

(b)(6)

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: OCT 03 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,


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 The director's decision will be withdrawn and the petition remanded for a new decision.

The petitioner is an IT services business. 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 September 4, 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). 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.¹

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 Certification, was accepted for processing by any office within the employment system of the DOL.

¹ 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).

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 September 20, 2011. The proffered wage as stated on the ETA Form 9089 is \$156,312.00 per year. The ETA Form 9089 states that the position requires a Bachelor's degree in computer science, engineering, math, business administration or related and 60 months of experience in the proffered position or as a programmer, analyst, engineer, developer, lead, architect or consultant.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2008 and to currently employ 105 workers. On the ETA Form 9089, signed by the beneficiary on April 30, 2012, the beneficiary claimed to have worked for the petitioner since July 16, 2011.

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 that it has paid the beneficiary partial wages in all relevant years as of the priority date in 2011. Thus, the petitioner must demonstrate that it can pay the difference between wages actually paid to the beneficiary and the proffered wage since 2011. In the instant case, the record reflects that the petitioner paid the beneficiary \$45,000.00 in 2011, \$69,814.93 in 2012 and \$77,030.00 in 2013. The petitioner must show that it had the ability to pay the difference between the actual wages paid and the proffered wage from 2011 through 2013.²

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

² The difference between the actual wages paid and the proffered wage is \$111,312.00 in 2011, \$86,497.07 in 2012 and \$79,282.00 in 2013.

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., Inc. 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 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 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 a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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:

Tax Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due to Instant Beneficiary
2011	-\$1,015.00	\$551,424.00	\$45,000.00	\$111,312.00
2012	\$408,817.00	\$845,256.00	\$69,814.93	\$86,497.07
2013	\$457,984.00	\$3,912,734.00	\$77,030.00	\$79,282.00

Therefore, for 2011 through 2013, the petitioner did not pay the full proffered wage but did have sufficient net income or net current assets to pay the difference between wages actually paid and the proffered wage.

As the petitioner has filed petitions for multiple beneficiaries, the petitioner must produce evidence that its job offer to each beneficiary is realistic and that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date and continuing until the beneficiary of each petition obtains lawful permanent residence. According to the petitioner it has filed sixty-five (65) 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. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The information provided by the petitioner on appeal and in response to our Notice of Intent to Dismiss (NOID), reflects that the petitioner paid partial wages to the beneficiaries of the other Form I-140 immigrant petitions and that the total wages owed to all sponsored beneficiaries was approximately \$2.6 million in 2011 and \$4 million in 2012.

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

³ 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 as 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).

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.

In the instant case, the petitioner's tax returns reflect that its sales have more than doubled between 2011 and 2013 to over \$18 million, as well as growth in net income and net current assets during a similar period. The petitioner paid more than \$6 million in wages to its employees in 2012, which is more than the total wages owed to all beneficiaries. Therefore, based on a totality of the circumstances, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has established that it more likely than not had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

Upon review of the record, including evidence submitted on appeal and in response to our NOID, we have determined, however, that the director did not fully consider whether the beneficiary will be employed at the location listed on the labor certification and whether the petitioner will be the beneficiary's actual employer. Therefore, we will remand the case to the director for further action.

Location of Job Opportunity

Beyond the decision of the director,⁴ we note that evidence submitted by the petitioner in response to our July 3, 2014 NOID raises issues regarding the location in which the beneficiary will be employed. The ETA Form 9089 lists the work location for the proffered position as [REDACTED]. The Form I-140 immigrant petition lists the work location as [REDACTED]. Our NOID requested evidence to clarify this inconsistency and further evidence to establish that the actual work location is not a virtual office and that the proffered job exists at the actual work location and not at an offsite

⁴ We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

location. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c).

In response to our NOID the petitioner provided an assignment of sublease contract for office space at [REDACTED]. The contract indicates that the location has been subleased to [REDACTED] since June 5, 2012. A July 17, 2012 letter from [REDACTED] states that the petitioner is its parent company and that all of the petitioner's companies and subsidiaries are now located at the [REDACTED] address.⁵ [REDACTED] is a separate company with its own Federal Employment Identification Number (FEIN). While the letter states that [REDACTED] is a subsidiary of the petitioner it is unclear why the letter was not provided by the petitioner itself. There is no explanation from the petitioner of the nature of its relationship with [REDACTED] or why the petitioner's 2012 tax return did not list [REDACTED] as its subsidiary. Further, there is no evidence in the record which identifies "all companies and its subsidiaries" other than the petitioner and [REDACTED]. Finally, while the petitioner's 2013 tax return indicates that it is located at the [REDACTED] address, the 2013 Form W-2 issued to the beneficiary indicates the petitioner's address as [REDACTED]. The petitioner has failed to provide independent, objective evidence which reconciles these inconsistencies. *Matter of Ho*, 19 I&N Dec. at 591-92.

Therefore, the petition will be remanded to the director for the consideration of these issues, and any other issue the director deems appropriate. The director may request additional evidence from the petitioner, if needed, and the petitioner may submit additional evidence within a reasonable time period to be set by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

As always in visa petition proceedings, the burden of proof rests entirely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013).

ORDER: The director's decision dated September 4, 2013 is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.

⁵ The sublease contract reflects that the leased space in the [REDACTED] is 3,246 square feet.