



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **NOV 18 2014**

OFFICE: TEXAS 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:

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,


Ron Rosenberg
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 dismissed.

The petitioner describes itself as a software consulting business. It seeks to employ the beneficiary permanently in the United States as a "Business System Analyst." 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 September 3, 2013 denial, the 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.

The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹

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 ETA Form 9089 was accepted on March 27, 2012, the priority date. The proffered wage as stated on the ETA Form 9089 was \$74,235.20 per year.

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

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.²

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 2000 and to currently employ 86 U.S. workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 12, 2013, the beneficiary claimed to have worked for the petitioner beginning on January 1, 2009.

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 demonstrated with Forms W-2, Wage and Tax Statements, that it paid the beneficiary \$57,420.22 in 2012 and \$69,585.55 in 2013, which amounts are respectively \$16,814.98 and \$4,649.65 less than the proffered wage for these years. Thus, the petitioner must demonstrate that it can pay the difference between the proffered wage and the wage actually paid to the beneficiary in 2012 and 2013.

The petitioner must also establish that it has had the continuing ability to pay the combined proffered wages to each of its other sponsored workers from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. at 144-145. We issued the petitioner a request for evidence (RFE), dated January 22, 2014, requesting that the petitioner provide evidence of its ability to pay all of its sponsored workers from the instant priority date onward. In response to our RFE, counsel provided evidence of wages paid to two beneficiaries the petitioner had sponsored in 2013, both of whom had priority dates earlier than the priority date of the instant beneficiary. We subsequently noted in a notice of intent to

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, 766 (BIA 1988).

dismiss (NOID), dated June 3, 2014, that in addition to the two sponsored workers identified as being sponsored in 2013, USCIS records indicated that the petitioner had filed Form I-140 petitions for 15 other beneficiaries who had not yet adjusted to lawful permanent resident status and three beneficiaries who had adjusted to lawful permanent resident status in 2013. We requested evidence of the wages paid to these other beneficiaries. In response to our NOID, the petitioner submitted evidence of wages paid to these beneficiaries and evidence that several of the sponsored workers had resigned and the petitions filed on their behalf were withdrawn. The table below shows the wages paid in 2012 and 2013 to the instant beneficiary and the other sponsored workers who still are employed by the petitioner:

	Year	Wages Paid (Form W-2)	Proffered Wage	Deficiency in Wages Paid
Instant Beneficiary				
	2012	\$57,420.22	\$74,235.20	\$16,814.98
	2013	\$69,585.55	\$74,235.20	\$4,649.65
Other Sponsored Workers				
	2012	\$68,398.20	\$74,235.20	\$5,837.00
	2013	\$68,611.50	\$74,235.20	\$5,623.70
	2012	\$71,520.00	\$63,419.00	\$0.00
	2013	\$71,520.00	\$63,419.00	\$0.00
	2012	\$60,904.95	\$77,400.00	\$16,495.05
	2013	\$67,525.96	\$77,400.00	\$9,874.04
	2012	\$71,540.10	\$76,960.00	\$5,419.90
	2013	\$62,675.80	\$76,960.00	\$14,284.20
	2012	\$69,202.00	\$77,168.00	\$7,966.00
	2013	\$75,863.92	\$77,168.00	\$1,304.08
	2012	\$81,126.88	\$73,861.00	\$0.00
	2013	\$78,959.04	\$73,861.00	\$0.00
	2012	\$69,911.94	\$66,934.00	\$0.00
	2013	\$72,780.88	\$66,934.00	\$0.00
	2012	\$64,984.26	\$77,584.00	\$12,599.74

	2013	\$65,132.28	\$77,584.00	\$12,451.72
	2012	\$59,794.48	\$72,675.00	\$12,880.52
	2013	\$63,335.76	\$72,675.00	\$9,339.24
	2012	\$6,080.00	\$78,400.00	\$72,320.00
	2013	\$34,352.00	\$78,400.00	\$44,048.00
		Total deficiencies for all beneficiaries		
			2012	\$150,333.19
			2013	\$101,574.63

Therefore, the petitioner must establish that it had the ability to pay the total deficiencies in wages paid to the instant beneficiary and the petitioner's other sponsored workers of \$150,333.19 and \$101,574.63 in 2012 and 2013, respectively.

