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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



U.S. Citizenship  
and Immigration  
Services

DATE: **AUG 20 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

*Jack [Signature]*  
*FOR*

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner is a software company. It seeks to employ the beneficiary permanently in the United States as a computer and information systems manager. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 December 30, 2013 denial, an 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)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

### **Ability to Pay**

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, Application for Permanent Employment

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<sup>1</sup> 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, 766 (BIA 1988). On the Form I-290B, Notice of Appeal or Motion, the petitioner indicated that it would not be filing any additional evidence and/or a brief.

Certification, 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on December 2, 2011. The proffered wage as stated on the ETA Form 9089 is \$131,164.80 per year. The ETA Form 9089 states that the position requires a master's degree in computer science, engineering, math, business administration or a related field.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2010 and to currently employ 10 workers. On the ETA Form 9089, signed by the beneficiary on September 1, 2012, the beneficiary did not claim to have worked for the petitioner.

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, 144 (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 Sonogawa*, 12 I&N Dec. 612, 614-15 (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. In the instant case, the petitioner has not established that it paid the beneficiary any wages during any relevant timeframe including the period from the priority date in 2011. According to USCIS records and reflected in the table below, the petitioner has filed at least eleven (11) Form I-140 immigrant petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition in addition to the instant beneficiary's proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

<b>BENEFICIARY</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>
T-S-	\$181,521.60	\$181,521.60	\$181,521.60
S-K-	\$122,200.00	\$122,200.00	\$122,200.00
H-T	\$63,107.20	\$63,107.20	\$63,107.20
K-S-	\$92,019.20	\$92,019.20	\$92,019.20

A-S-	\$92,019.20	\$92,019.20	\$92,019.20
I-S-P-	\$92,019.20	\$92,019.20	\$92,019.20
C-A-	\$92,019.20	\$92,019.20	\$92,019.20
S-E-	\$92,019.20	\$92,019.20	\$92,019.20
S-S-	\$122,200.00	\$122,200.00	\$122,200.00
M-N-A-H-	\$122,200.00	\$122,200.00	\$122,200.00
A-G-	\$92,019.20	\$92,019.20	\$92,019.20
<b>Total Wages owed</b>	<b>\$1,163,344.00</b>	<b>\$1,163,344.00</b>	<b>\$1,163,344.00</b>

The record does not contain evidence of any wages paid to the above-listed employees since the priority date.<sup>2</sup>

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 St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. 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 Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (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, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co.*, 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. *See also Taco Especial*, 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:

<sup>2</sup> An August 9, 2013 notice of intent to deny (NOID) informed the petitioner that the total proffered wages offered to other beneficiaries was \$1,327,206.40 and that it had failed to establish its ability to pay these and the instant beneficiary's proffered wages. The director's NOID informed the petitioner that it had not provided any evidence of wages paid to these beneficiaries. In response to the NOID, the petitioner did not provide any evidence of wages paid to these beneficiaries. On appeal, the petitioner has not provided any evidence of wages paid to these beneficiaries.

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 St. Donuts*, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

For an S corporation, USCIS considers net income to be the figure shown on Line 21 of the Form 1120S, U.S. Income Tax Return for an S Corporation. 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, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>3</sup> A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The table below reflects the information provided by the petitioner regarding its ability to pay the proffered wage:

<b>Tax Year</b>	<b>Net Income</b>	<b>Net Current Assets</b>	<b>W-2 Wage</b>	<b>Balance Due Beneficiary</b>	<b>Balance Due to Other beneficiaries</b>	<b>Total Remaining Balance</b>
2011	\$45,124.00	\$546,389.00	N/A	\$131,164.80	\$1,163,344.00	\$1,294,508.80

<sup>3</sup> 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). *Dictionary of Accounting Terms* 118 (3d ed., Barron’s Educ. Series 2000).

2012	-\$17,490.00	\$549,709.00	N/A	\$131,164.80	\$1,163,344.00	\$1,294,508.80
2013	UNKNOWN	UNKNOWN	N/A	\$131,164.80	\$1,163,344.00	\$1,294,508.80

Therefore, for 2011 and 2012, the petitioner failed to establish that it paid any wages and it failed to demonstrate sufficient net income or net current assets to pay the proffered wages to the beneficiary and the beneficiaries of other petitions filed on their behalf by the petitioner. The petitioner has failed to provide documentation to establish that it had sufficient net income or net current assets in 2013 to pay the proffered wages to the beneficiary and the beneficiaries of other petitions filed on their behalf by the petitioner.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has 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.

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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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.

In the instant case, the petitioner has failed to provide its tax returns for 2013 and did not indicate if they were unavailable, preventing us from making a determination as to whether the petitioner had the ability to pay the proffered wages since 2011. In addition, there is no evidence in the record of the historical growth of the business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the business' reputation within its industry. A September 5, 2013 letter from [REDACTED] indicates that they currently employ the beneficiary through a "contract with [REDACTED] states that the beneficiary will be transferred to

the petitioner along with the revenue he generates, which is greater than the beneficiary's proffered wage.<sup>4</sup> It appears the petitioner relies upon [REDACTED] transfer of a contract with a third party for creation of the proffered position. Reliance on the possibility of a contract being transferred in the future is too speculative to demonstrate the petitioner's current ability to pay the proffered wage. Further, it is unclear if the proffered position is for permanent and full-time employment with the petitioner, raising doubts as to whether there is a *bona fide* job offer. Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See also C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

#### **Petitioner's Location and Worksite**

Evidence submitted by the petitioner establishes that the location listed on the labor certification as the proffered place of employment is a virtual office which provides mailbox plus, telephone answering, VO (virtual office) and VO plus services. The petitioner also submitted a letter from [REDACTED] president, on [REDACTED] letterhead, stating that the beneficiary will be employed by the petitioner, but remain located at [REDACTED] address in [REDACTED] California.<sup>5</sup> These two locations are more than 35 miles apart and approximately 40 minutes driving distance. The two locations are in different counties and different metropolitan statistical areas. While this location may be within commuting distance of the petitioner's [REDACTED] address, the two locations are still in different counties and different metropolitan statistical areas. Neither the labor certification nor the petition lists a work location other than the petitioner's [REDACTED] address. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c)(2). While the director addressed this as an issue in his decision, the petitioner failed to respond to this discrepancy on appeal.

Furthermore, the receipt for the Form I-290B, Notice of Appeal or Motion, was returned from the [REDACTED] South Carolina address listed on the Form I-290B as undeliverable. If the petitioner has relocated to [REDACTED] South Carolina, the two locations are on opposite sides of the country, are not in commuting distance and are located in different metropolitan statistical areas. As discussed

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<sup>4</sup> *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), speaks against the use of projection of future earnings to establish the ability to pay the proffered wage.

<sup>5</sup> As discussed above, this raises doubts as to whether there is a *bona fide* job offer. See 20 C.F.R. § 626.20(c)(8) and § 656.3; 20 C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987); *Modular Container Systems, Inc.*, 1989-INA-228 (BALCA Jul. 16, 1991) (*en banc*). The proffered position appears to be based on a position with [REDACTED] that is already filled and there is no evidence that the petitioner is willing or able to compensate the beneficiary itself.

above regarding the [REDACTED] location, the labor certification and petition do not list a work location other than the petitioner's [REDACTED] address. 20 C.F.R. § 656.30(c)(2).

The petitioner is required to list all known work addresses for the proffered position and to place posting notices at all known client sites. [REDACTED] address is not listed as a worksite on the labor certification and there is no evidence that a posting notice was displayed at [REDACTED] for the required period. In any future filings, the petitioner must address these issues.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.