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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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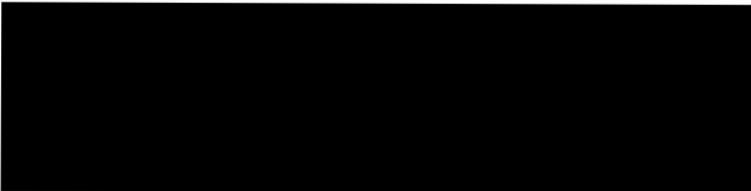


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **APR 21 2009**  
SRC-07-058-51695

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

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:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
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) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a clergy/minister (radio minister). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the Department of Labor (DOL). The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage beginning on the priority date to the present. 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 October 16, 2007 denial, the primary issue in this case is whether or not the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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 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 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 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 March 2, 2006. The proffered wage as stated on the ETA Form 9089 is \$24,000 per year. The ETA Form 9089 states that the position requires a bachelor degree in Divinity and two years of experience in the job offered. On the ETA Form 9089, the beneficiary claimed to have worked for the petitioner in the proffered position since January

2005. On the petition, the petitioner claimed to have been established in 1990, and to have no employees. The petitioner did not provide information on its gross annual income and net annual income, but indicated that it is a non-profit organization.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal counsel submits a brief, a letter dated October 31, 2007 from [REDACTED], a certified public accountant (CPA), regarding the petitioner's bank accounts balances, and copies of bank statements for the petitioner's saving accounts covering December 2006 through August 2007. Other relevant evidence in the record includes bank statements for the petitioner's checking accounts covering February 2006 through August 2007 and the beneficiary's two paychecks issued by the petitioner on August 1, 2007 and September 1, 2007 respectively. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel argues that the director erred in finding that the petitioner did not have the ability to pay the proffered wage because the petitioner's bank statements show that at all times since March 2006, the petitioner has had at least \$2,000 or the monthly proffered salary available in its bank accounts.

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, U.S. 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 (Reg. Comm. 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

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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 (BIA 1988).

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 claimed that the beneficiary has worked for the petitioner since 2005, and submitted the beneficiary's two paychecks as evidence that the petitioner hired and paid the beneficiary the proffered wage. The submitted two paychecks show that the petitioner paid the beneficiary \$2,000 on August 1, 2007 and September 1, 2007. The proffered wage in the instant case is \$24,000 per year or \$2,000 per month. Although the paychecks do not indicate what months the amounts were paid for, the petitioner demonstrated that it paid the beneficiary the proffered wage for two months in 2007. However, the petitioner failed to establish that it paid the beneficiary the full proffered wage from the priority date in 2006 through the present. The petitioner is obligated to demonstrate that it could pay the full annual proffered wage for 2006, and the proffered wage for ten months in 2007 with its net income or its net current assets.

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. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

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 assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business 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. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup>

The evidence indicates that the petitioner is a non profit organization. The record does not contain copies of the petitioner's Form 990 Return of Organization Exempt from Income Tax (Form 990) for any relevant years. On July 17, 2007, the director issued a request for evidence (RFE) requesting that the petitioner submit a copy of its Form 990 or an appropriate version of Form 990 for 2006 or a 2006 audited financial statement. In response to the RFE, counsel asserted that the petitioner is not required to file a Form 990 and supported her assertion with a letter dated August 6, 2003 from the Internal Revenue Service (IRS). However, counsel did not submit the petitioner's 2006 audited financial statement, nor did counsel explain why such a document was not submitted. The record does not contain the petitioner's annual reports for any relevant years.

The regulation 8 C.F.R. § 204.5(g)(2) specifies evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner did not submit any type of evidence enumerated in 8 C.F.R. § 204.5(g)2. Accordingly, the petitioner failed to demonstrate that it had sufficient net income or net current assets to pay the proffered wage from the priority date.

The petitioner's net income or net current assets are shown on its annual reports, tax returns or financial statements and according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. The petitioner did not provide information on its net income or net current assets. Therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets to pay the beneficiary the full proffered wage in 2006 and the difference between wages actually paid to the beneficiary and the proffered wage in 2007.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "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). *Id.* at 118.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of its audited financial statements. The petitioner in the instant case is not required to file its tax returns, and therefore, its audited financial statements for the relevant years are the only type of regulatory-prescribed evidence to demonstrate the amount of net income or net current assets and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the ETA Form 9089 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date to the present through an examination of wages paid to the beneficiary, its net income or its net current assets.

Counsel submits bank statements for the petitioner's bank checking and saving accounts covering February 2006 through August 2007 as evidence to establish the petitioner's ability to pay the proffered wage. However, counsel's reliance on the balances in the petitioner's bank accounts 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), such as annual reports or audited financial statements, 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, annual report or audited financial statement, such as the petitioner's net income or net current assets that were considered in determining the petitioner's ability to pay the proffered wage. Counsel asserts that the bank accounts under the name of [REDACTED] belong to the petitioner. Upon a careful review of evidence submitted in the record, such as certificates from the secretary of the State of Texas and Amendment to the Articles of Incorporation filed with the Texas government, the AAO concurs with counsel's assertion that the petitioner qualifies as the successor-in-interest to [REDACTED], and therefore, is the owner of the bank accounts under the name of [REDACTED].

However, since the bank statements in this case cannot be considered as a type of evidence enumerated in the regulation to establish the petitioner's ability to pay, the bank account ownership issue is irrelevant in this matter and the AAO will not discuss this issue further.

Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12

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<sup>3</sup> The successor-in-interest status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

I&N Dec. 612 (Reg. Comm. 1967). *Sonegawa* relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has evidence been submitted to establish that the years 2006 and 2007 were uncharacteristically unsuccessful years in a framework of financially successful years for the petitioner.

Counsel's assertions on appeal that the petitioner has demonstrated that it could pay the proffered wage from the day the ETA Form 9089 was accepted for processing by DOL do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)). The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.