 21, 2008 with a labor certification approved by the DOL on October 16, 2007 and valid until April 13, 2008. 188 days passed after the expiration of the labor certification's validity date and prior to the filing of the petition with USCIS. As the filing of the instant case was after 180 days of the labor certification's expiration, the petition was, therefore, filed without a valid labor certification pursuant to 8 C.F.R. § 204.5(l)(3)(i).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for

issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.