U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 3 1 2013 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting 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). The appeal will be dismissed.

The petitioner describes itself as a nonprofit religious organization. It seeks to employ the beneficiary permanently in the United States as a security consultant. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The priority date of the petition is October 27, 2003.[2]

At issue in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage from the priority date.

The record shows that the appeal is properly filed 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.

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.[3]

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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. Comm. 1977). 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

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[1] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[3] 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).

> 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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The proffered wage in the instant case is $18.13 per hour ($37,710.40 per year.)

The petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, that it was established in 1989 and employs four workers. On the Form ETA 750B, signed by the beneficiary on October 21, 2003, the beneficiary claimed to have been employed by the petitioner since October 2002.

On appeal, counsel asserts that the director failed to acknowledge the petitioner's financial statements; that because the petitioner has renewed the beneficiary's H-1B status it has shown its ability to pay; that *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967) should be considered in the present case; and, that based on a prior case reversed by the AAO, the present matter should also be reversed.

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 petitioner paid wages to the beneficiary as shown in the table below.

- In 2003, the Form W-2 states Wages, tips, other compensation of $4,000
- In 2004, the Form W-2 states Wages, tips, other compensation of $2,500

Additionally, the petitioner submitted four paystubs issued to the beneficiary in 2004, and copies of portions of the beneficiary's personal Form 1040 for years 2003 and 2004. Some of the paystubs do not indicate the employer. Further, any wages shown on the paystubs should be included in the wages shown the 2004 Form W-2 issued to the beneficiary by the petitioner. The beneficiary's 2003 and 2004 Forms 1040 state that the beneficiary received business income, but there is no indication from what source the income was received.

Therefore, for the years 2003 and 2004, the petitioner did not pay the beneficiary a salary equal to or greater than the proffered wage.

If, as in this case, 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 petitioner's net income and net current assets. *River Street Donuts, LLC v. Napolitano,* 558 F.3d

111 (1st Cir. 2009); *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. 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). USCIS may also 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. Comm'r 1967).

The record before the director closed on January 9, 2009, with the receipt by the director of the petitioner's response to the director's request for evidence (RFE). The RFE requested the petitioner submit copies of its federal tax returns, annual reports or audited financial statements from the priority date of October 27, 2003 and continuing; and, evidence of any wages paid to the beneficiary.

In response to the director's RFE, the petitioner submitted unaudited financial statements/balance sheets for 2002, 2005, 2007, and 2008. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

As is noted above, the petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.* The petitioner did not submit tax returns, annual reports or audited financial statements covering the period from the priority date. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation

Counsel's assertion that because the petitioner has renewed the beneficiary's H-1B status, it has met the ability to pay requirement is rejected. The fact that a beneficiary's nonimmigrant H-1B status has been extended does not establish the petitioner's ability to pay the proffered wage for an immigrant visa petition as required by 8 C.F.R. § 204.5(g)(2).

Counsel's assertions and the evidence submitted on appeal do not outweigh the petitioner's failure to provide the evidence required by 8 C.F.R. § 204.5(g)(2) to establish its ability to pay the proffered wage.[4]

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[4] Since the record does not contain evidence required by regulation to establish ability to pay, an examination of the totality of the circumstances (including the overall magnitude of the

Finally, although not a basis for this decision, a search of public records shows that the address used by the petitioner, [redacted] is also the address for the [redacted] There is no indication that the petitioner is actually located at this address, and the record does not contain an explanation of why the petitioner's address is the same as the address for the University. Public records also show the beneficiary owns his own business, named [redacted] calling into question whether a *bona fide* offer of permanent employment exists in this case.

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.

ORDER: The appeal is dismissed.

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petitioner's operations) pursuant to *Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967) is not applicable.