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

[redacted]

DATE: MAR 20 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Nebraska Service Center. The Administrative Appeals Office (AAO) withdrew the director's decision and remanded the case for further investigation. The director denied the petition. The matter is now on appeal before the AAO. The appeal will be dismissed.

The petitioner is a Christian non-profit school. It seeks to employ the beneficiary permanently in the United States as a high school teacher in math and physics. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director initially determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification, and denied the petition.

On July 1, 2010, the AAO withdrew this decision and affirmed that the beneficiary's education satisfied the terms of the labor certification. However, the AAO remanded the case to the director to determine whether the petitioner had 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 issued a Request for Evidence (RFE) to the petitioner on August 20, 2010 relevant to the petitioner's ability to pay the proffered wage. Upon receipt of the petitioner's response and a review of the record, the director concluded that the petitioner had not established its ability to pay the proffered wage and denied the petition on December 7, 2010. The petitioner has appealed from this decision.

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.

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on November 17, 2005, which establishes the priority date. The proffered wage as stated on the ETA Form 9089 is $41,000 per year.

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.

The evidence in the record of proceeding shows that the petitioner is a tax exempt corporation. The petitioner indicated on Form I-140, Immigrant Petition for Alien Worker, at part 5, section 2 that the organization was established in 1986 and employs 33 workers. It claims a gross annual income of $845,056.04 per year. According to the copies of the tax returns in the record, the petitioner's fiscal year runs from September 1st to August 31st of the following year. On the ETA Form 9089, that was signed by the beneficiary on March 28, 2006, the beneficiary states that he has been employed by the petitioner since April 13, 2004.

With respect to the petitioner's ability to pay the proffered wage, counsel asserts that the petitioner has had difficulty in obtaining financial records but that it has had the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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. Comm. 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 overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

It is noted that on remand, the director issued a RFE to the petitioner relevant to its ability to pay the proffered wage. The director requested 1) that the petitioner provide evidence of its ability to pay the proffered wage from the priority date onward, which must include annual reports, complete Form 990 U.S. tax returns for the 2005-2009 period, or independently-audited financial statements for the same period; and 2) to provide all W-2s issued to the beneficiary for 2005, 2006, 2007, 2008 and 2009.

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 record of proceeding contains copies of the IRS Form W-2s that were issued by the petitioner to the beneficiary as shown in the table below.

- In 2005, the Form W-2 stated total wages of $30,150, which is $10,850 less than the $41,000 proffered wage.
- In 2006, the Form W-2 stated total wages of $28,100, which is $12,900 less than the proffered wage.
- In 2007, the Form W-2 stated total wages of $29,800, which is $11,200 less than the proffered salary.
- In 2008, the Form W-2 stated total wages of $31,200, which is $9,800 less than the proffered wage.

The petitioner is obligated to show that it can pay the difference between the proffered wage and wages already paid in each year. The petitioner did not submit any other Forms W-2 for the beneficiary for 2009.

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 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). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, the petitioner showing that it 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 USCIS should have considered income before expenses were paid rather than net income.

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 116. "[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 record contains copies of two of the petitioner's Form 990, tax returns for 2003 (covering data from September 1, 2003 to August 31, 2004 and Form 990Z for 2008 (covering data from September 1, 2008 to August 31, 2009). Form 990, line 18, demonstrates its excess (or deficit) for these fiscal years as shown in the table below.

- In 2003, the Form 990 stated revenue of -$183,539.
- In 2008, the Form 990Z stated revenue of $11,122.

The petitioner submitted copies of IRS transcripts of Form 990 for fiscal year(s) 2004, 2005, 2006, and 2007, however none show any revenue. It is additionally noted that as the 2003 return reflects information prior to the priority date of November 17, 2005, it is not immediately relevant to the petitioner's ability to pay the proffered wage from the priority date onward.[1]

Therefore, for the years 2005, 2006, 2007, and for 2009, the petitioner did not have sufficient net revenue to pay the difference between the proffered wage and wages actually paid to the beneficiary. For fiscal year 2008, the petitioner appeared to have the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary, although it is noted that the petitioner

[1] It will be considered in reviewing the petitioner's overall ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

did not submit a W-2 for 2009, which would be required as the petitioner's 2008 tax return encompassed part of 2009.

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. It is noted that the Form 990 does not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted audited balance sheets. However, the record is devoid of 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Accordingly, for the years 2005, 2006, and 2007, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and wages actually paid to the beneficiary.[2]

It is noted that the petitioner has submitted a copy of its February 2006 and its August 2010 bank statement. The petitioner's reliance on the balance in selected bank accounts is misplaced. It is noted that 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. Further, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner has also submitted copies of a 2005 unaudited financial statement and an unaudited balance sheet as of September 27, 2010. 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.

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[2] A petitioner's total assets are not considered in this evaluation. Total assets include depreciable assets that the petitioner uses in its operation. Those depreciable assets will not be converted to cash during the ordinary course of operation 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. Accordingly, without audited balance sheets, the petitioner's net current assets have not been established, and it has not been established that such assets were available to pay the proffered wage at any time beginning on the priority date.

Therefore, from the date the 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.

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)).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence of record that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

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. 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, or the petitioner's reputation within its industry.

In this matter, the overall circumstances do not establish that the petitioner had the ability to pay the proffered wage. The record does not establish that the petitioner had the ability to pay the proffered wage in 2005, 2006, 2007, or 2009. Additionally, the petitioner did not appear to have the ability to pay the proffered wage in the prior year tax return (2003) submitted to the record. No facts paralleling those in *Sonegawa* are present to establish that the petitioner had the ability to pay the proffered wage. Accordingly, the petitioner has not established that its overall circumstances demonstrate that it could pay the proffered wage beginning on the priority date.

Based on a review of the record, the petitioner has not established that it has had the financial ability to pay the proffered wage from the priority date onward pursuant to 8 C.F.R. § 204.5(g)(2). 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.