If the petitioner does not establish that it employed and paid the beneficiary and its other sponsored workers 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:

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).

The petitioner’s tax returns demonstrate its net income for 2012 and 2013, as shown below.

- In 2012, the Form 1120S stated net income³ of \$13,980.00.
- In 2013, the Form 1120S stated net income of \$8,992.00.

Therefore, for the years 2012 and 2013, the petitioner did not have sufficient net income to pay the deficiencies in wages paid to the instant beneficiary and its other sponsored workers.

As an alternate 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 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

³ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2013) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 13, 2014) (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2013, the petitioner’s net income is found on Schedule K of its 2013 tax return.

⁴ 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). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron’s Educ. Series 2000).

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 petitioner's tax returns demonstrate its end-of-year net current assets for 2012 and 2013, as shown in the table below.

- In 2012, the Form 1120S stated net current assets of -\$74,190.00.
- In 2013, the Form 1120S stated net current assets of \$165,665.00.

Therefore, the petitioner did not have sufficient net current assets to pay the deficiency in wages paid of \$150,333.19 in 2012. In 2013, the petitioner's net current assets were sufficient to pay the deficiencies in wages paid of \$101,574.63.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the ability to pay the proffered wages to the beneficiary and the other sponsored workers in 2012 through an examination of wages paid, or its net income or net current assets.

Counsel asserts on appeal that the director did not consider the petitioner's average monthly checking account balance for 2012 in determining whether the petitioner had the ability to pay the beneficiary's proffered wage. 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 tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets.

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 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 Sonogawa*, 12 I&N Dec. at 614-15. 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 [REDACTED] 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.

In the instant case, the Form I-140 states that the petitioner has been in business since 2000 and that it currently employs 86 U.S. workers.⁵ As stated above, the petitioner's tax returns in the record state low amounts of net income in 2012 and 2013, as well as negative net current assets for 2012. The petitioner has not provided any evidence of unexpected business losses or expenses in 2012. The tax returns also reflect that the petitioner had declining amounts of gross receipts from 2011 to 2013 and that the petitioner had \$948,526.00 fewer gross receipts in 2013 than it did in 2011. The tax returns state that in 2013 the petitioner paid \$452,400.00 less in salaries and wages than it did in 2011. The tax returns state that the petitioner spent \$1,155,603.00 and \$1,378,312.00 for non-employee compensation for 2011 and 2012, respectively, but that it paid no amount of non-employee compensation for 2013. Similarly, the tax returns reflect that the petitioner paid \$214,655.00 and \$256,629.00 in independent contractor fees for 2011 and 2012, respectively, but the 2013 tax return does not state any amount was paid to independent contractors. There is nothing in the record that suggests the petitioner's tax returns paint an inaccurate financial picture. In addition, a search of public records indicates that the petitioner had a tax lien filed against it from New York in 2012 for \$551.00 and a federal tax lien filed in 2013 for \$7,883.00, which casts further doubt on the petitioner's ability to pay the proffered wage of the instant beneficiary and the other sponsored workers.⁶ The record does not contain any evidence of the petitioner's reputation in the industry or its historical growth. 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.

⁵ We note that a search of New Jersey business records indicates that the petitioner has not paid its annual fee which was due in August 2014. In any further filings, the petitioner must provide evidence that it is an active business within the state of incorporation.

⁶ These liens do not alone form a basis for the denial of the instant petition, but they are listed here solely as it relates to the totality of the circumstances. In any further filings, the petitioner must demonstrate that these liens have been resolved.

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NON-PRECEDENT DECISION

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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.